

When Does a Pushback Constitute a Collective Expulsion? ECtHR Criteria under Article 4 of Protocol No. 4

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Abstract

People who flee conflict, persecution, or systemic failures of protection may seek safety at Europe's maritime and land borders. In that setting, the case law of the European Court of Human Rights has clarified when a pushback or rapid border removal amounts to a collective expulsion prohibited by Article 4 of Protocol No. 4 to the European Convention on Human Rights. This article compares Hirsi Jamaa and Others v. Italy, N.D. and N.T. v. Spain, and M.K. and Others v. Poland. The three judgments show that the outcome turns principally on whether the state exercised jurisdiction, whether genuine and effective avenues of lawful entry were available, whether the individuals had cogent reasons for not using those avenues, and whether the authorities conducted a meaningful examination of each person's circumstances. Where those safeguards are absent, a group removal may violate Article 4 of Protocol No. 4 and may also engage Articles 3 and 13 of the Convention.

Keywords: pushbacks; European Court of Human Rights; collective expulsion; migration; asylum; Italy; Spain; Poland.

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1. Methodology

This article employs a comparative methodology. This methodology is utilized to demonstrate the way in which Article 4 of Protocol No. 4 to the ECHR is applied in push-backs or collective expulsion. The case law examined was selected based on its jurisprudential and historical significance.

The key elements were the place of interception (sea and land borders), group characteristics, behavior and push-backs.

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The historical methodology explores the way in which migration is successful in changing the interpretation of ECHR. In this historical evolution, all the articles transcend the protection of migrants and refugees in a doctrinal and jurisprudential methodology. This article seeks to examine why the ECtHR treats some border removals as collective expulsions but not others? It answers this question by reference to *Hirsi Jamaa and Others v Italy* and *N.D. and N.T. v Spain*. The relevant nuances stem from the case of *M.K. and Others v Poland*.

2. Migration, the ECHR Mechanism, and Collective Expulsion

Since the beginning of human civilization, migration has been a common phenomenon for assorted reasons, the most important being wars and pandemics. This protection was strengthened after World War II².

In 1953, the European Convention on Human Rights (ECHR) entered into force. In 1959, the European Court of Human Rights (ECtHR) was set up. It is important to know that these European instruments were created by European governments to enable individuals to seek protection of their rights. In this context, the main interest of this mechanism was to establish the possibility of bringing an application before the ECtHR, alleging that a State has restricted or violated a right protected by the Convention.

Asylum-seekers may also exercise this right. The procedure is free of charge. However, certain conditions apply. An application is declared admissible by the ECtHR if: all domestic remedies have been exhausted, the harm suffered must be significant and the time elapsed since the last final decision must not exceed four months³.

Italy and Spain⁴ are known as states with a continuous flow of migrants and refugees⁵. These states occupy a sensitive geopolitical position due to vulnerabilities within their countries.

If the governments do not apply the legislation in a truly effective way, national security can be limited. In this context, an internal conflict between authorities and newcomers may arise. Poland is not a primary host State, as in Spain.

In recent years, due to the Russia and Ukraine conflict, Poland has started

² Philipp Seufferling and Koen Leurs, "Histories of Humanitarian Technophilia: How Imaginaries of Media Technologies Have Shaped Migration Infrastructures," *Mobilities* 16, no. 5 (2021): 670–87, <https://doi.org/10.1080/17450101.2021.1960186>.

³ Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului* [The European Protection of Human Rights], 6th ed. (Bucharest: Hamangiu, 2023), 74.

⁴ Council of the European Union, "EU Action to Manage Irregular Arrivals in Spain," accessed August 29, 2026, <https://www.consilium.europa.eu/en/policies/western-routes/>.

⁵ Italian Ministry of Foreign Affairs and International Cooperation, "Migration Flows to the EU," accessed August 29, 2026, https://www.esteri.it/en/temi/unione_europea/dossier/migrazioni/.

to confront a continuous flow of migrants from Eastern Europe⁶.

As a preliminary observation, Italy, Greece, and Poland have produced landmark case law on collective removals and transfers. For this reason, it is necessary to examine how the ECtHR has interpreted the Convention through clear and constructive reasoning. In these cases, judges have sometimes expressed different opinions, including separate or dissenting views. Yet a single purpose often remains paramount: the protection of human rights must prevail, even when States invoke national security. Article 3 of the Convention is absolute and must be applied in a robust manner. Moreover, under Article 4 of Protocol No. 4, the competent authorities must examine each case individually before removal; otherwise, there is a risk of collective expulsion.

3. A Comparative Framework: Italy, Spain, and Poland

The jurisprudence of Italy, Spain, and Poland offers a complex perspective under the interpretation of ECHR in rapid removals and push-backs from borders.

The three cases had different outcomes. In *Hirsi Jamaa and others v. Italy*, the decision was in favor of the applicants, whereas the decision in *NT and ND v. Spain* was disputed. These disputes arose after the 2017 Chamber judgment when the judges of the Third Section passed the case in favour of NT and ND. The Spanish authorities asked the Grand Chamber for a requested referral and the final decision in 2020 was in favor of the Spanish authorities.

The motivation was that the behavior of the applicants was contrary to European norms, having a forcible entry across the border. The reasoning has a broad legal text, on the one hand the state is responsible for ensuring the real and effective existence of legal means of access at the border and for granting protection applications. On the other hand, the Court observed the conduct of the applicants and the existence of real and effective legal means of access. It was established in concrete circumstances that the state was not responsible for the lack of individual examinations. At the same time, emphasis was also placed on the fact that the applicants did not use the legal means of access, nor did they demonstrate convincing reasons that would justify their non-use.

In the last case, *M.K. and others v. Poland*, the judges observed the actual reality at the border points: as long as the authorities ignore requests for international protection/asylum and do not ensure a real, individual examination, even if the authorities claimed to have conducted hearings and interviews, the state was found guilty.

⁶ Kamil Łuczaj and Katarzyna Krakowska, "Imagining Poland: Exploring Geographical Imaginaries in the Ukrainian War Refugee Narratives," *Geoforum* 166 (2025): 104394, <https://doi.org/10.1016/j.geoforum.2025.104394>.

3.1. Hirsi Jamaa and Others v. Italy: Bridging Legal Principles and Domestic Practice

Italy has faced sustained and increasingly complex migratory flows originating from Libya along the Central Mediterranean route⁷. These asylum-seekers risk their lives in the most dangerous conditions from regions of Africa to start a new life in a European system⁸. In 2012, ECtHR delivered its judgment in the case of *Hirsi Jamaa and Others v Italy*⁹. The applicants were originally from Somalia (11) and Eritea (13) and came to Italy with a group of 200 people. The Italian authorities intercepted them at sea and transferred them to Libya without any form of individual examination¹⁰. In their submissions, the applicants mentioned that their lives were put in danger because of non-compliance with Article 13 of the ECHR.

By way of background approximately 200 new arrivals and Italian authorities were involved. The authorities had no preparation to manage an adequate due to limited resources. Official interviews for international protection did not exist. At the same time no medical or legal assistance was made available¹¹. Moreover, due to the great number of asylum-seekers¹² healthcare systems faced a crisis. Tuberculosis was discovered at the Italian borders and a man from Nigeria died from it¹³. At the same time, the malaria was found in some positive tests done in pregnant women¹⁴.

A landmark was the *Codice della Navigazione*¹⁵ which provided for the

⁷ Silvia Peracchi, "Migration Crisis in the Local News: Evidence from the French–Italian Border," *Journal of Urban Economics* 150 (2025): 103808, <https://doi.org/10.1016/j.jue.2025.103808>.

⁸ Rosalia Marrone et al., "Screening for Neglected Tropical Diseases and Other Infections in African Refugees and Asylum Seekers in Rome and Lazio Region, Italy," *Travel Medicine and Infectious Disease* 56 (2023): 102649, <https://doi.org/10.1016/j.tmaid.2023.102649>.

⁹ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Grand Chamber, application no. 27765/09, judgment of February 23, 2012, <https://hudoc.echr.coe.int/eng?i=001-109231>.

¹⁰ European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights: Prohibition of Collective Expulsions of Aliens*, updated August 31, 2025, 6, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_4_protocol_4_eng.

¹¹ European Court of Human Rights, *Guide on Article 4 of Protocol No. 4*, 9–10.

¹² Francesco Campo, Sara Giunti, and Mariapia Mendola, "Refugee Crisis and Right-Wing Populism: Evidence from the Italian Dispersal Policy," *European Economic Review* 168 (2024): 104826, <https://doi.org/10.1016/j.eurocorev.2024.104826>.

¹³ Silvio Tafuri et al., "Tuberculosis Screening in Migrant Reception Centers: Results of a 2009 Italian Survey," *American Journal of Infection Control* 39, no. 6 (2011): 495–99, <https://doi.org/10.1016/j.ajic.2010.10.013>.

¹⁴ Laura Todaro et al., "Malaria and Other Neglected Infections in Pregnant Migrants: A Retrospective Study in Northern Italy," *International Journal of Infectious Diseases* 161 (2025): 108168, <https://doi.org/10.1016/j.ijid.2025.108168>.

¹⁵ Italy, *Regio Decreto 30 marzo 1942, n. 327, Approvazione del testo definitivo del Codice della navigazione*, Gazzetta Ufficiale no. 93, April 18, 1942, <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1942-03-30;327>.

de facto identity of the Italian state in the high seas as long as Italian ships existed. This fact is explicitly mentioned in the case of *Hirsi Jamaa and others v Italy*¹⁶.

At that time, the two States concluded a bilateral agreement¹⁷. This accord was to establish the cooperation in migration and asylum politics. It was a complex accord due to multiple and related laws. The patrols that observed the proper management of the border area were made up of mixed personnel (Italians and Libyans). In 2008, a new treaty was signed in Libya, for illegal entry of asylum-seekers and objectives of limited the migration¹⁸. All of them guaranteed the respect of human rights in accordance with Universal Declaration of Human Rights (1948) and ECHR(1953). In their submissions before the ECtHR the Italian authorities mentioned that in that time Libya was considered a safe country¹⁹. After the final decision of *Hirsi Jamaa and others v Italy* the Italian authorities needed to stop the expulsion to Libya. At the same the authorities agreed to create a robust protection system that would respect ECtHR jurisprudence.

A new cooperation was created between Libya and Italy. In 2017, a new Treaty of cooperation and development was signed²⁰. In this treaty was mentioned the consolidation of border security between Libya and Italy. This consolidation was to limit the illegal migration in Italy. Thus, the coast between Zawiya and Sabratha has been almost blocked²¹. However, if some people manage to pass through these Libyan checkpoints, the Italian authorities have indicated the creation of a temporary reception center, funded by Libya, where they can be accommodated. This accommodation will continue until repatriation²². In Libya, the protection of human rights does not align with ECHR standards. In this context, the authorities of the borders need to have a deep mechanism to stop asylum-seekers without limiting human rights and trying to maintain national security.

¹⁶ See *Hirsi Jamaa and Others v. Italy*, paras. 77–82.

¹⁷ Italy and Libya, *Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista* [Treaty of Friendship, Partnership and Cooperation], signed August 30, 2008, <https://www.senato.it/service/PDF/PDFServer/BGT/736511.pdf>.

¹⁸ Italy and Libya, *Treaty of Friendship, Partnership and Cooperation*.

¹⁹ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, para. 30.

²⁰ Italy and Libya, *Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of the Borders*, signed February 2, 2017, <https://www.asgi.it/wp-content/uploads/2017/02/ITALY-LIBYA-MEMORANDUM-02.02.2017.pdf>.

²¹ Lucia Pradella and Rossana Cillo, “Bordering the Surplus Population across the Mediterranean: Imperialism and Unfree Labour in Libya and the Italian Countryside,” *Geoforum* 126 (2021): 483–94, <https://doi.org/10.1016/j.geoforum.2020.06.019>.

²² Anja Palm, “The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?,” *EU Immigration and Asylum Law and Policy*, October 2, 2017, <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>.

This decision marked an end of automatic expulsion under the bilateral consideration. The measures that were adopted created a support for national security and a suspension of expulsion until all measures of human rights were taken.

Italy was immediately monitored by the Committee of Ministers after the decision to observe how it redresses the practice of collective returns by sea and how it ensures real and effective procedural guarantees during and after the transfer. It is necessary to make a distinction between the guarantees in Article 13 ECHR and 4 Protocol 4. As regards guaranteeing the right to an effective remedy before the national authorities, there must be an accessible, practical and effective remedy. While Article 4 of Protocol 4 must establish an effective prohibition of collective expulsion and impose the obligation of an individual examination. Thus, if we had a situation of collective expulsion without a prior individual verification, it could immediately lead to a violation of Article 4 Protocol 4 and Article 3 ECHR. We can have a more complex situation like the case of *Hirsi Jamaa and Others v Italy*, where these two articles coexist with Article 3. Thus, in this latter situation, there may be concurrent violations of three provisions.

3.2. *N.D. and N.T. v. Spain* and the Scope of Protection for Refugees and Migrants

Historically, some cases have been more significant than others. In ECtHR jurisprudence *N.D and N.T v Spain* is a central case in the field of protection of vulnerable persons. This case law is unique due to its complexity and procedural history. *N.D and N.T. v. Spain* is complex because of the double character of the judgment and because the final judgment was delivered by the Grand Chamber. In the Third Section, the applicants succeeded, and in the Grand Chamber, the Court found no violation.

In the history of the cause, two applicants crossed the border with Melilla with a group of asylum-seekers. They were intercepted by the Civil Guard and returned to their country of origin.

The Grand Chamber analysed in depth the unlawful group entry and the behaviour of the new arrivals. The Court held that where a State provides genuine and effective access to lawful entry procedures, responsibility may shift depending on the applicants' conduct. At this time, certain Spanish legislation was in force and required compliance by all. First was the Spain's Aliens Act²³. This was not applied by the authorities because the applicants were not really in Spanish territory. It contained the right to linguistic assistance, procedures of expulsion, or identification. There was legislation for rights and freedom for migrants in

²³ Spain, *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*, Boletín Oficial del Estado no. 10, January 12, 2000, 1139–50, <https://www.boe.es/buscar/act.php?id=BOE-A-2000-544>.

Spain²⁴. This second instrument provided for the right to legal assistance and interpretation for all persons, without discrimination. Organic Law 4/2015 added the Tenth Additional Provision to Organic Law 4/2000, creating a special regime for Ceuta and Melilla.²⁵

The first change was the physical interaction between authorities and new arrivals. This means that the authorities need to go with asylum-seekers at the frontier, they cannot expel them through a general procedure. This intervention can be done without any lawyer assistance.

The Spanish authorities consider that a person benefits from Spanish law and the rights conferred upon him when he passes through all the checkpoints. Until he completes the checkpoints, the newcomer is not on Spanish territory.

We suggest that these perceptions and legislative changes, made by the Spanish authorities on the one hand and by the ECtHR judges on the other, are based on the increasing number of migrants entering Europe. At the same time, with the 21st century, migration to the Spanish area has increased.

A 2026 report cited an estimate that the number of undocumented migrants living in Spain rose from 107,409 in 2017 to 837,938 in 2025.²⁶ Some migrants began to move internally within Spanish territory or to other European countries²⁷. In this regard, the situation has become tense, and the procedures for granting refugee status have become more complex. The Grand Chamber recalled that there were legal procedures for entering the European space. For this reason, the applicants' use of this entry cannot be attributed to the State.

3.3. The Legislative System of Protection in Poland under the *M.K. and Others v Poland* case law

In 2020, the ECtHR requested provisional measures in the case of *M.K. and others v Poland*²⁸. In this case law two Chechen applicants were being transferred by Polish authorities in Belarus. The applicants repeatedly requested protection at the Belarus-Poland border but were ignored by the Polish authorities. They were returned to Belarus without a real examination of their claims.

The Polish authorities usually used very short interviews, and in official

²⁴ Spain, *Ley Orgánica 4/2000*.

²⁵ Spain, *Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana*, Boletín Oficial del Estado no. 77, March 31, 2015, <https://www.boe.es/buscar/act.php?id=BOE-A-2015-3442>.

²⁶ Guy Hedgecoe, "Spain Plans to Give Half a Million Undocumented Migrants Legal Status," *BBC News*, January 27, 2026, <https://www.bbc.com/news/articles/c62n6gw1dp9o>.

²⁷ Jorge De la Roca, "Selection in Initial and Return Migration: Evidence from Moves across Spanish Cities," *Journal of Urban Economics* 100 (2017): 33–53, <https://doi.org/10.1016/j.jue.2017.04.004>.

²⁸ European Court of Human Rights, *M.K. and Others v. Poland*, applications nos. 40503/17, 42902/17, and 43643/17, judgment of July 23, 2020, <https://hudoc.echr.coe.int/eng?i=001-203840>.

notes the protection declarations were frequently reframed as economic or personal reasons. While asylum applications were sometimes not actually registered. All these elements led the Court to find that Poland had failed to fulfil its obligations under the Convention.

This case must be seen as a collective border push-back practice. Although the authorities issued standard individual decisions and conducted short interviews, these did not truly reflect the individual situation and fears invoked by the applicants. All of this was part of a broader policy of denying access to the international protection procedure. In this way, collective expulsion becomes a real risk, especially in the return to a third country (Belarus) without sufficient guarantees against chain refoulement.

The Polish legislative system was based under the Polish Constitution²⁹. This Constitution recognized the right to asylum and guaranteed the protection of fundamental rights. Moreover, the Act on Foreigners was adopted in 2013³⁰, based on which a refusal decision could be issued quickly at the border, with the possibility of appeal, but this appeal did not have an automatic suspensive effect, so it could not prevent immediate return.

We thus observe that the Polish authorities applied the legal framework in a formalistic and restrictive manner: they used the border control mechanism and standard decisions to qualify the applicants as economic migrants, without explicitly and faithfully reflecting their desire to request international protection, which was decisive in the Court's analysis.

With the final decision in this case, the Polish authorities made adjustments regarding protection at external borders. Every foreigner entering the Polish system was forced to sign a standardized grid in which they were informed about what rights they had, what the correlative obligations were and how they could legally defend themselves if they felt their rights were violated.

This questionnaire was in several languages to ensure the Polish authorities that European protection standards were being respected³¹. It was welcomed by the new arrivals and by the experts of Council of Europe. The experts asked the Polish authorities for supplementary details about this questionnaire. These explanations were necessary to see the real way in which the Polish authorities are capable of protecting the human rights in accordance with ECtHR at the Eastern European borders³².

²⁹ Poland, *Constitution of the Republic of Poland of 2 April 1997*, Dziennik Ustaw 1997, no. 78, item 483, <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>.

³⁰ Poland, *Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach* [Act of 12 December 2013 on Foreigners], Dziennik Ustaw 2013, item 1650, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20130001650>.

³¹ Council of Europe, Committee of Ministers, "Communication from the Polish Authorities Concerning *M.K. and Others v. Poland*," DH-DD(2024)68E, January 22, 2024, <https://hudoc.exec.coe.int/eng?i=DH-DD%282024%2968E>.

³² Council of Europe, Committee of Ministers, "M.K. and Others v. Poland," decision CM/Del/Dec

Even if the Polish authorities made significant changes, Poland still has certain shortcomings. The Committee of Ministers supervises Poland listing some shortcomings that still exist: the concrete way of registering people in official state documents, the way in which an appeal can be made and the suspensive effect of the transfer.

This case-law led to some changes in the way of perception of internal and European legislation. The authorities reinterpret the law in extenso in the subject of migration and asylum procedure for collective expulsion and push-backs. However, questions remain about the explanation of how an asylum procedure is executed and guaranteed by state authorities. When the Russia Ukraine war started, Poland was one of the states which hosted Ukrainians. In general, the Ukrainian migrants from Poland were mostly women and children³³.

The government assisted them in finding employment and accommodation. In general, they began working in hospitals or other medical institutions³⁴. In this way, they could support their families which were sent to fight in the armed conflict. Poland, in this way, set an example for the EU institutions³⁵.

4. Comparative Conclusion

All these three cases create a great jurisprudence in push-backs against migration and asylum in ECtHR. All of them are unique and have prompted re-interpretations of ECHR. Together, they demonstrate the way in which the ECtHR judges evaluate cases: conduct, border context, and the guarantee of human rights in accordance with ECHR.

All cases are examined in the context of collective expulsions and guarantees of refoulement. The ECtHR treats “expulsion” and “collective expulsion” as distinct concepts. However the three cases create a nuanced landscape. While in the case of *Hirsi Jamaa and Others v Italy* the authorities intercepted the group at sea and returned them to Libya without an individual examination, in the case of *M.K. and Others v Poland* the applicants were at an official border crossing point, that is to say the place where, at least in theory, access to the protection procedure should have been effective. In this context, the Court noted that very

(2024)1492/H46-24, March 14, 2024, <https://search.coe.int/cm?i=0900001680aec211>.

³³ Ivanna Kyliushyk, Dominika Winogrodzka, and Emil Chról, “The Twists and Turns of Mobility Capital Formation: A Multi-Level Analysis of Factors Impacting Capital Building among Ukrainian Forced Migrants in Poland,” *Mobilities* 21, no. 2 (2026): 450–67, <https://doi.org/10.1080/17450101.2025.2542167>.

³⁴ Liudmyla Andriiashenko, Michał Zabdyr-Jamróz, Paweł Lipowski, and Alicja Domagała, “Immigration of Medical Personnel from Ukraine to Poland—Context, Regulations, and Trends,” *Health Policy* 152 (2025): 105241, <https://doi.org/10.1016/j.healthpol.2024.105241>.

³⁵ Daniel Tilles, “EU Includes Poland among Countries to Be Exempted from Migrant Relocation,” *Notes from Poland*, November 12, 2025, <https://notesfrompoland.com/2025/11/12/eu-includes-poland-among-countries-to-be-exempted-from-migrant-relocation/>.

brief interviews, the failure to record or distort statements regarding protection and the use of standard individual decisions may in fact mask a policy of refusal of access to asylum which amounts to collective expulsion.

The case of *N.D. and N.T. v Spain* does not overturn the principle, but rather qualifies it. In that case, the Grand Chamber analysed the existence of real and effective legal means of access to protection procedures and the conduct of the applicants at the time of crossing the border, holding that they had attempted to enter without authorisation, in a large group and by force, without demonstrating convincing reasons attributable to the State for not using the existing legal means. In these specific circumstances, the Court considered that the lack of an individualised procedure at the time of return was the consequence of the applicants' conduct, concluding that there had been no violation by the Spanish State of the applicants' rights.

In conclusion, these three judgments show that, although States have a legitimate right to control borders, problems of managing migratory flows cannot justify practices incompatible with the Convention; the difference in the solution between the cases depends decisively on the existence, in practice, of access to effective legal means and on the guarantees of individual examination.

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