ADiM BLOG
July 2022
EDITORIAL

The (non-)penalisation of asylum seekers for irregular entry: the Refugee Convention put to the test by the ECtHR

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Key words

Prohibition of collective expulsion – Article 4 Prot. 4 ECHR – Non-penalisation for irregular entry – Article 31 Refugee Convention – Principle of non-refoulement

Abstract

Recent judgments of the ECtHR have developed and attempted to clarify the exception to the prohibition of collective expulsion of aliens introduced by the 2020 N.D. and N.T. v Spain judgment. Scholars already detected several critical aspects of this exception per se *and of its not so rigorous application by the ECtHR. This blog post adds another piece to this puzzle by analysing the tension between the N.D. and N.T. exception and Article 31(1) of the Refugee Convention, which establishes the principle of non-penalisation of asylum seekers on the account of their regular entry.*

1. *Introduction*

As is well-know, the *N.D. and N.T. v Spain* Grand Chamber's judgment introduced a brand-new exclusionary clause to the prohibition of collective expulsion of aliens, provided for under Article 4, Protocol 4 of the European Convention on Human Rights (ECHR). In its subsequent judgments, the European Court of Human Rights (ECtHR) has developed and tried to clarify the scope of this exception. The next few lines are far from providing a comprehensive analysis of this case-law, which scholars have closely followed and fiercely contested during the past months. Rather, after a brief sketch of the main elements of this judge-made exception and the situations to which it applies (Section 2), the post attempts to shed a light on a somehow less mainstream aspect, namely the possible tension between this exclusionary clause and Article 31(1) of the 1951 Geneva Convention on the Status of Refugees (Refugee Convention), which enshrines the principle of non-penalisation of asylum seekers on account of their irregular entry (Section 3). The last section will outline short and more general concluding remarks on the relationship between States' right to expel third country nationals, the principle of *non-refoulement* and the "applicants' own conduct" exception (Section 4).

2. *The prohibition of collective expulsion of aliens in the recent case-law of the ECtHR*

According to the case-law of the ECtHR, the alien's behaviour is an element to be considered for the purpose of Article 4, Protocol 4. Notably, there is no violation of the prohibition of collective expulsion if the lack of an individual decision «can be attributed to the applicants' own conduct». In its case-law, the Court applied this exception solely to cases where aliens' lack of «active cooperation» with the refugee determination procedure (*Berisha and Haljiti v the Former Yugoslav Republic of Macedonia)* or the expulsion proceeding (*Dristas and others v Italy*) obstructed the individual assessment of their claim. In such circumstances, the ECtHR excluded State responsibility for the absence of such an assessment.
In the (in)famous case of *N.D. and N.T. v Spain*, the Grand Chamber of the ECtHR extended the scope of the «applicants' own conduct» exception to situations in which the behaviour «of persons who cross a land border in an unauthorized manner, deliberately take advantage of their large numbers and use force, is such as to create a clearly disruptive situation which is difficult to control and endangers public safety» (§ 201). The Court then established a two-step test to assess a complaint in this specific context. First, the ECtHR will consider whether the respondent State provided «genuine and effective access to means of legal entry, in particular border procedures». If this is the case, and the asylum seekers did not make use of it, the Court will examine whether there were «cogent reasons» preventing the use of these procedures which were based on «objective facts for which the respondent State was responsible» – without prejudice to the application of Articles 2 and 3 ECHR (§ 201).

On the merits, the ECtHR observed that the applicants were apprehended and turned back after they had crossed the Morocco-Spain border in an unauthorised manner by participating in the storming of the Melilla border fences (§ 206). The Court than applied the two-step test and declared that Spain had afforded genuine and effective access to several means of allowing entry into its territory lawfully and that there were no cogent reasons, based on objective facts for which Spain was responsible, for the applicants failing to make use of such arrangements (§§ 212 ff). The ECtHR thus unanimously excluded a violation of Article 4, Protocol 4 ECHR.

Commentators have criticised this judge-made exception *per se* and the ECtHR's deceptive and superficial performance of the two-step test (see Bernardini, Ciliberto, Fazzini, Hakiki, Mussi, Santomauro, Thym, Wissing). In a subsequent judgment, three judges of the Court partly echoed scholars' concerns on the impact that an «overly broad interpretation» of the exception may have on compliance with the principle of *non-refoulement* under Articles 2 and 3 ECHR and stressed «the limited circumstances in which the judgment is applicable» (*Asady and others v Slovakia, Joint Dissenting Opinion of Judge Lemmens, Keller, and Schembri Orland*, §§18-19, 24-25), notably situations of unauthorised border crossing *en masse* and using force, resulting in difficult to control disruption which endangers public safety.

The Court's subsequent judgments on the prohibition of collective expulsion recalled the approach of *N.D. and N.T. v Spain* as the general principles applicable to the cases at hand, including the reference to the large number of migrants and the violent manners of unauthorised border crossing which, at a first glance, constitutes the preliminary condition which triggers the application of the «applicants' own conduct exception». In spite of that, the ECtHR performed the two-step test on cases that «apart from the applicants' unauthorised manner of entry […] cannot not be compared to the situation in *N.D. and N.T.*» (*Shahzad and others v Hungary*, § 61). In other words, it was the irregular entry that prompted the application of the exclusionary clause, and not crossing the border *en mass* by using force (Wriedt).

This subsequent case-law dealt with applications against Poland, Hungary, Croatia, and North Macedonia (see e.g., *M.K. and others v Poland*; *Shahzad and others v Hungary*; *M.H. and others v Croatia*; *A.A. and others v North Macedonia*; *A.B. and others v. Poland*). The Court acknowledged that applicants did not use force, nor did they resist the officers, or opposed the measures and actions taken by national authorities. Nonetheless, the ECtHR proceeded «to examine whether, by crossing the border irregularly, the applicants circumvented an effective procedure for legal entry» (*Shahzad and others v Hungary*, § 61; *A.A. and others v North Macedonia*, § 114). The Court then applied the two-step test and found Poland, Hungary, and Croatia in violation of Article 4, Protocol 4 ECHR (for a more detailed analysis of each judgment, see Gatta, Schmalz, de Conink). On the contrary, according to a debatable assessment of the genuine and effective access to means of legal entry and the lack of cogent reasons preventing their use (Schmalz, Bernardini and Rizzuto Favuzza, Penasa), the ECtHR did not deem the expulsions from North Macedonia as «collective» in nature and, thus, dismissed the claim.

In each of these judgements, the Court sidestepped what, according to *N.D. and N.T. v Spain*,

constituted the preliminary condition of the «applicants' own conduct» exception, which thus does not apply solely to a limited range of circumstances – as called for by scholars and the three dissenting judges in *Asady and others v Slovakia*. Beside the already mentioned concerns on the deteriorating repercussions of such exception on the level of protection afforded by Article 4, Protocol 4 ECHR and on the effectiveness of the principle of *non-refoulement*, this broad scope of application may be in tension with other States' treaty-based obligations, among which the principle of non-penalisation of asylum seekers on account of their irregular entry under Article 31(1) of the Refugee Convention..

3. *The principle of non-penalisation of irregular entry under Article 31(1) of the Refugee Convention* vis-à-vis *the «applicants' own conduct» exception*

Article 31(1) of the Refugee Convention prohibits States parties from imposing penalties «on account of their illegal entry […] on refugees who, coming directly from a territory» where they fear persecution within the meaning of the Convention, are «present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry».

The drafters of the Convention introduced the principle of non-penalisation to face the realities of refugees, who usually flee from their country of origin and, thus, are «rarely in a position to comply with the requirements for legal entry […] into the country of refuge» (The Refugee Convention, 1951: The *Travaux préparatoires* analysed with a Commentary by Dr. Paul Weis, p. 202). The rule exempts from penalties refugees who, following unauthorised border crossing or resorting to other irregular means of access, promptly submit their application to national authorities (2017 Oxford Roundtable, § 3).

According to a well-established interpretation of Article 31(1), the principle applies to both asylum seekers and refugees who come directly from their country of origin, or from other transit countries where they fear persecution or could not obtain protection – e.g., due to exclusionary provision on safe country of origin (Goodwin-Gill, §§ 26-28; Costello, Ioffe, Büchsel, §§ 4.1-4.2; 2017 Oxford Roundtable, §§ 6-10). The term «irregular entry» covers arriving or securing entry in breach of the immigration laws of the destination State (Goodwin-Gill, §§ 34). The *ratione loci* scope of the provision covers asylum seekers within the jurisdiction of the State, including those at the sea or land borders (Poon; 2017 Oxford Roundtable, § 11).

The content and scope of the other elements of the principle of non-penalisation are less clear-cut. There is no single time limit to measure the «delay» in submitting applications, nor an exhaustive list of «good causes» for illegal entry: these flexible criteria require a case-by-case interpretation which considers the specific circumstances of each asylum seeker (UNHCR, 1999 Detention Guidelines, § 4; Costello, Ioffe, Büchsel, §§ 4.4-4.5; 2017 Oxford Roundtable, § 16, 18). The term «good causes» encompasses – among other circumstances – the inability to enter the country of refuge in a regular manner due to legal and factual barriers or risks, such as the fear of being rejected at border crossing points following a summary examination of the

application for international protection (2017 Oxford Roundtable, § 18; Costello, Ioffe, Büchsel, §§ 4.5).

Lastly, the understanding of the wording «penalties on account of their illegal entry» may be challenging. Scholars, national legislation and domestic case-law support a broad interpretation of the term «penalties». According to a teleological reading (Vienna Convention on the Law of Treaties, Article 31(1)), the term covers administrative, civil, and criminal sanctions, alongside any measure «that has the effect of being disadvantageous» (Costello, Ioffe, Büchsel, §§ 4.6.1), or that subjects asylum seekers to «any detriment for reasons of their unauthorized entry» (Hathaway, pp. 411-412). This broad interpretation is supported by national laws (e.g., Argentina, Article 40; Bolivia, Article 7; Honduras, Article 46(2); Venezuela, Article 2(3)) and domestic case-law, which notably included «denying a person access to the refugee claim process on account of his illegal entry» (Supreme Court of Canada, § 63). Moreover, Article 31(1) only prohibits those penalties imposed «as the result of unlawful entry» (Hathaway, p. 411), thus requiring a casual nexus between unauthorised access and the imposition of a sanction. The last remark concerns the drafters' explicit will to exclude expulsions from the scope of the term «penalties» and, hence, from the principle of non-penalisation (The Refugee Convention, 1951: The *Travaux préparatoires* analysed with a Commentary by Dr. Paul Weis, p. 219; Commentary on the Refugee Convention, pp. 98-99). However, States' rights to expel asylum seekers is not boundless, since – among other limits – it «is circumscribed by the principle of *non-refoulement*» (Goodwin-Gill, § 30).

The case-law of the ECtHR on the «applicants' own conduct» exception to Article 4, Protocol 4 ECHR is in tension with the principle of non-penalisation. According to the Court's most recent approach, the exception absolves States from an appropriate and reasonable examination of the personal circumstances of each member of a group of migrants and, as a consequence, from issuing individual expulsion orders, whenever aliens enter a State's territory in an unauthorised manner. The exception does not apply when the State had not provided genuine and effective access to means of legal entry or, where it did, when there were cogent reasons preventing the asylum seekers to make use of such proceedings, based on objective facts attributable to the respondent State.

The principle of non-penalisation and the judge-made exception apply to (at least partly) overlapping situations. Both rules refer to the irregular entry of asylum seekers at States' borders, who submit their request for international protection to border guards without delay – although the *ratione personae* scope of Article 4, Protocol 4 is wider, since it covers "aliens" regardless their status as asylum seekers. Both envisage the existence of circumstances that justify unauthorised entry.

On paper, such circumstances are alike and include situations where legal barriers (e.g., the unavailability of means of legal entry) or factual obstacles (e.g., the ineffectiveness of such proceedings, including the summary assessment of each claim) prevent aliens from entering the country in a regular manner. However, a closer look at the line of reasoning in *N.D. and N.T. v Spain* and in *A.A. and others v North Macedonia* shows that the ECtHR based its conclusion

on a dubious national legal basis and completely disregarded the evidence proving the *de facto* inaccessibility of the means of legal entry (Ciliberto; Wriedt). Moreover, the «cogent reasons» requirement adds a further burden on applicants, who must prove that the there is a causal nexus between the State's conduct and the difficulties encountered in accessing means of legal entry. This restrictive approach excludes all the situations where the «good causes» under Article 31(1) of the Refugee Convention are grounded on conducts, events, or facts that are not attributable to the respondent State – such as those attributable to the authorities of transit States, an aspect that is extremely problematic in the current context of outsourcing of migration controls (Ciliberto; Hakiki; Papageorgopoulos).

Last but not least, the main incompatibility between the judge-made exception to Article 4, Protocol 4 ECHR and the principle of non-penalisation under Article 31(1) of the Refugee Convention concerns the imposition of penalties on the account of the illegal entry of aliens. The «applicants' own conduct» exception allows States to adopt measures – such as the denial of access to the refugee determination procedure (*N.D. and N.T. v Spain*; *A.A. and others v North Macedonia*) or performing an inadequate examination of their request for international protection – to the detriment of asylum seekers as a result of their unauthorised entry. The qualification of such measures as «penalties» within the meaning of Article 31(1) of the Refugee Convention is hard to deny. Moreover, the most recent case-law of the ECtHR shows that States may adopt these sanctions on the sole account of aliens «illegal entry».

4. *Concluding remarks*

The incompatibility between the judge-made law exception based on the «applicants' own conduct» and the normative provision which prohibits the imposition of penalties as the result of the unauthorised entry of asylum seekers is only one of the harmful consequences of the approach of the ECtHR to push-backs of migrants at land borders.

Neither scholars nor international law, including the Refugee Convention, challenge States' right to expel third country nationals. The very same ECHR recognises this sovereign power, provided that national authorities comply with certain procedural guarantees – such as those enshrined in Article 4, Protocol 4. Access to asylum procedures, *per se*, and a proper examination of applications for international protection are functional to the practical and effective enjoyment of substantive rights. On the contrary, the penalisation of illegal entry of aliens through an exception to the prohibition of collective expulsions risks depriving asylum seekers of the protection afforded under international refugee and human rights law, including the principle of *non-refoulement* (Vitiello). Compliance with the latter requires national authorities to carry out an individual examination of the circumstances of each alien, regardless of the means of (ir)regular entry, before performing an expulsion. Ultimately, and without excluding the possibility of an extension of its application to interception on the high sea, the «applicants' own conduct» may turn to a *carte blanche* for pushbacks at land borders of asylum seekers which attempt to enter States' territory in an unauthorised manner.

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To quote this post: G. CILIBERTO, *The (non-)penalisation of asylum seekers for irregular entry: the Refugee Convention put to the test by the ECtHR,* ADiM Blog, Editorial, July 2022.