Enlarging the Hole in the Fence of Migrants' Rights

A.A. and others v. North Macedonia

Dana Schmalz

06.04.2022 doi: 10.17176/20220406-131305-0

With the judgment in *A.A. and others v. North Macedonia*, the European Court of Human Rights further branches out the creative exception to the prohibition of collective expulsions. This prohibition is a human rights guarantee laid down in Article 4 of the 4th Additional Protocol to the European Convention on Human Rights.

With the Grand Chamber decision in *N.D. and N.T. v. Spain*, the Court had created a line of reasoning that curtails migrants' rights against the wording of the provision. Two chamber judgments, *Shahzad v. Hungary* (cf. discussion here) and *M.H. and others v. Croatia* (request for referral to Grand Chamber pending) have subsequently applied this exception in a consistent and narrow manner. The decision in *A.A. and others v. North Macedonia* now ignores this reasoning and twists the *N.D. and N.T.* criteria into an even broader exception from the prohibition of collective expulsions.

Expulsions should now be prohibited only, the Chamber suggests, if persons couldn't have used existing legal entry-points. With this reasoning, the prohibition of collective expulsions is turned into an obligation to offer a place to apply for asylum somewhere at the border. But not only are these legal access points for asylum applications often de facto restricted, the ever more creative exceptions to rights of the Convention and its Protocols threatens the credibility and authority of the Court.

The facts of the case

The applicants of the case are Afghan, Iraqi and Syrian nationals, including a Syrian family from Aleppo and a person in a wheelchair. They had been in the refugee camp of Idomeni, that many will remember: the camp later dissolved, next to the border to North Macedonia, where people gathered in desperation about the living conditions and lack of access to asylum procedures in Greece. (During that period, the contradiction of the Dublin system had become manifest: those who successfully made the journey onwards and arrived in other EU member states could not be returned to Greece due to systemic deficiencies in the asylum system that amounted to human rights violations. But for those who had not had the chance, means or ability to get to other member states, no remedy was provided – they remained in Greece. Idomeni was a gathering point for trying to cross into North Macedonia and onwards to EU states. Regarding the living conditions in Idomeni, the Court found for instance in case *Sh.D. and others* a violation of Article 3 of the ECHR, the prohibition of inhuman and degrading treatment, for minors in the camp.)

The applicants were part of a group of several hundred persons who on 14 March 2016 walked into North Macedonia, were stopped, threatened with violence by soldiers, and forcibly returned into Greece.

Applying the N.D. and N.T. standards - in a wrong way

To determine if these returns violated the prohibition of collective expulsions, the Court applies the "principles [...] set out in *N.D. and N.T.*" (para. 112): the expulsion that took place is of a collective nature in the sense of the provision, if there was no "reasonable and objective examination of the particular case of each individual", unless that lack of examination can be attributed to the applicants' own conduct. This "own conduct" exception originated from a lack of "cooperation with the available procedure for conducting an individual examination" (*N.D. and N.T.*, para. 200) and was stretched into an exception that included the consideration of the applicants' conduct long proceed-

ing the moment of lacking examination and of expulsion. In that sense, it was in a problematic way turned into an exception of behavior deemed wrongful. But at least the Grand Chamber in *N.D. and N.T.* provided a list of cumulative criteria, applying the own conduct exception to "situations in which the conduct of persons who cross a land border in an unauthorised 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" and at the same time "genuine and effective access to means of legal entry, in particular border procedures" were available and the later applicants did not make use of them without "cogent reasons" (*N.D. and N.T.*, para. 213).

This extensive criteria for an unexpectable exception to a rights guarantee were applied again in *Shahzad v. Hungary*, where the Court found that the unauthorised entry was insufficient to exclude the protection under Article 4 of the 4th Additional Protocol, as there had been no disruptive situation caused and the available legal entry was not effectively accessible. Even though several criteria from the list were lacking, the *Shahzad* Judgment also reiterated that those criteria must be fulfilled not alternatively but in addition to each other (*Shahzad*, para. 59). The legal entry and failure to make use of it are to be "taken into account" in addition to the prior criteria.

This is now disregarded in *A.A. and others v. North Macedonia* by the Chamber from the Second Section. The Court here finds that whereas the applicants had entered North Macedonia as part of a large group, there had been no use of force (para. 114). It continues then to examine if "by crossing the border irregularly, the applicants circumvented an effective procedure for legal entry". Instead of additionally "taking into account" the existence of legal entry points, their existence is turned into a sufficient condition for excluding the protection of Article 4 of the 4th Additional Protocol (para. 115 – 123). It is a remarkably holey citation of the previous formula when the Court here concludes that there was no violation since "the applicants [...] placed themselves in jeopardy by participating in the illegal entry [...], taking advantage of the group's large numbers" (para. 123).

Not much left of the fence

The prohibition of collective expulsions can be seen as a fence: it prohibits to expel persons without a minimum examination of each case because only such minimum examination can guarantee that there is no refoulement in violation of international refugee law or in violation of Article 3 of the Convention. Thereby, the personal scope of protection is necessarily broader: not only those who would later be found refugees or persons benefitting from the protection of Article 3 of the Convention fall under the prohibition of collective expulsion, but all aliens. This is necessary because in the moment of states' actions to expel without examination, the distinction is impossible. To therefore post factum limit the personal scope of protection is contrary to the very substance of the provision.

We have seen in the *N.D. and N.T.* decision with this grotesque last addition a successive perforating of the prohibition of collective expulsions. Article 4 of the 4th Additional Protocol has effectively been turned into an obligation for states to provide some legal access to an asylum procedure, with an otherwise broad permission to expel without procedure. What becomes clear is that ultimately, this harms not only the fence but also what the fence was meant to protect: the very core of protection of refugees and persons facing a risk of inhuman and degrading treatment. At existing border points, the right to apply for asylum is routinely violated, as the Court has itself found in other instance (see here and here). There exist today already, bureaucratic pushbacks alongside physical pushbacks. Where there is no longer an obligation to examine individual cases, regardless of lawfulness of entry, and the forcible return of persons from the territory without procedure is legalized, the principle of non-refoulement, the essence of refugee protection, is at serious risk.

A plea for basic standards of argumentation and consistency

On a somewhat personal note: it has become difficult to teach the human rights law concerning migrants. After the *N.D. and N.T.* judgment, the clearly stated list of criteria for this newly invented exception was the reference point for conveying still some expectation of consistency. While I do believe it belongs into a legal education to see and understand that judicial decisions depend on surrounding political circumstances, there is a difference between political influence and sheer departure from reliable reasoning and basic standards of sound argumentation. The curtailment of migrants' rights under Article 4 of the 4th Additional Protocol has become unforeseeable. That rights can be limited against the explicit wording, to an ever-greater extent in successive decisions, is hard to convey. At this points, it is not just those concerned about migrants' rights but anyone concerned about the reputation of the Court (cf. also Article 21 of the Convention) who must hope for this judgment to be referred to and corrected by the Grand Chamber.

ABOUT THE AUTHOR

Dana Schmalz

Dana Schmalz is a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg/Berlin.

SUGGESTED CITATION

Schmalz, Dana: Enlarging the Hole in the Fence of Migrants' Rights: A.A. and others v. North Macedonia, Verfassungsblog, 06.04.2022, doi: 10.17176/20220406-131305-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220406-131305-0.