



## The immediate return to Morocco of sub-Saharan migrants who were attempting to enter Spanish territory in Melilla amounted to a collective expulsion of foreign nationals, in breach of the Convention

In today's **Chamber judgment**<sup>1</sup> in the case of **N.D. and N.T. v. Spain** (applications nos. 8675/15 and 8697/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsions of aliens) to the European Convention on Human Rights, and**

**a violation of Article 13 (right to an effective remedy) taken together with Article 4 of Protocol No. 4.**

The case concerned the immediate return to Morocco of sub-Saharan migrants who had attempted on 13 August 2014 to enter Spanish territory illegally by scaling the barriers which surround the Melilla enclave on the North-African coast.

The Court noted that N.D. and N.T. had been expelled and sent back to Morocco against their wishes and that the removal measures were taken in the absence of any prior administrative or judicial decision. At no point were N.D. and N.T. subjected to any identification procedure by the Spanish authorities. The Court concluded that, in those circumstances, the measures were indeed collective in nature.

The applicants' version of the attempt to scale the barriers towards Melilla was corroborated by numerous statements, gathered by various witnesses and journalists as well as by the UN High Commissioner for Refugees or by the Human Rights Commissioner. Lastly, the Court noted the existence of a clear link between the collective expulsion to which N.D. and N.T. were subjected at the Melilla border and the fact that they were effectively prevented from having access to a remedy that would have enabled them to submit their complaint to a competent authority and to obtain a thorough and rigorous assessment of their requests before their removal.

### Principal facts

The applicants, N.D. and N.T., are, respectively, Malian and Ivorian nationals who were born in 1986 and 1985. N.D. arrived in Morocco in March 2013 and stayed for about nine months in the makeshift camp on Gurugu Mountain, near the border crossing into Melilla, a Spanish enclave situated on the North-African coast. N.T. arrived in Morocco at the end of 2012 and also stayed in this camp.

On 13 August 2014 N.D. and N.T. left the camp and attempted to enter Spain with a group of sub-Saharan migrants via the Melilla border crossing. This border crossing is made up of three enclosures, namely two six-metre-high external barriers and another three-metre-high internal barrier. N.D., N.T. and other migrants scaled the first barrier. They claimed that the Moroccan authorities threw stones at them. N.D. succeeded in climbing to the top of the third barrier. N.T. said

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

that he managed to cross the first two barriers. N.T. climbed down at about 2 p.m., assisted by the Spanish police, and N.D. at around 3 p.m.

They were immediately arrested by members of *Guardia Civil*, handcuffed and returned to Morocco. At no point were their identities checked. They did not have an opportunity to explain their personal circumstances or to receive assistance from lawyers, interpreters or medical personnel. They were subsequently transferred to the Nador police station, and then to Fez, more than 300 km from Melilla, in the company of 75 to 80 other migrants who had attempted to enter Melilla on the same date. Videos of the events of 13 August were made by witnesses and journalists, and those videos were submitted to the Court by the applicants. Non-governmental organisations subsequently lodged a complaint and called for the opening of an investigation.

Later, on 9 December 2014 and 23 October 2014 respectively, N.D. and N.T. succeeded in entering Spanish territory by the Melilla border crossing. Orders for deportation were issued against both of them. N.D. was returned to Mali on 31 March 2015. An order for N.T.'s deportation was issued on 7 November 2014 and his current situation is unknown.

### Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens), the applicants claimed that they had been subjected to a collective expulsion without an individual assessment of their situation, with no basis in law and without the provision of any legal advice.

Relying on Article 13 of the Convention (right to an effective remedy) taken together with Article 4 of Protocol No. 4, the applicants complained that it had been impossible to have their identity established, to put forward their individual situations, to challenge before the Spanish authorities their return to Morocco and to have the risk of ill-treatment that they ran in that State taken into consideration.

The application was lodged with the European Court of Human Rights on 12 February 2015. The Council of Europe Commissioner for Human Rights exercised his right to intervene in the proceedings and submitted written comments. Written observations were received from the Office of the United Nations High Commissioner for Refugees (UNHCR), the UN High Commissioner for Human Rights (UNOHCHR), the Spanish Commission for Assistance to Refugees (CEAR) and, acting collectively, from the Centre for Advice on Individual Rights in Europe (the AIRE Centre), Amnesty International (AI), the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), all of which had been given leave to intervene in the written proceedings by the President of the Chamber.

Judgment was given by a Chamber of seven judges, composed as follows:

Branko Lubarda (Serbia), *President*,  
Luis López Guerra (Spain),  
Helen Keller (Switzerland),  
Dmitry Dedov (Russia),  
Pere Pastor Vilanova (Andorra),  
Alena Poláčková (Slovakia),  
Georgios A. Serghides (Cyprus),

and also Fatoş Aracı, *Deputy Section Registrar*.

## Decision of the Court

### Article 1 – Territorial application

The Government considered that the application was based on events which occurred outside the jurisdiction of Spain. The applicants had not succeeded in getting past the protective structures at the Melilla border crossing and had not therefore entered Spanish territory. The police had had no choice but to prevent them being able to enter Spanish territory.

The Court noted that, in the Government's view, the events had occurred outside the jurisdiction of Spain, in that the applicants had not succeeded in entering Spanish territory. The Court considered that it was unnecessary to establish whether or not the border crossing erected between Morocco and Spain was located in Spain. It reiterated that, where there was control over another, this was *de jure* control exercised by the State over the individuals concerned. In the Court's opinion, from the moment that the applicants climbed down from the barriers, they had been under the continuous and exclusive control of the Spanish authorities. For the Court, there could be no doubt that the facts of the present case fell within the jurisdiction of Spain, within the meaning of Article 1 of the Convention.

### Objections raised by the Government

The Government considered that the applicants could not claim to be "victims" of the events complained of by them. The applicants had claimed, without official identity documents in support of their statement, that they had participated in the assault on the Melilla border crossing at dawn on 13 August 2014 and that they recognised themselves on the video recordings submitted by them. The Government were of the opinion that, even supposing that the persons visible on the videos were the applicants, they had lost victim status in that they had succeeded in entering Spanish territory unlawfully and deportation orders had been issued against them. Furthermore, neither of the two applicants has submitted a request for international protection to the Spanish authorities before applying to the Court.

The Court confirmed that the applicants could claim to be victims. They had given a coherent account of the circumstances, their countries of origin and the difficulties that had led them to the makeshift camp on Mount Gurugu, and of their participation with other migrants in the attempt to scale the barriers surrounding the Melilla border crossing on 13 August 2014, with the aim of entering Spanish territory. In support of their statements, the applicants had submitted video stills that appeared credible. Furthermore, the Government did not deny the existence of summary expulsions, and shortly after the events in question had amended the Institutional Act on the rights and freedoms of foreign nationals.

Lastly, the Court dismissed the Government's objection of non-exhaustion of domestic remedies, to the effect that the applicants had not challenged the deportation orders against them before the administrative proceedings courts, and that only the second applicant had requested asylum. Concerning as it did deportation orders issued after the events complained of, this objection of non-exhaustion had to be rejected.

### Article 4 of Protocol No. 4

The Court observed that it was undisputed that N.D. and N.T., who were under the exclusive and continuous control of the Spanish authorities, had been expelled and sent back to Morocco against their wishes. This clearly amounted to "expulsion" for the purposes of Article 4 of Protocol No. 4.

The Court noted that the removal measures had been taken in the absence of any prior administrative or judicial decision. At no point were N.D. and N.T. subjected to any procedure. The issue of sufficient safeguards did not even arise in this case, as there had been no assessment of each individual situation. No identification procedure had been carried out by the Spanish

authorities in respect of either applicant. The Court concluded that, in those circumstances, there was no doubt that these were indeed collective expulsions.

The Court concluded that the removal of N.D. and N.T. had been of a collective nature, in breach of Article 4 of Protocol No. 4 to the Convention and that, accordingly, there had been a violation of that provision.

#### Article 13 taken together with Article 4 of Protocol No. 4

The Court attached greater weight to the applicants' version, in that it was corroborated by a very large number of witness statements gathered by, among others, the UN High Commissioner for Refugees and the Human Rights Commissioner. The Court had already noted under Article 4 of Protocol No. 4 that the applicants were immediately expelled by the authorities, and that they had no access to interpreters or to legal assistance, for the purpose of informing them of the relevant provisions of asylum law or the procedures available to them to challenge their expulsion. The Court noted the existence of a clear link between the collective expulsion to which N.D. and N.T. were subjected at the Melilla border and the fact that they were effectively prevented from having access to any domestic remedy meeting the requirements of Article 13.

In the light of these circumstances and of the immediate nature of their expulsion, the Court considered that the applicants had been deprived of any remedy that would have enabled them to submit their complaint to a competent authority and to obtain a thorough and rigorous assessment of their requests prior to their expulsion.

For these reasons, the Court concluded that there had been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4 to the Convention.

#### Just satisfaction (Article 41)

The Court held that Spain was to pay each of the applicants 5,000 euros (EUR) in respect of non-pecuniary damage.

#### Separate opinion

Judge Dedov expressed a separate opinion, which is annexed to the judgment.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.