

ECtHR - N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, 13 February 2020

Country of Applicant:

Ivory Coast
Mali

Date of Decision:

13-02-2020

Citation:

N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, 13 February 2020

Court Name:

European Court of Human Rights (Grand Chamber)

Keywords:

[Effective access to procedures](#) [1]
[Effective remedy \(right to\)](#) [2]
[Inhuman or degrading treatment or punishment](#) [3]
[Procedural guarantees](#) [4]
[Return](#) [5]

Relevant Legislative Provisions:

International Law > [1951 Refugee Convention](#) [6] > [Art 1](#) [7]
International Law > [1951 Refugee Convention](#) [6] > [Art 3](#) [8]
International Law > [1951 Refugee Convention](#) [6] > Art 4
International Law > [1951 Refugee Convention](#) [6] > Art 16
International Law > [1951 Refugee Convention](#) [6] > Art 22
International Law > UN Convention against Torture
International Law > UN Convention against Torture > Art. 3
International Law > [1951 Refugee Convention](#) [6] > [Art 31](#) [9]
International Law > [1951 Refugee Convention](#) [6] > [Art 32](#) [10]
International Law > [1951 Refugee Convention](#) [6] > [Art 33](#) [11] > Art 33.2
Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [12] > [Article 1](#) [13]
European Union Law > [EN - Treaty on European Union](#) [14]
European Union Law > [EN - Treaty on European Union](#) [14] > Article 67
European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01 > Article 78
Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#)

[12] > [Article 3](#) [15]
European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01
Council of Europe Instruments > ECHR (Fourth Protocol)
Council of Europe Instruments > ECHR (Fourth Protocol) > Art 4
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [16] > [Article 4](#) [17]
Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [12] > [Article 13](#) [18]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [16] > [Article 18](#) [19]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [16] > [Article 19](#) [20] > [Art 19.1](#) [21]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [16] > [Article 19](#) [20] > [Art 19.2](#) [22]
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [23]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 1](#) [25]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 2](#) [26]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 4](#) [27]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 5](#) [28]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [16] > [Article 47](#) [29]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 8](#) [30]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 12](#) [31]
European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [32] > [Article 2](#) [33]
European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [24] > [Article 13](#) [34]
European Union Law > [EN - Recast Qualification Directive, Directive 2011/95/EU of 13 December 2011](#) [32] > [Article 4](#) [35]
European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [36] > [Article 6](#) [37]
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [23] > [Article 13](#) [38]
European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [36] > [Article 7](#) [39]
European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [36] > [Article 8](#) [40]
European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [36] > [Article 9](#) [41]

Headnote:

The Court found no violation of the Convention given that the applicants would have had

access to a genuine and effective possibility of submitting arguments against their expulsion had they entered lawfully into Spain ? they did not have any ?cogent reasons? for not using the border procedures available at designated entry points. As such, the lack of an individualised procedure for their removal was the consequence of their own conduct.

Facts:

The case revolves around the storming of border fences in Melilla, a Spanish enclave in the north of Morocco, and the immediate subsequent expulsion of the migrants involved. The applicants, N.D. and N.T., are Malian and Ivorian nationals respectively. In late 2012/early 2013, they arrived in Morocco, where they stayed in the informal camp on Mount Gurugu for close to a year. On 13 August 2014, they attempted to cross the border fences into Spain, along with 600 other migrants. They managed to escape the Moroccan police but got stuck on top of the inner fence and were helped down with ladders by the Spanish Guardia Civil. They were then immediately escorted back to Morocco by those same officers without any procedure, and transferred to the Nador police station before being taken to Fez and left there on their own.

The case was positively decided in a Chamber ruling in 2017, where the Court found that there had been a violation of Article 4 Protocol 4, due to the absence of administrative decisions and the lack of legal assistance and interpretation. The case was referred to the Grand Chamber in January 2018.

Decision & Reasoning:

The government?s preliminary objections

On *jurisdiction*, the Court rejected the argument of an operational border on the basis that jurisdiction is primarily territorial and as such could be limited only in exceptional circumstances. In this regard, Spain referred to the ?difficulty of managing illegal immigration in the Melilla enclave? but the Court held that it could not discern any reasons to believe that the effective exercise of Spanish authority was restricted. The objection was rejected. Regarding Spain?s argument that the applicants had eventually entered Spain and could not maintain their *victim status*, the Court replied that this case concerned an alleged collective expulsion, and as such it could not take into consideration events subsequent to a separate border crossing. This objection was also rejected.

Lastly, on the *exhaustion of domestic remedies*, the government argued that the applicants could have tried to obtain entry visas in their countries of origin or applied for asylum while in Morocco. The Court answered that, in light of the applicants? complaint that they were subjected to a collective expulsion, the procedures proposed by Spain could not be regarded as effective remedies, themselves being presented as alternatives to illegal entry rather than remedies. The objection was dismissed.

Alleged violation of Article 4 Protocol No. 4 (Art. 4 P4)

Applicability

The Court first admitted that states may arrange policies to allow access to their territory only to people fulfilling the relevant legal requirements, especially given the present context of immigration in Europe. However, it stressed that ensuing problems could not justify recourse to practices incompatible with the Convention.

It then asked whether *the concept of 'expulsion' within the meaning of Art. 4 P4* covered the 'non-admission' of aliens at a state border given Spain's argument that this situation was a case of non-admission and was not covered by the expulsion provisions Art. 4 P4. The Court referred to the International Law Commission's (ILC) Draft Articles on the Expulsion of Aliens which show that the terms 'expulsion', 'refoulement' and 'non-admission' could be used interchangeably, so that 'expulsion' would be used as a generic term. Therefore, the Court equated the 'non-admission' of a refugee with their 'refoulement', meaning that the sole fact that a state refuses to admit an alien within its jurisdiction does not release it from its obligations towards that person.

The Court found this to be further confirmed by EU law, as well as its own previous case law. The Court concluded that the protection of the Convention could not be dependent on formal considerations (such as whether the people were admitted to the territory in accordance with a particular provision of national or European law) 'states' legitimate concern to foil attempts to circumvent immigration restrictions cannot go so far as to render ineffective the protection afforded by the Convention. Therefore Article 4 Protocol 4 was found to be applicable in this case.

Merits

Pursuant to its judgments in *Hirsi Jamaa, Sharifi, and Khlaifia*, the Court noted that the decisive criterion for Art. 4 P4 is the substance of a reasonable and objective examination of a specific case and did not depend on the number of persons involved. The aim of this Article is to maintain the possibility for each alien concerned to assert a risk of treatment incompatible with the Convention were they to return. That is why it requires states to ensure that they each have 'a genuine and effective possibility of submitting arguments against their expulsion'.

However, there is no violation if the lack of an individual decision can be attributed to the applicant's own conduct, a culpability argument that had been raised by Spain. According to the Court, where there are enough arrangements for legal entry to secure the right to request protection under the Convention in a genuine and effective manner, states can require applications to be submitted at existing border points. As such, they may refuse entry to aliens, including potential asylum seekers, who have crossed the border at a different location without cogent reasons that would be attributable to Spain. The Court agreed that Spain gave the applicants several possible means of seeking admission to the national territory by applying for a visa or for international protection and that these legal avenues were available. Moreover, the Court did not find that the applicants had any 'cogent reasons' not to use these border procedures, noting that the applicants also had access to Spanish embassies and consulates to have their file examined under a specific procedure for international protection (Section 38 of Law 12/2009) or to apply for a visa.

The Court stressed that there was no general duty under Art. 4 P4 for states to bring persons under the jurisdiction of another state within their own. Departing from the Chamber judgment, the Court found that the lack of an individual removal decision was attributable to the non-use of official entry procedures and there had been no violation of Art. 4 P4.

Alleged violation of Art. 13 ECHR in conjunction with Art. 4 P4

The applicants complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco. The Court held that in so far as it had found that the lack of an individualised procedure for their removal was the consequence of the applicants' own conduct, it could not hold the state responsible for not making available a legal remedy against that removal. The Court reversed the Chamber ruling and found that there was no violation of Art. 13 ECHR taken in conjunction with Art. 4 P4.

Outcome:

Application rejected: no violation of Art. 4 Protocol No. 4, no violation of Art. 13 ECHR taken in conjunction with Art. 4 P4.

Observations/Comments:

As noted by the Court in its judgment, this was the first time it addressed the issue of the applicability of Art. 4 P4 to the immediate return of aliens after a group attempt to cross a border unauthorised. You can read our commentary on the case [here](#) [42].

A few preliminary issues are of particular interest:

- *On the continued examination of the case (Art. 37 §1 (a) ECHR)*

There was a question as to the **maintenance of contact** of the applicants with their representatives, given that they both lived in precarious circumstances and had no fixed address. The lawyers stated that they had remained in touch with the applicants, received updates, informed them of the case's developments, and could join them by telephone. The government referred to the *V.M.* case at the hearing regarding the lack of an address and contact details for the applicants. The Court concluded that there was nothing that could call into question the lawyer's account of the **applicants' interest** and their contacts throughout the proceedings.

The Court added that in any event it could continue the examination of a case because respect for human rights required it i.e. where the case raises **important issues** that go beyond the particular situation of an applicant. This applied here because the case was referred to the Grand Chamber under Art. 43 ECHR, meaning it raised a serious issue ? in this instance, the interpretation of the scope and requirements of Art. 4 P4 regarding mass attempts by migrants to enter a state in an unauthorised manner. As such, nothing could justify stopping the examination of the application under Art. 37 ECHR.

- *On the assessment of evidence and establishment of facts by the Court*

The government argued that the applicants had not demonstrated that they were part of the group that had scaled the fences due to the poor quality of the **video footage** submitted. The applicants argued that the evidence gathered was sufficient and that the state should have furnished more elements to the contrary.

Given the differences in the parties' accounts of the facts, the Court assessed whether it was persuaded of the truthfulness of the applicants' statements as to their participation in the storming of the fences. And because the difficulty for the applicants of adducing evidence of their involvement was linked to the violation alleged (i.e. absence of identification and personalised treatment) and at the core of their complaint, the Court sought to ascertain whether the applicants had furnished **prima facie evidence**.

In that regard, the Court noted that the applicants had given a **coherent account** of their individual

circumstances and participation in the storming, and that they had provided video footage to that effect in which they had recognised themselves. Moreover, the Court observed that the reports provided by the government only demonstrated the impossibility of identifying the applicants but did not refute their arguments. The Court therefore concluded that the applicants had presented **sufficient evidence** and presumed their account of the events to be truthful.

This summary was written by Alexandra Nouvel, PhD Candidate at the European University Institute.

Case Law Cited:

[CJEU - Case C-47/15, Sélina Affum v Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai](#) [43]

ECtHR - Ramzy v the Netherlands, Application No. 25424/05

[ECtHR - M.A. and Others v. Lithuania \(no. 59793/17\), 11 December 2018](#) [44]

ECtHR- Assanidze v. Georgia [GC], Application no. 71503/01

ECtHR - Ilascu and Others v Moldova and Russia [GC], Application No. 48787/99

[ECtHR - M.S.S. v Belgium and Greece \[GC\], Application No. 30696/09](#) [45]

ECtHR - Dritsas v Italy, Application No. 2344/02

ECtHR - Berisha and Haljiti v the former Yugoslav Republic of Macedonia, Application No. 18670/03

ECtHR - El Masri v. the former Yugoslav Republic of Macedonia [GC], Application No. 39630/09

[ECtHR - Paposhvili v. Belgium, Application no. 41738/10, 13 December 2016](#) [46]

[CJEU ? Joined Cases C-391/16, C-77/17 and C-78/17, M \(Révocation du statut de réfugié\)](#) [47]

[ECtHR - F.G. v. Sweden \(no. 43611/11\) \(Grand Chamber\), 23 March 2016](#) [48]

[ECtHR - V.M. and others v. Belgium, Application no.60125/11, 7 July 2015](#) [49]

[ECtHR - Sharifi and Others v Italy and Greece, Application No. 16643/09](#) [50]

[ECtHR - Khlaifia and Others v. Italy \(GC\), no. 16483/12, 15 December 2016](#) [51]

[ECtHR - Hirsi Jamaa and Others v Italy \[GC\], Application No. 27765/09](#) [52]

CJEU - C-444/17 Arib, 19 March 2019

[CJEU - C-646/16, Khadija Jafari and Zainab Jafari](#) [53]

ECtHR - Andric v Sweden, Application No. 45917/99

Attachment(s):



Other sources cited:

- *Council of Europe documents*

Twenty Guidelines of the Committee of Ministers on Forced Return, 4 May 2005

2015 annual activity report by Nils Muiznieks, Commissioner for Human Rights, 14 March 2016

Report by Special Representative on migration and refugees Tomás Božek of fact-finding mission to Spain, 3 September 2018

Resolution 2299 (2019) of the Parliamentary Assembly on pushback policies and practice in Council of Europe member states, 28 June 2019

Travaux préparatoires of Protocol No. 4

Authentic Language:

English

State Party:

Spain

National / Other Legislative Provisions:

Institutional Law 4/2000 of 11 January 2000 on rights and freedoms of aliens in Spain and their social integration (LOEX)

esp. Section 58(3)(b) and the Tenth Additional Provision as amended by Institutional Law 4/2015 laying down special rules for Ceuta and Melilla; and the implementing Royal Decree 557/2011 esp. Art. 23

18 and 19 of the Asylum Law 12/2009 (Ley de Asilo)

Links:

- [1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A11
- [2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A30
- [3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A43
- [4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A59
- [5] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2490
- [6] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>
- [7] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#1>
- [8] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#3>
- [9] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#31>
- [10] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#32>
- [11] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#33>
- [12] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [13] https://www.asylumlawdatabase.eu/node/195#toc_1
- [14] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>
- [15] https://www.asylumlawdatabase.eu/node/195#toc_12
- [16] <https://www.asylumlawdatabase.eu/node/453>
- [17] https://www.asylumlawdatabase.eu/node/453#toc_29

- [18] https://www.asylumlawdatabase.eu/node/195#toc_60
- [19] https://www.asylumlawdatabase.eu/node/453#toc_85
- [20] https://www.asylumlawdatabase.eu/node/453#toc_88
- [21] https://www.asylumlawdatabase.eu/node/453#toc_90
- [22] https://www.asylumlawdatabase.eu/node/453#toc_91
- [23] <https://www.asylumlawdatabase.eu/node/4037>
- [24] <https://www.asylumlawdatabase.eu/node/1306>
- [25] https://www.asylumlawdatabase.eu/node/1306#toc_42
- [26] https://www.asylumlawdatabase.eu/node/1306#toc_45
- [27] https://www.asylumlawdatabase.eu/node/1306#toc_67
- [28] https://www.asylumlawdatabase.eu/node/1306#toc_77
- [29] https://www.asylumlawdatabase.eu/node/453#toc_198
- [30] https://www.asylumlawdatabase.eu/node/1306#toc_101
- [31] https://www.asylumlawdatabase.eu/node/1306#toc_137
- [32] <https://www.asylumlawdatabase.eu/node/4038>
- [33] https://www.asylumlawdatabase.eu/node/4038#toc_70
- [34] https://www.asylumlawdatabase.eu/node/1306#toc_145
- [35] https://www.asylumlawdatabase.eu/node/4038#toc_95
- [36] <https://www.asylumlawdatabase.eu/node/3946>
- [37] https://www.asylumlawdatabase.eu/node/3946#toc_117
- [38] https://www.asylumlawdatabase.eu/node/4037#toc_165
- [39] https://www.asylumlawdatabase.eu/node/3946#toc_126
- [40] https://www.asylumlawdatabase.eu/node/3946#toc_137
- [41] https://www.asylumlawdatabase.eu/node/3946#toc_141
- [42] <https://www.asylumlawdatabase.eu/en/journal/nd-and-nt-v-spain-do-hot-returns-require-cold-decision-making>
- [43] <https://www.asylumlawdatabase.eu/en/content/cjeu-case-c%E2%80%91914715-s%C3%A9lina-affum-v-pr%C3%A9fet-du-pas-de-calais-procureur-g%C3%A9n%C3%A9ral-de-la-cour-d%E2%80%99appel>
- [44] <https://www.asylumlawdatabase.eu/en/content/ecthr-ma-and-others-v-lithuania-no-5979317-11-december-2018>
- [45] <https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>
- [46] <https://www.asylumlawdatabase.eu/en/content/ecthr-paposhvili-v-belgium-application-no-417381013-december-2016>
- [47] <https://www.asylumlawdatabase.eu/en/content/cjeu-%E2%80%93-joined-cases-c-39116-c-7717-and-c-7817-m-r%C3%A9vocation-du-statut-de-r%C3%A9fugi%C3%A9>
- [48] <https://www.asylumlawdatabase.eu/en/content/ecthr-fg-v-sweden-no-4361111-grand-chamber-23-march-2016>
- [49] <https://www.asylumlawdatabase.eu/en/content/ecthr-vm-and-others-v-belgium-application-no6012511-7-july-2015>
- [50] <https://www.asylumlawdatabase.eu/en/content/ecthr-sharifi-and-others-v-italy-and-greece-application-no-1664309>
- [51] <https://www.asylumlawdatabase.eu/en/content/ecthr-khlaifia-and-others-v-italy-gc-no-1648312-15-december-2016-0>
- [52] <https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509>
- [53] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-64616-khadija-jafari-and-zainab-jafari>
- [54] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20N.D.%20AND%20N.T.%20>