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Summary land border expulsions in front of the ECtHR: ND and NT v Spain

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This journal contribution is to be read in conjunction with the EDAL case summary on *ND and NT v Spain* [1].

Introduction :

When ND and NT submitted their application to the European Court of Human Rights in February 2015, the latest Grand Chamber judgment on collective expulsions was *Hirsi Jamaa and others v Italy* [2] App no 27765/09 (ECtHR, 23 February 2012), and there was a feeling that, in a context of intense externalization by the EU of both its border control and legal responsibility, the Court embraced its role as human rights safe keeper.

As ND and NT?s applications progressed, the Grand Chamber published its judgment in *Khlaifia and others v Italy* [3] App no 16483/12 (ECtHR, 15 December 2016), quietly overturning some of its jurisprudence on collective expulsions, yet leaving many questions open. *ND and NT v Spain [1]* App nos 8675/15 and 8697/15 (ECtHR, 3 October 2017) is the first judgment on collective expulsions since *Khlaifia*.

The admissibility stage: jurisdiction, evidence and victim?s status

In *ND and NT*, the Court rejected all of Spain?s inadmissibility arguments in a series of strongly worded dicta. First, the Court dismissed the concept of an inter-border zone - or as otherwise referred to by the Spanish government, an?operational border [4]?, with a varying location depending on the circumstances - in which the Convention (?ECHR?) would not apply. For the first time, the Court applied its *Al-Skeini* App no 55721/07 (ECtHR, 7 July 2011) and *Hirsi* jurisprudence to a land border and concluded that irrespective of whether the applicants had entered Spanish territory, *de facto* control would in any event trigger jurisdiction (paras 54-55).

Yet the issue of evidence remained. One of the practical obstacles to litigating systemic summary expulsions is the lack records, visual or other. In this case, Spain argued that the applicants could not conclusively establish they belonged to the group collectively expelled on 13 August 2014. It even submitted a police report purporting to forensically analyse images on which the applicants had identified themselves and which concluded that they could not be individually recognised in those images (para 56). Nonetheless, the Court ruled that the lack of conclusive evidence as to the applicants? presence in that group was due to the Government?s failure to carry out any identification before expulsion. Thus, the Government could not hide behind such a lack of evidence to defend this claim (para 60). It must be noted that a number of factors were paramount to the Court?s finding in this case. First, Spain was unable to deny neither the occurrence of a

group summary expulsion on 13 August 2015 nor an established practice of such expulsions at the Spanish-Moroccan land border. Secondly, the evidence and accounts submitted by the applicants were deemed credible (para 59). Theoretically based on the legal doctrine of estoppel, this dictum sets out a principle crucial to bringing group summary expulsions to judicial scrutiny.

Spain also argued that, because the applicants had subsequently managed to re-enter Spain and have their case examined individually months after the expulsion complained of, they had lost their victim status. The Court rejected that argument as well, given that the ECHR violations at stake had never been examined (para 60). The Court highlighted that subsequent expulsion procedures relating to a later entry on Spanish territory were irrelevant to the issue of exhaustion of domestic remedies (para 64). These clarifications as to the irrelevance of subsequent immigration and/or asylum procedures may be instructive to Governments which, like Spain, attempt to utilise the determination and risk-taking of migrants and refugees, who despite practices of summary expulsion manage to have their case duly considered.

Summary expulsions are by nature collective

Up until the Grand Chamber?s judgment in *Khlaifia*, the Court?s approach to collective expulsions was to conclude a violation of article 4 protocol 4 ECHR unless it was established beyond doubt that an objective and reasonable examination of the individual circumstances had occurred. In *?onka and others v Belgium* [5] App no 51564/99 (ECtHR, 5 February 2002), the Court ruled that article 4 protocol 4 ECHR had been violated because it had doubts as to whether the applicants? individual circumstances had been adequately examined (para 61). In *Hirsi* the Grand Chamber, following this principle, concluded that the facts of the case did not permit to establish the existence of sufficient guarantees ensuring the examination of individual circumstances (para 185). A similar conclusion was reached in *Sharifi and others v Italy and Greece* [6] App no 16643/09 (ECtHR, 21 October 2914), a case where there was a factual dispute as to which procedure, if any, had been followed (paras 214-25).

In *Khlaifia* the Grand Chamber repeated much of its jurisprudence on collective expulsions (paras 237-41). However when considering whether sufficient guarantees as to the examination of individual circumstances existed, it heavily relied on a twofold test: (i) whether the applicants had the opportunity to notify the authorities of any reason why they should not be deported and (ii) whether such arguments were considered by the competent authority (paras 247-8). The Grand Chamber dismissed the claim under article 4 protocol 4 on the basis that the length of the applicants? pre-removal detention and the identification procedures they underwent indicated they had an opportunity to alert the authorities of any ground on which they should not be deported (para 247). In that case, the Court highlighted that in the course of the ECtHR proceedings the applicants had not been able to provide any reason which justified their presence on Italian territory (para 253).

Though that twofold test was already expressed in *Hirsi* (para 184), there was a definite change of approach in *Khlaifia*, where it was not for the Government to establish there had been an objective and reasonable examination of individual circumstances. It was rather for the applicants to argue that, within the administrative procedure in place, they had not had an opportunity to raise arguments against their expulsion.

As pointed out by the Court in *ND and NT,* the facts of this case are crucially different. There was no administrative or judicial procedure as to the applicants? expulsions. It would have been pointless to consider whether sufficient guarantees for an individual examination were provided, the answer being too obvious when the Government did not even identify individuals before expulsion. These summary expulsions were by nature collective and in violation of article 4 protocol 4 ECHR (para 107).

Through its ruling in *ND and NT* the Court confirmed a distinction already drawn in *Khlaifia* (para 242) between cases of summary immediate expulsions - such as in *Hirsi*, *Sharifi* and *ND and NT* ? which are collective by nature, and those cases where a procedure is followed but doubts arise as to whether those expulsions are nonetheless collective (*ND and NT*, para 100).

Summary expulsion means no remedy

The most striking turn of jurisprudence operated in *Khlaifia* was that in relation to the right to an effective remedy (article 13 ECHR) taken in conjunction with the prohibition of collective expulsions (article 4 protocol 4 ECHR). When previously, an automatic suspensive effect was required for a remedy to be effective (*Conka*, paras 79-82; *Hirsi*, para 199; *Sharifi*, para 242), the Grand Chamber in *Khlaifia* undid that requirement in pure article 4 protocol 4 cases ? namely cases which do not have a concomitant article 3 or/and article 2 ECHR claim (para 277). On that basis, the Court dismissed the claim made under article 13 in conjunction with article 4 protocol 4 ECHR, noting that on the facts of the case there was no reason to believe that the judicial remedy indicated on the refusal-of-entry decisions was ineffective (para 272). Yet the Grand Chamber left open the question of what constitutes an effective remedy under article 13 when taken in conjunction with article 4 protocol 4 ECHR only.

That question remains unanswered. Unlike in *Khlaifia*, the applicants in *ND and NT* had access to no remedy at all and thus the question of effectiveness could not be examined (para 118). As in *Sharifi*, the Court once again highlighted the obvious link between the collective expulsions to which the applicants were subjected and the fact that they had no access to a domestic remedy which could fulfill the article 13 ECHR requirements (para 120).

Conclusion

Spain has been conducting summary group expulsions at its land border with Morocco since 2005. That practice is enshrined in law since 2015 (paras 18-9), and the Spanish government has always affirmed that the practice and the law are fully in line with Spain?s human rights obligations.

The Court?s judgment in *ND and NT* is not final, and Spain has already indicated that it is considering requesting a referral to the Grand Chamber [7]. Yet even domestically the law is challenged in front of the Constitutional Court (recurso de inconstitucionalidad n.º 2896-2015). Though the domestic case is pending [8], one might expect that this ECtHR judgment, in effect a declaration of incompatibility between said law and the Convention, will bear consequences.

Further, in a political context where an increasing number of European Governments undertake to build fences at their land borders and reports on practices of summary expulsion are on the rise, this judgment can only be welcomed as an important step in clarifying the legal implications of such immediate summary expulsions.

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(This journal entry is an expression of the authors' own views, and not those of EDAL or ECRE).

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