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CASE LAW COMMENTARY

European Court of Human Rights, Judgment of 5 April 2022, *A.A. and Others v. North Macedonia*, App. nos. 55798/16 *et al*.

Closing eyes on collective expulsions at the border: is the ECtHR still a guarantor of foreigners' fundamental rights?

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Abstract

Following the judgment N.D. and N.T. v. Spain*, the ECtHR has issued another judgment concerning the scope of application of Article 4 Prot. 4 ECHR. While the Court acknowledged the respondent State's*

jurisdiction, it nonetheless denied that a violation of the absolute prohibition of collective expulsion had occurred, building up its findings on the 'culpable conduct' test.

A. FACTS OF THE CASE AND JUDGMENT

1. *Facts*

On 14 March 2016, few days after the closure of the Greek-Macedonian border, a group of over 1.500 refugees stranded in dire conditions in the informal refugee camp of Idomeni in Greece, walked into North Macedonia to find safety, through what became known as a "March of Hope". Together they were intercepted, circled, boarded into vans, driven back to the border and forced by armed officers to re-enter Greece through a hole in the fence. Eventually they were summarily and forcibly returned into Greece border without an examination of their personal circumstances.

The applicants, a group of Syrians, Iraqis and Afghans nationals, including a Syrian family and a person in a wheelchair, lodged applications before the European Court of Human Rights complaining against their mass expulsion from North Macedonia. They argued that Macedonian officers ignored the desperate circumstances they had fled in Greece and gave them no chance to challenge their expulsion. Instead, they sent them back to the informal refugee camp of Idomeni, where over 10,000 persons were forced to remain, surviving with no state support in terrible and squalid conditions. In light of these facts, the applicants considered that their summary expulsion without an examination of their personal circumstances violated the prohibition of collective expulsion under Article 4 Protocol 4 and the right to an effective remedy under Article 13 ECHR taken in conjunction with the former provision.

2. *Judgment*

The Court proceeded to analyze whether the lack of individual deportation decisions could be justified by the applicants' conduct. It examined whether, by crossing the border irregularly, the applicants had circumvented an effective procedure for legal entry. And in light of these circumstances, it compared the present case to *N.D. and N.T.* in which the applicants were apprehended during an attempt to cross the land border *en masse* by storming the border fences. However, the Court noted a divergence and a similarity from the Spanish case: although in the Macedonian case no use of force was made, it does nevertheless invoke the concept of culpable conduct. As a matter of fact, according to the Court, Macedonian law had provided for the possibility of appeal against removal orders. Nonetheless, the applicants, by deliberately attempting to enter the territory as part of a large group and in an unauthorised

area, had placed themselves in an illegal situation and had therefore chosen not to use the existing legal procedures: «it was the applicants who put themselves in jeopardy by participating in the illegal entry into Macedonian territory, taking advantage of the large numbers in the group. The lack of individual removal decisions had been a consequence of their own conduct» (§ 123). The Court, thus, unanimously excluded a violation of Article 4 of Protocol No. 4 ECHR.

By invoking Article 13 ECHR, the applicants had also complained about the absence of an effective remedy with suspensive effect to challenge their summary expulsion to Greece. The Government had replied by arguing that they had not used the remedies available to them and that, in any event, requiring the existence of such a remedy in a situation of a massive influx of migrants was unacceptable. According to the then, that would have imposed too great burdens on States which were already facing serious challenges in trying to cope with waves of migrants. The Court ruled that the absence of a remedy against the applicants' removal did not in itself constitute a violation of Article 13 of the Convention. It considered that the applicants' complaint about the risks they would face in the country of destination had never been raised before the competent authorities of the respondent State in accordance with the statutory procedure.
In conclusion, the Court unanimously held that there was no violation of Article 13 in conjunction with Article 4 of Protocol No. 4, concerning the availability of an effective remedy with suspensive effect to challenge a summary expulsion.

B. COMMENT

1. *Upholding jurisdiction issues…*

The most interesting preliminary issue dealt with by the ECtHR consists in the answer to the following question: do the applicants fall within the jurisdiction of North Macedonia? For Member States, "jurisdiction" means "responsibility" and, as could be expected, North Macedonia was quick to reject the assumption that migrants fell within its jurisdiction, provided that *inter alia* a «mass influx of migrants» had posed serious problems to borders' authorities and due to aliens' illegal and violent attempt to cross the State border (§ 57). Territoriality is the very essence of jurisdiction, the Court reminded – in its own territory, every State is deemed *naturaliter* to exercise its sovereign powers, unless exceptional circumstances are proved to have limited or altered «the extent of its jurisdiction» (§ 60). This rebuttable presumption, in the material case, may not be refuted. Recalling that «territorial exclusions» are prohibited within the ECHR legal framework—and hence no "grey zones" in jurisdiction issues are to be found when (at least alleged) violations of human rights are at stake (*Matthews*)—, the Strasbourg Court noted that, albeit North Macedonian officials were

effectively facing the arrival *en masse* of a huge amount of migrants at the borders, they exercised «full authority» *vis-à-vis* those individuals (§ 62). This holds true also considering that other countries' police officers were present at the border (which was, indeed, an argument specifically put forward by the Macedonian government to challenge its jurisdiction). With the words of the ECtHR, «the Convention cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. To conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless» (§ 63). After *Hirsi Jamaa* and *N.D. and N.T.*, a new trend is growing in Strasbourg – individuals pushed back at borders or on the high seas may benefit from the protection of the Convention and Member States are not allowed to artificially assert that their sovereignty has been infringed due to the difficult situation raised by an *en masse* immigration influx – in those circumstances, finally, they shall be held accountable for a violation of human rights. Hence, Article 1 ECHR is progressively extending its scope, encompassing under its provision all those situations in which migrants are supposed to be commonly involved, such as rejection at borders (see recently *Shazad*, § 51). Extending jurisdiction in those cases is tantamount to extending Member States' area of responsibility which is a crucial legal *prius* – only through the acknowledgment of jurisdiction Member States could be eventually held compliant for a breach of the ECHR. However, *A.A. and Others* provided the ECtHR with the opportunity to strengthen this guarantistic—and not obvious—approach.

2. *…while eroding fundamental guarantees against collective expulsions?*

The concept of culpable conduct was introduced by the Grand Chamber in the case *ND and NT v. Spain*, in which the ECtHR identified a number of criteria, essentially related to the conduct of the person subject to expulsion, that constituted an exception to the protection offered by Article 4 Protocol 4, which provides for the prohibition of collective expulsions.

More precisely, in its conclusions, the Court found that the applicants had participated in a mass assault on the border fences in Melilla, «taking advantage of their large numbers and using force, instead of using the existing legal procedures to enter Spanish territory, thus creating a situation that was difficult to control and posed a risk to public safety». The Court had hence held that the lack of individual removal decisions could be attributed to the applicants' own "culpable conduct", thus introducing a worrying inversion of priorities between the duty of states to ensure the effectiveness of the right to seek protection and the duty of migrants to have access to legal routes (§ 213).

The *ND and NT v. Spain* case went down in history and was also highly contested for the concerns it raised (see Hanna Hakiki; Nora Markard, Tino Hruschka), as it seemed to legitimize the indiscriminate *refoulement* of people seeking refuge at Europe's land borders, as

well as justifying the absence of an effective judicial remedy against an expulsion order.

These concerns were allayed by subsequent Strasbourg jurisprudence itself, in which, the Court seems to have emphasised the limited applicability of the culpable exception in its jurisprudence related to refusal of asylum at the border, holding that the conditions for its applicability must be fulfilled cumulatively, so as not to violate the guarantees offered by Article 4 of Protocol No. 4. (see *Shahzad v. Hungary* and *MH v. Croatia*).
That being said, *A.A. and others*, nonetheless, fits in as a worrying reminder of the *ND and NT v. Spain*, which the Court itself quotes in order to determine if these returns violate the prohibition of collective expulsions (§ 112). Indeed, the Court recalls the «subjective» criteria related to the migrants' culpable conduct to justify the suspension of conventional guarantees, therefore extending the spectrum of applicability of culpable conduct exception
As a matter of fact, although the Court did not ascertain the cumulative existence of all the criteria for the application of the exception, (§ 114), it considered sufficient that the applicants had circumvented an effective procedure for legal entry in the absence of «cogent» reasons that could justify this choice (§ 130). Therefore, according to this reasoning, it would seem to be sufficient to rely on a single condition to determine culpable conduct.

In fact, although in *Shahzad* (§ 59) the Court had made it clear that in order to apply the exception it was necessary to verify that all criteria were met, in *A.A. and Others* the ECtHR seems to acknowledge quite the opposite – it is sufficient that only one criteria is met, hence considerably broadening the range of application of this exception on a case-by-case basis, widening *de facto* the margin of manoeuvre of the Court.

3. *Concluding remarks*

Is the prohibition of collective expulsions, the essence of refugee protection, at risk? Might the «own culpable conduct» criterion threaten migrants rights, for a situation created *de facto* by European border policies? One could assume that after *A.A. and Others* the answer to both questions should be in the affirmative. It is not disputable that Member States are fully legitimate to govern migrations flows and to request third-country nationals to arrive at «existing border crossing points» (§ 115). Conversely, to deny protection from collective expulsions because of the circumstance that the applicants had taken advantage of their large numbers, crossing the border at a different location, seems to be an artificial line of reasoning, being expression of a too formalistic approach, *a fortiori* when the foreigners at stake – as in the instant case – had not made use of force (§ 114). The two-steps test advocated by the Court (i.e. the existence of legal access + assessment of culpable conduct/cogent reasons provided by the migrants) thus raises concerns for what relates the effectiveness of the prohibition of collective expulsions, to the point that one could wonder whether «cogent reasons» might be

deemed to have existed in future cases. Since they are not exhaustively defined within ECtHR's case-law on the matter, the application of the two-sided test may be considered as being a *chèque en blanc* to Member States, as the latter might be allowed to implement *de facto* collective expulsion measures without the need, for instance, of an individual examination of the migrant concerned *before* his/her removal (Vitiello, 2022, p. 4). Essentially, the lack of such an examination is deemed to be a «consequence» of the culpable conduct of the foreigner, thus suspending the State's obligation *in parte qua* (Penasa, 2022, p. 6).

Many worrying questions remain as to what approach the ECtHR will take in future cases and whether states will open legal avenues for refugees or rather try to find new ways to hinder access to their external borders. However, the case of *AA and others v. Macedonia* rather seems to lean towards the literature that turns victims into perpetrators (Wriedt). In fact, it is difficult to understand how a group not recognised as violent by the Court itself, forced to live in inhuman conditions in detention centers and consisting of a man in a wheelchair could have deliberately created «a clearly disruptive situation which was difficult to control and endangered public safety». Furthermore, the Court does not seem to take into account the evidence showing the lack of access to legal routes across the land border, at the time, which is the (critical) decisive point.

Finally, the idea that foreigners' blameworthy behavior might absolve Member States for their obligations involves something very similar to the notion of *versari in re illicita* (Bernardini, 2020, p. 10) which is adopted in criminal law field – as the applicants had put themselves in jeopardy, the Court is setting forth, they shall face the consequences of their actions. Given the lack of thorough explanation of this point in the court's reasoning, one wonders whether we have not rather moved from a plea of guilty to a mere "presumption of culpability", that seriously calls into question the protection of human rights at borders, especially that of *non-refoulement*.

SUGGESTED READING

To read the text of the judgment:
European Court of Human Rights, *A.A. and Others v. North Macedonia*, Second Section, 5th April 2022, App. nos. 55798/16 *et al*.

Case law:
N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, 13 February 2020.
M.K. and Others v. Polonia, nos. 0503/17 42902/17 43643/17, 27 July 2020.
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OXFAM, *Closed Borders*, September 2016.

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