A.A. AND OTHERS V. NORTH MACEDONIA

A Critical Analysis: "True" facts versus law

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1. INTRODUCTION WITH A SUMMARY OF THE CASE

The European Court of Human Rights (ECtHR) held that the lack of individual removal decisions for migrants arriving in large groups, where effective legal entry procedures were circumvented without compelling reasons, was not in violation of article 4 of Protocol no. 4 (prohibition of collective expulsion). The ECtHR found that the lack of legal possibility to challenge deportation was in line with article 13 (right to effective remedy) in conjunction with article 4 of Protocol no. 4 as this situation resulted from the applicants' unlawful conduct. Five Syrian nationals, two Iraqi nationals and one Afghan national brought the application following their collective expulsion from North Macedonia to Greece related to the events that happened on 14 March 2016 in what became known as "The March of Hope". The ECtHR found that the actions of the national authorities were in line with the European Convention of Human Rights (ECHR) as the applicant's lack of individual removal decisions resulted from their own conduct.

2. FACTS OF THE SITUATION

Between 2014 and 2016, the so-called "Balkan Route", which entailed travelling from Turkey via Greece and transiting through North Macedonia and neighbouring countries, became practically the only accessible channel for arriving at European Union (EU) countries for millions of migrants and refugees, including, ones from Afghanistan, Iraq and Syria.

In response to this serious influx of migrants, countries along the route adopted a wave–through approach by mainly permitting the migrants to pass through. 2015 and 2016 marked a wave of almost a million illegal border crossings on the Balkan Route, with 764 033 detections in 2015.[1] The flow of migrants resulting in illegal border crossings on the Balkan Route in 2016 was significantly lower than in 2015, with 130 325 detections of illegal border crossings.[2]

[1] Frontex, Western Balkan Route (europa.eu) (last accessed on 25 October 2022.
[2] Ibid.

The Balkan Route has been considered closed since March 2016, following several meetings and talks at the EU level involving the countries on the route. In particular, on 7 March 2016, the EU Heads of State or Governments announced that the irregular flow of migrants along the Balkan Route had ended.[3] This was followed by a decision of 8 March 2016[4] not to allow entry and controlled transit through the respondent State of migrants seeking to transit to Western European countries who did not meet the requirements for entry or did not seek asylum in North Macedonia.

The closing of the Balkan Route left thousands of migrants stranded between the fences on Macedonian – Greek Border, with most of them residing in Idomeni, a town situated on the border. Idomeni has a camp for refugees.

On 14 March 2016, hundreds of migrants blocked at the Greek Border camp of Idomeni decided to enter North Macedonia on foot using another crossing. Allegedly, the group followed instructions on approaching the river from a leaflet they had received at the Idomeni camp.[5] The march was set off from Idomeni and reached Suva Reka River, where migrants attempted to cross the river in a chain with the help of a rope tied to the river's sides. Volunteers, foreign journalists and other non-migrants who joined the march accompanied this group of migrants. This march is known and referred to as "The March of Hope".

Amongst the large group of migrants were a four-member family from Aleppo, Syria, including two children, and four more individuals, including an individual reliant on a wheelchair, from Syria, Iraq and Afghanistan (further referred to as "applicants"). On 14 March 2016, the applicants took part in the March of Hope and entered the Macedonian territory illegally crossing the border. The Macedonian officials forcibly returned them to the Greek border shortly after entering the country.

Foreign journalists, volunteers and other non-migrants accompanying the march had been separated from migrants, identified, fined, expelled, and banned from entering North Macedonia for six months. Two foreign journalists confirmed that their cameras had been confiscated.

On 15 March 2016, the Ministry of the Interior of North Macedonia informed the public that migrants had attempted an illegal entry in the vicinity of the village of Moin. It confirmed that about 1,500 migrants had illegally crossed the state border with Greece, and another group of about 600 people, intending to cross illegally, had also been intercepted at the border. There had been 72 foreign journalists with them, who had been secured and issued travel orders, after which they had returned to Greece. The migrants who had crossed illegally had also been returned.

3. FACTS OF THE CASE

Following these events, the mentioned individuals lodged separate applications to the ECtHR. The Syrian family from Aleppo submitted application no. 55798/16. They left Syria in late 2015, and on 24 February 2016, they arrived in Idomeni.

The applicants alleged that while taking a short walk in the Macedonian territory, they reached a point where military personnel of North Macedonia, including Czech and Serbian soldiers, surrounded the hundreds of refugees. The applicants alleged that they spent the night in the open air and that at 5 a.m. the following day (15 March 2016), they were threatened with violence by Macedonian soldiers unless

[3] *A.A. and others v. North Macedonia* (nos. 55798/16 and 4 others), Judgment 05.04.2022, §6, A.A. AND OTHERS v. NORTH MACEDONIA (coe.int).
[4] Ibid, § 7.
[5] Statewatch, 'Macedonia -Greece: March of Hope - the aftermath', 15.03.2016, Statewatch | Macedonia-Greece: March of Hope - the aftermath 15.3.16 (last accessed on 25 October 2022).

they returned to Greece. Following these treats, the applicants walked for three to four hours and arrived back in Idomeni.

Afghan, Iraqi and Syrian nationals submitted applications nos. 55808/16, 55817/16, 55820/16 and 55823/16. They elaborated on the personal circumstances that had made them leave their countries of origin. The applicant, reliant on a wheelchair, wheeled himself where possible and relied on others to carry him over muddy or rocky terrain and across the river.

The applicants alleged that they were intercepted and surrounded by soldiers of North Macedonia upon their arrival in Moin, who told those gathered that if they failed to turn off their cameras and phones, they would confiscate them. Media representatives were also threatened, as alleged by a volunteer who joined the march.

It was further alleged that the soldiers separated and arrested activists, journalists and volunteers (who were accompanying the refugees on the march), which prevented the subsequent actions of the state officials from being documented. The soldiers allegedly ordered the applicants to board army trucks and drove them back to the Greek border.

Some applicants alleged that the Macedonian police officers had been standing guard at the border fence. Others alleged that soldiers had formed two lines and ordered the refugees to run between them. The soldiers had allegedly used sticks to beat the refugees as they ran to the fence. The applicants were ordered to cross the fence to the Greek side of the border through a hole in the fence or by crawling under it. Soon afterwards, they returned to the camp in Idomeni, Greece.

A volunteer who took part in "The March of Hope" and was hidden among the migrants provided the same description of events, adding that soldiers from North Macedonia had kept their guns pointed at the migrants.

The applicants complained that their summary deportation by the authorities of North Macedonia had amounted to collective expulsion, in violation of their rights under article 4 of Protocol no. 4 of the ECHR (prohibition of collective expulsion of aliens). The applicants also complained that they had had no effective remedy with suspensive effect to challenge their summary deportation to Greece. They relied on article 13 of the ECHR (right to effective remedy) taken in conjunction with article 4 of Protocol no. 4. The ECtHR found it appropriate to examine the five applications jointly in a single judgment because of the similar subject matter of the applications.

4. DECISION OVERVIEW

The ECtHR delivered a unanimous judgement finding no violation of article 4 of Protocol no. 4 to the ECHR and of article 13 of the ECHR taken in conjunction with article 4 of Protocol no. 4.

The central issue for the ECtHR was whether the applicants' own conduct could justify the lack of individual removal decisions and whether the applicants had enjoyed access to effective remedy to challenge deportation.

The applicants argued that the national authorities had not individually assessed their case and, contrary to the law, the authorities had not issued an administrative or judicial order for their deportation. The applicants submitted that they were prevented from expressing their intention to seek asylum or oppose deportation. Therefore, they were victims of collective expulsion with no right to an effective remedy.

They submitted that the test of the culpability of their own conduct could not apply in situations where national law provided for the possibility of refugees and asylum-seekers being inside the territory after crossing irregularly. No means of legal entry were accessible either in law or in practice. They highlighted that any asylum-seeker attempting to enter the Macedonian territory legally would have been given a certificate of intention to claim asylum at the border crossing. Still, the relevant data confirmed that no such certificates had been issued from 8 March 2016 onwards. The applicants alleged that the officers' behaviour had not been an isolated incident, as there had been a pattern of summary unlawful deportations as early as November 2014. Referring to the ECtHR judgment in *M.S.S. v. Belgium and Greece* ([GC] [2011] no.30696/09) in respect of the Greek asylum system, the applicants stressed that the Macedonian authorities had not assessed the risks to which the applicants would be exposed if they were returned to Greece.

The Government's main argument was that the applicants' situation could be attributed to the culpability of their own conduct, specifically to their failure to use the official entry procedures. The applicants had not been treated as seekers of international protection primarily because of their own violent and aggressive attempt at breaking through the territory of the respondent State instead of trying to enter legally. The Government specified the number of border crossing points, and indicated that Bogorodica, situated near the Idomeni camp, was one of the two busiest, with more than 300,000 certificates issued between 19 June 31 and December 2015. They also indicated that only about 0.1% of those who had expressed the intention to apply for asylum had actually done so. The applicants could have expressed their intention to apply for asylum at any border crossing but instead had decided to cross the State border illegally. Had the applicants legally crossed the border, they would have been able to follow the standard procedure for obtaining asylum. However, the Government admitted that "…the area in which they had found themselves was an "inter-border" zone where it had been impossible to express the intention to apply for asylum" (§ 94).

The Government argued that the actions of the police officers had been necessarily aimed exclusively at maintaining the territorial integrity and ensuring public order and security. The Government stated that all applicants are now in EU states. Hence, it was obvious that their intention had not been to remain in North Macedonia. Lastly, the Government found that Greece could be considered safe as an EU country. By returning there, the applicants had not faced any risk of ill-treatment contrary to article 3 of the ECHR or *refoulement* to unsafe countries.

Macedonian Young Lawyers Association (MYLA) was a third-party intervener. The NGO provides free legal aid to asylum-seekers in North Macedonia and monitors the reception and treatment of refugees and asylum-seekers. MYLA confirmed that on 14 March 2016, there had been approximately 1000 people in a field near the village of Moin, surrounded by the Macedonian border police and army. They had not seen any physical force or threats used against the migrants. Every 20-30 minutes people had been instructed to get on board trucks and had been taken away. MYLA lawyers had not been allowed to approach them.

MYLA submitted that the authorities had not used the legal procedures and had barred access to the protection and guarantees stipulated by the national legislation. The authorities had returned the applicants to Greece without an adequate assessment of their individual situation and without access to an effective remedy to challenge their expulsion. They argued that the automatic nature of the returns prevented the applicants from applying for asylum or having access to a domestic procedure which would meet the requirements under article 13.

The ECtHR outlined the general principles as a background to examine whether the expulsion could be characterized as "collective" referring to *N.D. and N.T. v. Spain* [G.C.] [2020] 8675/15 and 8697/15, §§

193-201 and *Shahzad v. Hungary*, no. 12625/17, § 59, 8 July 2021. The Court highlighted that the absence of "a reasonable and objective examination of … each individual alien of the group" is the decisive criteria that defines an expulsion as "collective", provided that the lack of an individual expulsion decision could not be attributed to the applicant's own conduct (§ 112). In addition, referring to *N.D. and N.T.* (§ 201), the Court reiterated that States are absolved from responsibility under article 4 of Protocol no. 4 when persons crossing a land border illegally took advantage of the large numbers and use force, creating a disruptive situation and endangering public safety. In such situations, the Court will analyze whether the State provided genuine and effective access to means of legal entry and if it did, whether particular reasons prevented the applicants from using them based on objective facts for which the respondent State was responsible.

At the outset, the ECtHR noted that the facts of the case could lead to the conclusion that the applicants' expulsion was a collective measure, provided that the lack of individual examination of their situation could be attributed to their own conduct.

By referring to the documentation in the case file, the Court found that the applicants did not use any force or resist the officers. However, the ECtHR referring to *N.D. and N.T.* (§ 212) noted that the Macedonian law afforded the applicants a possibility of entering the territory at border crossing points, if they fulfilled the entry criteria or, failing that, if they sought asylum or at least stated that they intended to apply for asylum. Relying on the data provided by the Government regarding the implementation of the law in the Bogorodica border crossing, the ECtHR concluded that the State's obligation to accept asylum applications and expressed intentions to apply for asylum at this border crossing point is, in practice, implemented. The Court went on to note that despite the lack of data in the case file on the availability of interpreters, because of the large number of issued certificates, it was clear to the Court that some interpretation was available.

Further, the ECtHR addressed the applicants' argumentation that they could not seek asylum at the Bogorodica border crossing on 14 and 15 March 2016 became no certificates of an expressed intention to apply for asylum were issued at Bogorodica at the relevant time. The ECtHR disagreed with this applicants' argumentation. The Court stressed that after 8 March 2016, the transit was effectively no longer possible due to the EU's different approach to the increasing number of migrants along the Balkan Route. However, "… there is nothing in the case file to indicate that it was no longer possible to claim asylum at the border crossing, which still entailed an examination of the individual circumstances of each claimant, and a decision on expulsion, if the circumstances warranted it, which decision could have been appealed" (§ 119).

The Court found that, according to the case file, nothing prevented the potential asylum-seekers from approaching the legitimate border crossing points and lodging an asylum claim. Quite to the contrary, the applicants did not allege that they had ever tried to enter Macedonian territory by legal means. Referring to *N.D. and N.T.* (§ 220), the Court noted that the applicants did not have cogent reasons for failing to use any border crossing point to submit reasons against their expulsion properly and lawfully. That would indicate, in the ECtHR view, that the applicants had not been interested in applying for asylum in the respondent State, but had "…been interested only in transiting through it, which was no longer possible, and therefore opted for illegally crossing into it" (§ 121).

The Court found that despite some shortcomings in the asylum procedure and reported pushbacks, North Macedonia provided genuine and effective access to procedures for legal entry into the country, and the applicants did not have cogent reasons based on objective facts for which the respondent State was responsible, not to make use of those procedures. The ECtHR concluded that there was not a violation of article 4 of Protocol no.4.

Concerning the applicants' complaint that they had had no effective remedy to challenge the summary deportation to Greece, the ECtHR noted that although the Macedonian law provided a possibility of appeal against removal orders, the applicants were also required to abide by these rules for submitting an appeal against their removal. As the Court has previously found that the lack of an individualized procedure for their removal was the consequence of the applicants' own conduct in attempting to gain unauthorized entry, the Court concluded that North Macedonia is not responsible for lack of a legal remedy against that same removal. Therefore, the ECtHR found no violation of article 13 of the Convention in conjunction with article 4 of Protocol no. 4.

5. DECISION DIRECTION

This part provides a critical analysis of the case by identifying several issues that could have benefited from a more in-depth elaboration by the ECtHR. The issues touch on factual and legal elements, both crucial for contextualizing the case and opening a discussion on the soundness of the ECtHR judgement.

5.1. Usage of the term "illegal migrant"

The judgement uses the term 'illegal migrant/s" (§75 and §98). The usage of this term has been subject to criticism by the United Nations (UN) and Council of Europe (CoE) which prefer to use the term "irregular migrant" to other terms such as "illegal migrant" or "migrant without papers". The term "irregular migrant" is more neutral and does not carry the stigmatization associated with the term "illegal". It is also the term increasingly favored by international organizations working on migration issues.[6] Similarly, the CoE Commissioner for Human Rights expressed concern that the usage of term "illegal migrant" associates migrants with illegal acts, including criminal acts.[7]

5.2. Situation at the Transit Center Vinojug and official border crossing point Bogorodica

The Transit Center Vinojug is located approximately 500 meters from the Macedonian-Greek border. Asylum certificates are issued at this enter issues and not at the border crossing point Bogorodica. The center Vinojug and the border crossing point were closed when the events happened. The walking distance between the Idomeni camp and the Bogorodica border crossing is approximately 7.6 km. The walk between the two would take about one hour and thirty minutes. Therefore, the applicants were somehow trapped in the center. The Government acknowledged the applicants had found themselves in an "inter-border" zone where it had been impossible to express the intention to apply for asylum" (§ 94). The applicants subjected to horrific living conditions in the Idomeni camp used the closest route to leave Greece and enter North Macedonia. They had entered the Macedonia territory near the village of Moin, in the vicinity of the Suva Reka, which is close to the Transit Center Vinojug.

[6] Parliamentary Assembly of the Council of Europe, Resolution 1509 (2006).
[7] Commissioner for Human Rights, CommHR/MB/sf 003 2013, 14.02.2014, https://rm.coe.int/16806db7e0 (last accessed on 15 October 2022).

5.3. Legal v. illegal pathways dilemma, i.e., who is placed in danger, the applicants or the State?

The judgment elaborated that the applicants could have used the Bogordica border crossing to apply for asylum (§121), despite the impossibility of entering North Macedonia via legal routes. The ECtHR stipulated that "… there is nothing in the case file to suggest that potential asylum-seekers were in any way prevented from approaching the legitimate border crossing points and lodging an asylum claim (contrast *Shahzad*, cited above, § 63) or that the applicants attempted to claim asylum at the border crossing and were returned.

The applicants in the present case did not even allege that they had ever tried to enter Macedonian territory by legal means" (§ 121). Further, the Court found that the failure to seek protection by applying for asylum, was the applicants' fault, as they needed to use the official entry procedures existing for that purpose (§§. 122-3).

But the most considerable confusion in the judgment, which, if acknowledged, may have rendered a different decision, is that the border crossing point Bogorodica is not the registration point for asylum requests. The transit center Vinojug is a registration center. Therefore, the judgement is based on false factual information provided by the Government and accepted as valid, by the ECtHR (§§ 23, 24, 86, and 120). The applicants had not contested these data as they put faith in the veridicity of the information (§118).

We believe it is unnecessary to ask the applicants to explain whether they planned to enter the territory legally as they didn't possess the necessary documents to enter legally in the country. Therefore, they have used irregular means and routes. They couldn't be expected to enter legally when there were no conditions.

In this case, as the applicants stayed "illegally"[8] on the territory, they were subject to expulsion. The national law ensures that the "consequences arising from the measure imposed on him/her […] shall be taken into account when deciding to expulse a foreigner from the Republic of Macedonia." However, such expulsion does not apply to foreigners seeking protection from the country. For a foreigner to be subject to expulsion, the Ministry of Interior must issue an expulsion decision within 30 days of establishing the reasons for the expulsion. The expulsion decision must contain the date the foreigner must leave the country. The timeframe for departure must be determined, taking into account the time necessary for the person to obtain the necessary documents and means to leave the country.

The ECtHR noted that the applicants had not been interested in applying for asylum in the respondent State. Instead, they wanted to transit through it, which was no longer possible, and therefore opted for illegally crossing into it. We believe that the ECtHR could have made an effort to ascertain this statement as the crucial questions in the case were: a) whether the migrants had the effective opportunity to apply for asylum? b) were their individual circumstances taken into consideration? and c) did they have the opportunity to challenge the expulsion?

The ECtHR did not procure data on the availability of interpreters for the applicants nor clarified the facts regarding the treatment of the applicants from the moment the police intercepted them to the moment they were

[8] Law on Foreigners published on 23 March 2006 (Official Gazette of the Republic of Macedonia nos. 35/2006, 66/2007, 117/2008, 92/2009, 156/10, 158/11, 84/12, 13/13, 147/13, 148/15, 217/15), Article 100.1 stipulates that a "foreigner is deemed to illegally stay in the Republic of Macedonia if: he/she enters the country with no authorization; he/she does not possess a valid and recognized travel document supplied with a visa or residence permit; his/her visa is annulled, revoked, or its validity is reduced; upon expiry of the visa validity; he/she is deprived of the right to residence; he/she stays longer than three months in any half-year period as of the day of first entry into the Republic of Macedonia and is not subjected to visa requirement, or; in the procedure upon his/her application for recognition of the right to asylum is finally rejected and does not leave the territory of the Republic of Macedonia within the specified period."

expulsed back to Greece. For example, the Court did not pronounce whether the Syrian applicants (no. 55798/16), surrendered by military personnel in North Macedonia on 14 March 2016, slept the night in the open air, forced to leave the country the following day and returned to Greece had the opportunity to apply for asylum or challenge the expulsion.

The ECtHR did not pronounce whether the rest of the Afghan, Iraqi and Syrian migrants could have applied for asylum and challenged the expulsion when the police ordered the applicants to board army trucks, and drove them back to the Greek border.

Also, we believe that the applicants cannot bear the burden of not declaring to the authorities their fear of facing ill-treatment or persecution due to their return to Greece and afterwards, as they did not have access to interpreters or legal counsel. The Government do not contest this fact, raised by the MYLA, Special Representative of the Secretary General of the Council of Europe on Migration and Refugees or UNHCR (§47, §48, and § 106). Also, the ECtHR acknowledged these shortcomings in the asylum procedure and pushbacks (§ 122) but did not consider them of sufficient relevance to analyze the case under article 4 of Protocol no. 4.

5.4. Did pushbacks take place, and if they did, why the ECtHR justified the collective expulsion and didn't sanction the lack of individual removal decisions?

It does not appear from the judgement that the Government or the ECtHR deny that pushbacks happened. However, the judgement downplays the existence of such conduct, by finding that there were "some shortcomings in the asylum procedure and reported pushbacks" (§ 122 *et seq.).*

We believe that the ECtHR did not sanction the lack of an individual removal decision and justified the collective expulsion because the case passed the two-pronged test developed by the ECtHR in *N.D. and N.T. v. Spain*. As in the latter case, the ECtHR accepted that North Macedonia made available genuine and effective access to means of legal entry, in particular border procedures, for those arriving at the border. As in *N.D. and N.T. v. Spain,* the Court found that it is not contrary to the Convention that North Macedonia had refused entry to its territory to aliens, who have failed without cogent reasons to comply with the legal requirements by seeking to cross the border at a different location while taking advantage of their large numbers (§ 201).

However, before relying on the legal reasoning expressed in *N.D. and N.T. v Spain*, we need to pinpoint specific differences:

- the applicants in the instant case did not used force; on the contrary, the authorities used force; and
- the applicants formed part of a group of migrants (around 1.500) in "The March of Hope".

By comparing this case with *N.D. and N.T. v. Spain* it seems that the ECtHR was reluctant to explore why an individual assessment of the applicant's situation by the national authorities was absent in the case, but rather focussed on the two-pronged test developed with its previous jurisprudence. As in *N.D. and N. T. v. Spain* (§ 217), the ECtHR found that the respondent State did provide genuine and effective access to this border crossing point even though were no asylum requests at the border Bogorodica at the particular time.

The judgement effectively shifts the burden of proof from the Government to the applicants regarding the non-submission of "cogent reasons" for not using legal entry.

5.5. Did the ECtHR consider the conditions in Greece and the risk of *non-refoulement* for the migrants?

The approach taken by the ECtHR resonates with the Partially Dissenting opinion of Judge Koskelo in the case *N.D. and N. T. v. Spain* that the ECtHR established a shift "… from the relatively well-established requirements arising under the obligation of "*non-refoulement*" to a "carve-out" based on the criterion of "own conduct", elaborated and circumscribed by a series of novel criteria the application of which on the ground will not be without difficulties" (§ 43).

The ECtHR does not look into the conditions in the Idomeni Centre from the perspective of the *non-refoulement* principle. It was sufficient for the ECtHR that North Macedonia provided arrangements where aliens could apply for asylum and seek protection under article 3. If potential asylum-seekers have failed, without cogent reasons, to comply with these arrangements by seeking to cross the border at a different location and taking advantage of their large numbers, States may refuse entry to their territory to aliens (§ 115).

The ECtHR did not analyse further the States obligations stemming from the *non-refoulement* principle and did not consider how the situation in the Idomeni camp, described as "a tragedy that must not be repeated", "squalid" and "appalling" or "abysmal" (§ 25), could affect on the enjoyment of the migrant's rights.

In its join General comment, two UN Committees stated that the *non-refoulement* principle prohibits States "… from removing individuals, regardless of migration, nationality, asylum or another status, from their jurisdiction when they would be at risk of irreparable harm upon return, including persecution, torture, gross violations of human rights or other irreparable harm." [9]

This is in line with the interpretation of the *non-refoulement* principle in the context of migration by the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

Collective expulsion without an individual examination, i.e. appearing in person before a competent, impartial and independent judicial or administrative body to challenge the expulsion decision to seek "international protection" before the envisaged deportation, and in an individualized, prompt and transparent proceeding affording interpreter services and all other essential procedural safeguards, including the suspensive effect of an appeal, are irreconcilable with the prohibition of refoulement.

5.6. Whether the case deserves a more in-depth analysis of the applicants belonging to vulnerable groups?

The judgement lacks a more differentiated and sensitive approach to applicants who belong to vulnerable groups. One of the applicants was in a wheelchair, and two were minors. Persons with disabilities in transit can be at particular risk and be denied the enjoyment of economic, social and cultural rights.[10] For example, the Special Representative of the Secretary General of CoE on migration and refugees has raised serious concerns over the unmet migrants' accommodation and housing needs, including of

[9] Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, § 45, 1719871 (un.org) (accessed on 26 October 2022).

[10] OHCHR, "Situation of migrants in transit", 2021, pp. 13-16,INT_CMW_INF_7940_E.pdf (ohchr.org) (accessed on 26 October 2022).

persons with disabilities, in Greek camps, such as the one in Idomeni.[11]

As visible from the judgement, the ECtHR reached its conclusion without any differentiated approach for the migrant with disabilities. Similarly, the judgement lacks any invocation of the applicants' age to the point that readers cannot understand that two applicants were accompanied minors in an irregular situation.[12]

The ECtHR had the occasion to elaborate on the obligations of states regarding accompanied[13] and unaccompanied[14] migrant minors in detention or out of detention[15] (in the Idomeni camp).[16] Therefore, it may appear that there was no momentum for the ECtHR to pronounce more in-depth about the State obligations regarding accompanied child minors in irregular situations under Article 3 in the context of collective expulsion.

6. THE IMPACT OF THE DECISION ON FUTURE LITIGATION

As it seems, with this judgment, the ECtHR confirms the position taken in *N.T and N.D.*, implicitly stating that "pushbacks" from land borders are allowed if the States allow aliens to apply at the borders in an asylum procedure. Still, the aliens have consciously not used this procedure but have chosen to enter the country illegally. Some academics criticized this approach.[17] It may now be harder for individuals, victims of pushbacks on land returned to a country with appalling living conditions to allege human rights violations if facts reveal that they have caused the collective expulsion by their own "culpable conduct". This assumption may be different if, in the context of collective expulsion, the victims were subject to torture, inhumane-or degrading treatment or enforced disappearances that would trigger the State's responsibility under article 3 of the ECtHR.

[11] Council of Europe, Report of the fact-finding mission by Ambassador Tomáš Boček Special Representative of the Secretary General on migration and refugees to Greece and "the former Yugoslav Republic of Macedonia", 07-11 March 2016, 26.04.2016, Result details (coe.int) (accessed on 26 October 2022).

[12] Vera Wriedt, 'Expanding exceptions? AA and Others v North Macedonia, systematic pushbacks and the fiction of legal pathways', Strasbourg Observers, 30 May 2022, https://strasbourgobservers.com/2022/05/30/expanding-exceptions-aa-and-others-v-north-macedonia-systematic-pushbacks-and-the-fiction-of-legal-pathways/ (accessed 30 September 2022); AA and Others, Idomeni judgment – Meet Dayana, ECCHR Berlin, 29 March 2022, AA and Others, Idomeni judgment – Meet Dayana - YouTube (accessed 30 September 2022).

[13] ECtHR, Accompanied migrant minors in detention, June 2022, FS_Migrants_detention_FRA (coe.int) (accessed 19 September 2022).

[14] ECtHR, Accompanied migrant minors in detention, July 2022, FS_Unaccompanied_migrant_minors_detention_ENG (coe.int)

[15] *Rahimi c. Grèce,* application no. 8687/08, 5 April 2011.

[16] *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia* [2019] no. 14165/16), §§.52-62, (accessed 19 September 2022).

[17] See e.g., Nora Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain', EU Immigration and Asylum Law and Policy, 01.04.2020, A Hole of Unclear Dimensions: Reading ND and NT v. Spain – EU Immigration and Asylum Law and Policy (eumigrationlawblog.eu) (accessed 19 September 2022) and Sergio Carrera, 'The Strasbourg Court Judgement N.D. and N.T. v Spain A Carte Blanche to Push Backs at EU External Borders?' EUI Working Paper RSCAS 2020/21, https://cadmus.eui.eu/handle/1814/66629 (accessed 19.09.2022), *Giulia Raimondo,* 'N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrants', University of Oxford, Faculty Law Blogs, 20.04.2020, N.D. and N.T. v Spain: A Slippery Slope for the Protection of Irregular Migrants | Oxford Law Blogs (accessed 19 September 2022).