



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 20351/17
M.B. and R.A.
against Spain

The European Court of Human Rights (Third Section), sitting on 5 July 2022 as a Committee composed of:

Andreas Zünd, *President*,

María Elósegui,

Frédéric Krenc, *judges*,

and Olga Chernishova, *Deputy Section Registrar*,

Having regard to:

the application (no. 20351/17) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) on 9 March 2017 by a Guinean national, M.B. (“the first applicant”), and a Cameroonian national, R.A. (“the second applicant”), who were represented by Ms P. Fernández Vicens, a lawyer practising in Madrid;

the decision to give notice of the application to the Spanish Government (“the Government”), represented by their Agent, Ms H. E. Nicolás Martínez, State Attorney;

the decision not to disclose the applicants’ names (Rule 47 § 4 of the Rules of Court);

the parties’ observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

A. Background to the case

1. The case concerns the applicants’ immediate removal to Morocco after they had climbed the border fences between Morocco and Ceuta. They asserted that that had amounted to a collective expulsion forbidden by Article 4 of Protocol No. 4. They also complained of the lack of an effective

remedy in that regard and that they had been ill-treated at the border by the Spanish and Moroccan security forces. They asserted, furthermore, that they had been subjected to inhuman treatment in Morocco.

2. The present case shares a similar background to *N.D. and N.T. v. Spain* ([GC], nos. 8675/15 and 8697/15, 13 February 2020). However, in the instant case the events in question occurred in the autonomous city of Ceuta, a Spanish enclave of 18.5 sq. km located on the north coast of Africa, approximately 380 kilometres away from Melilla. Ceuta is separated from the Iberian Peninsula by the Strait of Gibraltar. Like Melilla, Ceuta lies on the migration route from North and sub-Saharan Africa, which is also used by Syrian migrants. The border between the autonomous cities of Ceuta and Melilla, respectively, and Morocco is an external border of the Schengen area and thus provides access to the European Union. As a result, those two cities are the focus of particularly intense migratory pressure.

3. The Spanish authorities have built a barrier along the land border separating Ceuta from Morocco comprising parallel fences, a complex surveillance system and a permanent detachment of *Guardia Civil*. The aim is to prevent irregular migrants from accessing Spanish territory. Gates have been built into the fences at regular intervals to provide access through them.

4. There are land border crossing points between Morocco and Spain, located along the fences. Mass attempts to breach the border fences are organised on a regular basis. Groups generally comprising several hundred persons, many of them from sub-Saharan Africa, attempt to enter Spanish territory by storming the fences. They frequently operate at night in order to produce a surprise effect and increase their chances of success, using improvised self-made tools and weapons.

5. The Red Cross provides medical assistance at the border on the basis of a cooperation agreement with the Spanish Government. Such assistance is provided, in principle, to any person in need – both migrants and public servants. The possibility of entry to Ceuta in the event that any of the migrants require hospital care is also provided for in the agreement.

6. Migrants who do not manage to evade the *Guardia Civil*, and those whom the officials succeed in persuading to come down from the fences of their own accord, using ladders, are taken back immediately to Morocco and handed over to the Moroccan authorities, unless they are in need of medical treatment, as stated above. Those who manage to evade the Moroccan and Spanish police forces and enter Spanish territory benefit from standard immigration-related proceedings, as provided in Institutional Law no. 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration (see *N.D. and N.T. v. Spain*, cited above, §§ 15-20).

B. The circumstances of the case

7. At the time of the events the applicants were living in the Tangier area of Morocco. According to the applicants, they had no legal status in Morocco and the first applicant had been trafficked by mafia across the border.

8. On 10 September 2016, at 6.50 a.m., the applicants, together with approximately 150 other people, attempted to storm the border fence at Ceuta. The first applicant passed through the outer fence by a door whose hinges had been breached. The second applicant, after the Moroccan police had allegedly beaten him on Moroccan soil, succeeded in climbing the outer fence.

9. The first applicant climbed and remained on top of the inner fence for almost nine hours. He was brought down by the *Guardia Civil* with the aid of a crane and was injured, as it had been topped by razor-blade-like devices designed to prevent anyone surmounting it. He was then escorted back to Moroccan territory through the gates between the fences.

10. The second applicant climbed down from the outer fence of his own accord because he was bleeding from the wounds he sustained before he had scaled the fence, being subsequently handed over to the Moroccan gendarmerie who forcibly removed him from the intra-fence area by shoving him, kicking him and hitting him on the legs. The applicant, after crossing the gate in the outer fence back to the Moroccan side of the border, attempted to escape from the security personnel, and was subsequently thrown to the ground by the Moroccan police, as can be seen in the video footage, provided by the applicants.

11. Both applicants did not receive medical aid before being handed over to Morocco. They submitted evidence indicating that they had received medical aid in Morocco for the injuries sustained on 10 September 2016. The Government pointed to the presence of the Red Cross personnel on the day in question who had attended to the injured, including migrants and the *Guardia Civil* agents. They also indicated that the Red Cross were autonomous in their decisions as to whether persons should be taken to the hospital in Ceuta, and that a number of injured persons had been transferred on that day to the hospital in Ceuta, but not the applicants.

12. According to the information submitted by the applicants' representatives, after these events, both applicants entered the territory of the European Union. The first applicant, once in Spain, applied for protection as an asylum seeker. His application was examined and dismissed on 13 November 2020. The second applicant lives in France.

THE COURT'S ASSESSMENT

A. Alleged violation of Article 3 of the Convention

13. The Court has recently summarised the relevant principles of application of Article 3 in the context of expulsion cases and the expelling State's duty in this respect (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 124 - 41, 21 November 2019).

14. The Court recalls that allegations of ill-treatment contrary to Article 3 must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Bouyid v. Belgium* [GC], no. 23380/09, § 82, ECHR 2015). It further reiterates that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*. According to the Court's case-law under Articles 2 and 3 of the Convention, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, strong presumptions of fact will arise in respect of injuries, damage and death occurred. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such an explanation the Court can draw inferences that may be unfavourable for the respondent Government (see, *Blokhin v. Russia* [GC], no. 47152/06, § 140, 23 March 2016).

15. Turning to the facts of the present case, the Court considers that the complaint under Article 3 of the Convention, as lodged by the applicants, must be considered from two distinct points of view. Firstly, it must be examined whether the applicants' rights under Article 3 have been violated by a direct action on the part of the defendant State. Secondly, regard must be given to the question of whether Spain has duly considered the implications of the applicants' return to Morocco in this regard, or of their non-admission into Spanish territory.

16. As for the first question at stake, the Court accepts the Government's assertions and agrees that as far as direct actions allegedly committed by Spain are concerned, the evidence, as a whole, shows that the injuries sustained by the first applicant were mainly due to his own conduct, particularly climbing the inner fence, which had been topped by razor-blade-like devices designed to prevent anyone surmounting it. The applicant decided to try to climb the Ceuta inner fence, despite the obstacles in place. The *Guardia Civil* used adequate means to prevent the first applicant from sustaining further wounds – namely a crane to detach him from the fence (see paragraph 9 above). Regarding the second applicant, there is no indication that the Spanish security forces had ill-treated him. The video evidence, in particular, indicated that the applicant physically opposed his removal to the

Moroccan territory by the Moroccan security forces: he attempted to run away from them and was subsequently stopped with the minimum amount of force necessary (see paragraph 10 above). In these circumstances, the Court is satisfied that there is no prima facie evidence that the Spanish authorities mistreated the applicants or used excessive force against them.

17. As to the provision of medical assistance, the Court notes the presence of the Red Cross personnel at the time of the events in order to provide medical assistance if required. The Court further notes that on 10 September 2016 the persons who had stormed the wall were attended by the Red Cross on the spot or transferred to the Ceuta hospital and that the Red Cross personnel could autonomously make decisions on whether migrants in need of medical assistance should be transported to the hospital (see paragraphs 5 and 11 above). With regard to the second applicant, who claimed that he had not received medical assistance from the Spanish security forces, there are no grounds to conclude that his condition would have required his hospitalisation in Ceuta or would have otherwise impeded his return to Morocco where medical assistance was available.

18. In the light of above the Court concludes that it does not have sufficient grounds to conclude that the applicants' rights under Article 3 have been violated by a direct action on the part of the defendant State.

19. Next, the obligation of the Spanish state to protect persons under its jurisdiction is to be assessed. This obligation is well established in the Court's case-law. As stated in *Hirsi Jamaa and Others v. Italy* ([GC], no. 27765/09, § 114, ECHR 2012) and *Ilias and Ahmed* (cited above, §§ 124–41), expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected in the receiving country to treatment contrary to Article 3. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.

20. Recalling its findings in the similar context in the case of *N.D. and N.T. v. Spain* ([GC], cited above, § 222-32), the Court finds no substantial grounds for believing that the applicants in the present case, had they made use of the existing procedures for legal entry into Spain, pending the outcome of that procedure, would have been exposed, pending the outcome of that procedure, to a real and concrete risk of ill-treatment in Morocco, where they had been living for a considerable time.

21. In the light of above, the Court finds that the complaint under Article 3 is manifestly ill-founded.

B. Alleged violation of Article 4 of Protocol No. 4 to the Convention

22. The applicants contended that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance.

23. The Court notes that the applicants placed themselves in jeopardy by their own actions, namely by participating in the storming of the Ceuta border on 10 September 2016, taking advantage of the group's large number and the use of force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the applicable legal provisions. Consequently, the lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct (see *N.D. and N.T. v. Spain* [GC], cited above, § 231).

24. In view of the above, the Court finds that this complaint, too, is manifestly ill-founded.

C. Alleged violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4

25. The applicants complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco

26. In so far as the Court has found that the lack of an individualised procedure for the applicants removal was the consequence of the applicants' own conduct in attempting to gain unauthorised entry at Ceuta, it cannot hold the respondent State responsible for not making available there a legal remedy against that same removal (see *N.D. and N.T. v. Spain*, cited above, §§ 240 and seq.).

27. It follows that the present application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

M.B. AND R.A. v. SPAIN DECISION

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 28 July 2022.

Olga Chernishova
Deputy Registrar

Andreas Zünd
President