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**OBSERVATOIRE SUR LE CONTENTIEUX EUROPÉEN DES DROITS DE L'HOMME N. 3/2020**

## 3. N.D. AND M.T. V SPAIN: A CONSERVATIVE TURN IN THE ECTHR IMMIGRATION CASES?

*1. Introduction*

For the first time in its history, this year the European Court of Human Rights (ECtHR hereafter) issued a long-awaited judgment on push back practices carried out at the Spanish external border with Morocco of Ceuta and Melilla. With N.D. and M.T. (App. nos. 8675/15 and 8697/15), published on February 13th 2020, the ECtHR was faced with the complex issue of qualifying on the so-called "hot returns" (*devoluciones calientes*) carried out by the Spanish border police and judging their legality *vis à vis* Article 4 Protocol 4 of the ECHR, which prohibits collective expulsions.

The judgment is highly relevant, as it gave the ECtHR the opportunity to deal with border control practices performed at the territorial borders, framing them within the perimeter of the Convention and of the concept of collective expulsion enshrined therein. It is even more relevant in the light of the fact that the Grand Chamber of the ECtHR overturned the previous third section decision. Indeed, while the latter qualified the Spanish "hot returns" as collective expulsion, and found Spain responsible of acting in breach of the Convention, the Grand Chamber overturned such findings, acquitting Spain of the violation of Article 4 Protocol 4 of the Convention.

The Court's reasoning has rightly been judged with deep disappointment and even concern by most of its commentators (see Mussi, Wissing). No doubt it is built upon a number of "inconsistencies", "contradictions" and unconvincing arguments which deserve attention not only in relation to the case itself, but also to the consequences they might have on future judgments. However, because of its contradictions, the judgment offers a unique perspective on the possible future of immigration law and policies in Europe, opening *de facto* a new pathway to a conservative era in the Court's case law (see Thym) and, therefore, allowing, to some extent, States to perform more openly restrictive border control practices.

In order to understand and to metabolise the "shock" and the "slap in the face" (see Oviedo Moreno) feelings caused by the judgment, I believe that it need to be framed within long term tendencies in immigration law and management operating for years now in the European context, and with other equally conservative-oriented decision adopted by the same Court on similar issues over the last months. In this light, the judgment represents the logical outcome and the final institutionalisation of the "securitarian" narrative operating and prevailing from years now in Europe.

This commentary will be structured as follows: it will explain the facts originating the case. Secondly, it will summarise the Court's reasoning for not finding a violation of Article 4 Protocol 4, overturning the third section decision. Thirdly, it will isolate and deal with two elements of the reasoning showing a degree of contradiction, which are also highly revealing of the Court's conservative turn. Moreover, it will examine the relation between the judgment and its outcomes on Article 3 ECHR. Finally, it will try to read the decision within the context of more structural tendencies in immigration law and policies, with the attempt of claiming how such a securitarian turn is not a "surprise", given the bigger context in which the Court is operating.

*2. Facts of the case*

The applicants, one from Mali and the other from Ivory Coast, fled their country of origin and were both living in Morocco. In August 2014 they took part to an attempt to enter Spain from the border fence of Melilla, together with other 600 migrants. The attempt was successful for both applicants, as they were helped from the Spanish border police to climb the fences and enter into Spain. However, they were repatriated to Morocco straight after, without being identified nor being "heard" or being given the possibility of applying for asylum. In sum, they were not at any time given the opportunity to explain their personal circumstances (para 25).

Some months later, they both succeeded to enter Spain again. One of the applicants applied for asylum but was rejected while the second applicant did not apply for asylum. They were both issued with expulsion orders at different times. Consequently, the first applicant returned to Morocco while the second applicant stayed in Spain irregularly (unlawfully, according to the Court's words, para 30).

The applicants lodged an appeal to the ECtHR, claiming a violation of Article 3, 13 and of Article 4 Protocol 4. The third section found Spain responsible of the violation of Article 4 Protocol 4 and of Article 13 in conjunction with Article 4 Protocol 4, dismissing the claim under Article 3.

In 2018, Spain brought the case before the Grand Chamber, whose decision and reasoning will be examined in the following sections.

*3. The Court's reasoning: jurisdiction*

As mentioned, the decision under examination contains a number of contradictions. Indeed, over the whole reasoning, the Court oscillates between re-defining in a conservative fashion some of its orientations and reiterating other elements of its settled case-law.

An example of the latter is shown in the context of the assessment on jurisdiction of Spain on the facts of the case.

In the first place, Spain argued that the facts of the case fell outside the scope of the Convention, and therefore the Court lacked jurisdiction over the case.

While admitting that the three fences separating Spain from Morocco are placed in Spanish territory, the State argued that those three fences constitutes an «operational border» designed to manage and prevent unauthorised entry in the country, on which Spain has limited jurisdiction.

It is, in the State's view, only «beyond» the three fences that the authorities have the duty to apply the Convention.

Drawing upon its settled case-law (in particular, Hirsi Jamaa and Others v Italy App. No. 27765/09), the Court rejected *in toto* the State's argument, affirming that, despite the difficulties in managing the «storming of the border fences», Spain alone had full authority over the whole sequence of events and acted consequently. Moreover, the Court reiterates that even extraordinary situations related to migration management cannot justify the existence of areas and portion of the States' territory outside the law, where no legal system is applicable.

In sum, «no artificial reduction in the scope of its (States) territorial jurisdiction» (para 110) is allowed to the extent that it has the effect of rendering the principle of effective human rights protection ineffective. It can be noted that this element of the judgment seems to aim at reaffirming the effectiveness of the rights enshrined in the Convention even in situation of distress for the State.

The Court, by stating so, puts the first stone of the judgment but also the first signal of contradiction, if we put the issue of jurisdiction in the context of the whole reasoning, as it will be shown in the following sections.

*4. Following: the migrants' behaviour*

Once confronted with the assessment of the violation of Article 4 Protocol 4 of the Convention, the Court examines, first of all, if the measures taken by the Spanish authorities were to be qualified as expulsion within the meaning of the Convention. Here, the Court recalls its case law on the matter (see Khlaifia and Others v. Italy, Application no. 16483/12, Hirsi Jamaa, cit.), and assess that the actions of the authorities represent a form of expulsion and therefore, fall within the meaning of the concept. In this case the Court rejects the State's argument that the actions of the authorities did not qualify as expulsion but rather as «refusal of admission to Spanish territory». In the Court's view, this distinction is irrelevant and indeed a «refusal of admission» or «rejection at the borders» represent a form of expulsion, which is supported not only by the Court's case-law, but also by International and EU Law (Charter of fundamental rights of the EU, Qualification Directive, Draft Articles on the expulsion of aliens International Law Commission).

The second issue to be assessed was whether the expulsion was collective. According to the Court, the collective nature of an expulsion does not have to comprise a minimum number of individuals, the latter being irrelevant. The criterion to be considered to establish whether an expulsion is collective is the absence of a «reasonable and objective examination of the particular case of each individual or alien of a group» (para 195, see Khlaifia, cit.).

The last circumstance seems to apply to the present case, as the applicants were expelled together with other persons in the absence of any chance to put forward any argument about their personal circumstances. However, here the Court makes the first torsion in its reasoning. Indeed, it introduces a «bad behaviour exception» to the situation of the applicants, meaning that the lack of an individual assessment in the applicants' case was to be attributed to their own conduct. Accordingly, «the applicant's own conduct is a relevant factor in assessing the protection to be afforded under Article 4 of Protocol No. 4. According to the Court's well-established case-law, there is no violation of Article 4 of Protocol No. 4 if the lack of an individual expulsion decision can be attributed to the applicant's own conduct» (para 200).

It is precisely this principle that brings the Court to the point of affirming that «it was in fact the applicants who placed themselves in jeopardy by participating in the storming of

the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. » (para. 232).

In sum, the lack of individual examination is to be attributed to the applicants' bad conduct and not to the State and, therefore, it does not constitute a violation of Article 4 Protocol 4.

This conclusion is problematic in the light of a number of elements. First of all, the Court refers to «its settled case law» when introducing the «bad behaviour exception» due to the lack of cooperation of the applicant with the State authorities. This reference has been criticised, as those case-law the Court refers to deal with circumstances other than those at stake in the present case. Indeed, the cases the Court quotes (*inter alia*, Berisha and Haljiti v the former Yugoslav Republic of Macedonia Application no. 18670/03), present situations where the couplable conduct of the applicants consisted, *inter alia*, in the refusal to be identified and hand in identity documents to the authorities, which objectively impeded the adoption of individualised decision and the conformity with Article 4 Protocol 4.

The applicants' case is quite different, as their behaviour did not consist in a deliberate refusal of cooperation with the authorities, but rather in an attempt to cross the border in an unauthorised manner, which did not affect the possibility for the Spanish authorities to take charge of the people participating in the storming.

The Court rather seems to engage in framing a new test which might be potentially be applicable to a wide range of circumstances where a large group of «irregular» migrants engage in an attempt to reach European borders by putting themselves deliberately in a given situation and «abusing» the circumstances (which is, sadly and often, the only practical venue to reach European borders).

It is to be seen whether the same reasoning and emphasis put on the irregular entry and the use of large numbers to make profit of the situation will apply to different scenarios, for instance, arrivals by sea (see Thym, cit.).

*5. Following: legal venues available to the applicants*

The second argument put forward by the Court to exclude violation of the Convention relates to the existence of legal pathways to enter the Spanish territory. Here the Court makes more than one torsion: while it seems to plea for a form of obligation upon States to make available means of legal entry, it is more than ambiguous when faced with the assessment of whether such legal pathways were concretely viable for the applicants.

According to the Spanish government, as of September 2014, the authorities had set up an office for registering asylum claims at the Beni Azir international border crossing point, which was operational even before the official opening. The State supports the last argument by stating that between January and August of that year, around 20 asylum applications had been lodged at that crossing point. In this light, the applicants had the possibility to make use of this pathway in order to enter Spain regularly, but failed to do so.

The Court embraced *in toto* the State's argument on the issue, apparently linking the failure to make use of the Spanish legal channel to the reasoning concerning the applicants' own conduct. Indeed, in the Court's view, the applicants could have used the Ben Azir crossing point instead of storming the fences and they had no cogent reason for deciding the opposite.

Two problems arise in this regard. The first relates to the question as to whether the Court affirms a duty to set legal pathways. The second concerns the issue of the examination of the accessibility to legal pathways made by the Court.

With regards to the first question, the Court seems quite vague on the issue. Indeed, it mixes «generous and almost revolutionary language» with "nebulous assessment of the Spanish practice (paras 211-7) that leaves the reader with the impression that the insistence on legal pathways is nothing more than a humanitarian fig leaf for border closures» (see Thym, cit.).

Moreover, it is not clear whether the availability of legal venues would stand as an independent element of assessment or if it is to be framed within the «own conduct» examination (see Thym).

The Court seems quite clear on one main point: the Convention «does not, however, imply a general duty for a Contracting State under Article 4 Protocol No. 4 to bring persons who are under the jurisdiction of another State within its own jurisdiction. In the present case, even assuming that difficulties existed in physically approaching this border crossing point on the Moroccan side, no responsibility of the respondent Government for this situation has been established before the Court. » (para 221).

This statement is hard to conceal with the possible existence of a positive obligation upon States to grant an individual right to claim legal access to Europe, namely because the Court does not set a jurisdictional test to establish a possible obligation to provide legal entry venues.

The impossibility to rely on such a duty seems confirmed by the recent Court's decision on humanitarian visa, where the Court denied the applicability of the Convention to consulates and embassies, excluding the possibility to consider them as legal means of entry in Europe (M.N. and others v. Belgium, Application no. 3599/18).

The second issue arising is the assessment made by the Court on the availability of such legal means themselves. In abstract terms, the Courts insisted on legal pathways being «genuinely and effectively accessible to the applicants» (para 211). However, the concrete assessment of the accessibility has been widely criticised (see above) for failing to address the obvious and concrete hurdles that the applicants, and more generally Sub Saharans, dealt with when trying to approach Ben Azir crossing point. The latter was supported by third party interveners, such as the Commissioner for Human Rights, which alleged the material impossibility to make use of that solution due to, *inter alia*, racial profiling practices carried out by the Moroccan authorities, and the irrelevant number of asylum application filed by Sub-Saharan migrants.

In sum, the Court's plea for a duty incumbent upon States to set legal pathways is neutralised by the absence of a jurisdictional threshold test and by the superficial assessment of the concrete and realistic availability of legal means of entry in the present case.

All that considered, the Court's reasoning on the element of legal venues seems highly contradictory and unsolved, leaving the impression that the insistence on legal pathways is nothing more than another element of ambiguity of the judgment functional to the exclusion of the applicability of Article 4 Protocol 4.

*6. The impact of the judgment on Article 3 ECHR*

As already mentioned, the third section rejected the claim under Article 3 ECHR in the present case. However, the Grand Chamber judgment and its analysis of Article 4

Protocol 4 have a number of linking elements with the principle of non-refoulement, especially in the light of the restrictive reading of the prohibition of collective expulsion given by the Court and its potential outcomes on Article 3 ECHR.

The Court reiterated that the necessity for States to protect their borders shall not restrict the guarantees attached to the respect of the principle of non-refoulement (para 232), underlying its absolute character. However, the Court's reading of the prohibition of collective expulsion inevitably affects the scope of Article 3 ECHR. Indeed, the procedural requirement to ensure an examination of the individual circumstances attached to Article 4 Protocol 4 is strictly connected to the respect of Article 3, which provides that every person shall have the right to claim a risk of ill treatment and to have the chance to put forward such an argument.

Therefore, the question remains as to the possibility of keeping the protection afforded by Article 3 ECHR intact while restricting the right to an individual examination under Article 4 Protocol 4. This issue is all the more important considering that most of the asylum application in Europe come from persons crossing the borders «irregularly».

In this sense, the Court seems to base its arguments on an evaluation *a posteriori* of the facts of the case and of the situation of the applicants.

As an example, the Court stressed the fact that none of the applicants had been granted asylum status once they successfully entered Spain, and that one of the applicants did not even apply for international protection. Accordingly, this would imply that they did not face any risk of ill treatment as a consequence of their expulsion to Morocco, which the Court considered a safe country for the applicants.

However, under the ECtHR established case-law, the fact that an applicant did not face ill treatment concretely does not absolve the State from the obligation to make a forward-looking and prospective assessment of such a risk. Stating otherwise would have the effect of rendering the absolute protection offered by Article 3 ineffective.

Nevertheless, it is arguable that the Court would have reached a different outcome if Article 3 was involved in the judgment, given its absolute character.

*7. Conclusion: the inevitable institutionalisation of a long term securitarian trend?*

The judgment has been criticised for leaving wide margins of discretion to States (Pichl, Shmalz) and for being inconsistent on a number of issues explained above. With its decision, the Court patently takes a different turn on its case law, initiating a more conservative and restrictive era.

Such a turn is revealed not only by the Court's conclusions but also by the language it uses and by the insistence on the «illegality» of the applicants' status and behaviour.

Quite often over the judgment, the Court indeed mentions and emphasise the fact that the applicants made use of violence while trying to force the border's barriers and deliberately decided to put themselves in an irregular situation despite having other (viable?) options.

This emphasis on violent illegal migrants is contrasted by the Court's considerations on the safeguards applicable to asylum applicants and to persons actually in need of international protection, which, however, was not the case of the applicants.

Inevitably, one would ask the question if such an insistence represents a moral-judicial argument to exclude «abusive» and «irregular» migrants from the protection offered by the Convention. It seems that the Court tried to frame a divide between irregular, abusive and, as such, underserving migrants and deserving asylum seekers.

Such a «moral» discourse on unauthorised and undeserving migrants is in line with the increasingly securitarian and restrictive migration policies put in place in EU Member States over the last years, which is based on the distinction between migrants deserving protection and those illegal endangering the safety of EU States.

Interestingly, the system of border fences build up in Ceuta and Melilla is a good example of such restrictive policies trying to deter asylum seekers and migrants from entering Europe, together with push backs actions and cooperation and externalisation to third countries (again, Spain is an example of the latter).

The restrictive turn is even more evident if we couple the present judgment with a number of recent decisions that the ECtHR issued over the last months. Indeed, the Court excluded violation of Article 4 Protocol 4 in another similarly ambiguous push-back case (Asady and Others v. Slovakia, App. No. 24917/15) and failed to give a realistic chance to the element of legal pathways in the visa case (see above).

All that considered, the ambiguity of the reasoning, together with the emphasis on the «irregularity», shows how the States' right to control the entry, removal and residence of aliens will prevail over the need to ensure the protection of those crossing borders irregularly for the next years.

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