



**Universiteit
Leiden**
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Case Note 2019/1

Communication 4/2016: D.D. v Spain

Alejandro Morlachetti, International Expert on Children Rights.

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Key words: Unaccompanied Migrant Children, Best interests of the child, Cruel, inhuman or degrading treatment or punishment, Automatic pushback practices

Subject matter: Summary deportation of unaccompanied migrant children from Spain to Morocco

CRC Provisions: art. 3, art. 20, art. 37

CRC OP3 Provisions: art. 5, art. 7 (e)

Other relevant communications: N/A

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(I) Outline of the Substantive Issues

This communication was brought against Spain by D.D., a citizen of Mali born on March 10, 1999 who was deported from Melilla to Morocco as an unaccompanied child in December 2014.¹

The Spanish cities of Ceuta and Melilla, situated as enclaves in Northern Africa, are the only land borders between the European Union and Africa. Melilla is separated from Morocco by three fences built on Spanish territory.

The Spanish Government has argued over the years that the fences erected between Spain and Morocco in the cities of Ceuta and Melilla are not considered to be located in Spain’s territory and therefore migrants intercepted while scaling the fences do not fall under Spanish jurisdiction.

According to the communication, D.D. tried on several occasions to cross the border (fences) that separates Melilla from Moroccan territory. On one of the occasions (March 2014) he was violently mistreated by Moroccan security forces while trying to access the first fence.

Months after, he managed to climb the Spanish border fence structure reaching the third fence and remained on top for hours without receiving any kind of assistance from the Spanish authorities. When

¹ The CRC Communication Protocol (CRC OP3) entered into force for the State Party on April 14, 2014.

he climbed down and stepped on Spanish ground, the Spanish military forces “Guardia Civil” apprehended, handcuffed and immediately returned him to Morocco.

He was returned to the Moroccan authorities without a chance to object to his summary deportation or to claim protection as an unaccompanied child. There were no attempts made by the Spanish authorities to ask about his age or personal situation, nor did they offer any legal assistance or contact with an interpreter or a child authority or social worker.

Soon after, D.D finally entered Spain and was transferred from Melilla to mainland Spain. He was also finally recognized as an unaccompanied child and was placed in a residence under the child protection system of Spain. After he entered mainland territory in Spain, he received legal assistance and the case was brought before the Committee on the Rights of the Child (CRC Committee)

The communication alleged that Spain violated the rights of D.D. under articles 3 (best interests of the child), 20 (special protection and assistance for children deprived of their family environment) and 37 (right to not be subjected to torture or other cruel, inhuman or degrading treatment or punishment) of the CRC

(II) Procedural Issues

The individual communication of D.D. against Spain was filed in November 2015 with the support of the European Center for Constitutional and Human Rights and Fundación Raices in Madrid. A joint Third-Party Intervention supporting the case was filed by the International Commission of Jurists, ECRE, AIRE Center and the Dutch Council for Refugees in May 2018.

Spain expressed that the communication was inadmissible because of the following:

1. *Rationae personae*, because D.D. initially declared to be of legal age after entering Spain and the author of the communication is not the same person who was returned by the Spanish authorities in December 2014;
2. *Rationae loci*, because Spain cannot be held responsible for the actions of the Moroccan authorities;
3. *Rationae materiae*, because the communication refers to the right of asylum of the author that is not contemplated in the CRC.

Spain also contended that the communication is inadmissible because the domestic remedies available to the author of the communication had not been exhausted (Art 7.e of the CRC OP3).

The Working Group on Communications acting on behalf of the CRC Committee, decided to reject Spain's request to examine separately the admissibility and the merits of the communication.

(III) Findings

The CRC Committee found the complaint to be admissible because D.D. was under the effective control of the Spanish authorities when he - after climbing the Spanish border fence structure and stepping on Spanish ground - was apprehended, handcuffed and returned to Morocco. In these circumstances, and regardless of whether the author is considered to have arrived in Spanish territory or not, he was under the effective control and authority of Spain.

The CRC Committee also held that due to the immediate execution of the expulsion and the absence of a formal order that could have been challenged by the author, there was no need to exhaust domestic remedies as they were not available.

Lastly, the CRC Committee considered that this complaint was not about asylum claims, but about the allegedly violation of rights stipulated in Articles 3, 20 and 37 of the CRC.

On the merits, the substantial question before the CRC Committee was to determine whether the immediate return of D.D. by the Spanish Civil Guard to Morocco on December 2, 2014, violated his rights recognized in articles 3, 20 and 37 of the CRC.

The CRC Committee concluded that there had been violations of arts. 3, 20 and 37 for the following reasons:

- The lack of a process of identification and evaluation of the situation of D.D. prior to his deportation, and the lack of opportunity to object to his eventual deportation, violates his rights contemplated in articles 3 and 20 of the CRC;
- The failure to provide special protection and assistance to D.D as an unaccompanied minor and the lack of initial assessment to determine his best interest prior to making a decision to return him to Morocco violate article 20 of the CRC
- The absence of any risk assessment to prevent irreparable damage to D.D. before deciding his deportation and not having taken into account his best interests violates articles 3 and 37 of the CRC;
- The way in which the deportation was executed, with D.D. arrested and handcuffed and returned without being heard and receiving legal and translation assistance, constitutes prohibited treatment under Article 37 of the CRC.

Based on these findings, the CRC Committee decided that Spain should provide adequate reparation to D.D, including financial compensation and rehabilitation for the damage he suffered. In addition, Spain must take measures to prevent similar breaches of the CRC in the future, in particular by amending Law 4/2015 and the special regime for Ceuta and Melilla to end the indiscriminate practice of automatic expulsions at the border.

(IV) Commentary

Spain has been the country with the most communications brought before the CRC Committee since the entrance into force of the CRC OP3.

Almost all of the communications are related to migration and asylum procedures affecting the rights of children, in particular about the following:

1. Subjecting an unaccompanied child to medical testing to determine his or her age
2. Lack of legal recognition of a migrant or an asylum seeker as a 'child', and not conducting best interests assessments in order for the child to be afforded protection
3. Lack of access to asylum proceedings by unaccompanied migrant children
4. Detention of children in a migrant detention centres for adults pending deportation

The importance of this communication brought by D.D., is that it constitutes the first individual submission against "Pushbacks" (the practice of coastguards and/or border control agents of preventing people from entering and seeking protection on their territory by forcibly and immediately returning them to another country without any guarantees) to the CRC Committee under the CRC OP3.

The decision of the CRC Committee delivered in its first session of 2019 in Communication 4/2016 (D.D. v. Spain) it is hardly a surprise. The deportation without guarantees of migrant people, including unaccompanied children ("pushbacks") at the border fences of Ceuta and Melilla has been reported upon and denounced by several international and local organizations.

UNICEF, in its recent report about the situation of migrant children in southern Spain,² warns about pushback practices in Melilla and reminds that these actions have already been questioned by the European Court of Human Rights (ECtHR),³ the Council of Europe,⁴ and the CRC Committee itself.

The CRC Committee, in the course of its examination of Spain’s periodic report under the CRC in March 2018, expressed its serious concern at the practice of automatic pushback of children seeking international protection in the autonomous cities of Ceuta and Melilla, without the necessary guarantees. The CRC Committee urged Spain to end the practice of the automatic pushback of some children, ensuring that all procedures and standards are in accordance with their status as children and in compliance with national and international legislation.⁵

The decision adopted by the CRC Committee confirms the validity of fundamental standards already expressed in its General Comments 6 (on the treatment of unaccompanied and separated children outside their country of origin)⁶, 22 (on general principles regarding the human rights of children in the context of international migration)⁷, and 23 (on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return)⁸ - all applicable to children in the context of international migration:

- State obligations under the CRC apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory (CRC GC 6. Para. 12 & CRC GC 22. Para 12);
- Access to the territory should be granted, regardless of the documentation children have or lack, and they are to be referred to authorities in charge of evaluating their needs in terms of protection of their rights and ensuring their procedural safeguards (CRC GC 23. Para 17. a);
- States should not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, including serious consequences for children due to insufficient provision of food or health services (CRC GC 6. Para. 27 & 46).

² UNICEF Comité Español, *Los derechos de los niños y niñas migrantes no acompañados en la frontera sur española*. Madrid, Febrero 2019.

³ Tribunal Europeo de Derechos Humanos (2017). *Caso N.D. y N.T. v. España*, Nro. 8675/15 y 8697/15. Sentencia del 3 de octubre de 2017.

⁴ Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18-24 March 2018. Information documents SG/Inf(2018)25. Estrasburgo, 3th September 2018. Ver sección 3.2, Summary Returns.

⁵ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Spain* Para. 44, 45. March 5, 2018.

⁶ Committee on the Rights of the Child, *General Comment 6. Treatment of unaccompanied and separated children outside their country of origin*. Para. 12. 2005, CRC/GC/2005/6.

⁷ Committee on the Rights of the Child, *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*. CRC/C/GC/22. (Hereinafter: 'CRC/C/GC/22')

⁸ Committee on the Rights of the Child, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*. CRC/C/GC/23.

This landmark decision by the CRC Committee should be the starting point for Spain and other States Parties to the CRC to adopt the necessary legislative and administrative measures in full compliance with international human rights standards, in order to protect the rights of migrant children crossing land borders.

It is time to move from rhetoric to reality and adopt the necessary measures to enforce the principle that children in the context of international migration should be treated first and foremost as children,⁹ and that the protection of rights should prevail over any migration control policy and practice.

Suggested citation:

A. Morlachetti, *Communication 4/2016: D.D. v. Spain*, Leiden Children's Rights Observatory, Case Note 2019/1, Leiden Law School, 11 June 2019

⁹ CRC/C/GC/22., *supra* note 7, Para. 11.