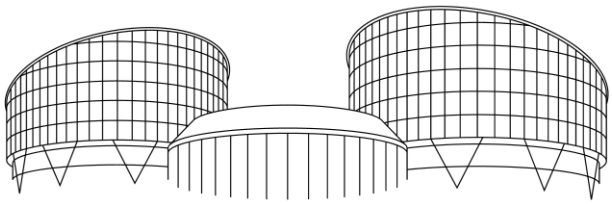

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HIRSI JAMAA AND OTHERS v. ITALY

(Application no. 27765/09)

JUDGMENT

Strasbourg

23 February 2012

Libya. In that connection, the Court has already had occasion to note that the presence of UNHCR in Tripoli hardly constituted a guarantee of protection for asylum-seekers on account of the negative attitude of the Libyan authorities, which did not recognise any value in the status of refugee (see paragraph 130 above).

154. In those circumstances, the Court cannot subscribe to the Government's argument that the activities of UNHCR represented a guarantee against arbitrary repatriation. Moreover, Human Rights Watch and UNHCR had denounced several earlier forced returns of irregular migrants, including asylum-seekers and refugees, to high-risk countries.

155. Therefore, the fact that some of the applicants have obtained refugee status does not reassure the Court as regards the risk of arbitrary return. On the contrary, the Court shares the applicants' view that that constitutes additional evidence of the vulnerability of the parties concerned.

156. In view of the foregoing, the Court considers that, when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR.

157. Furthermore, the Court reaffirms that Italy is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya. It reiterates that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.

158. It follows that the transfer of the applicants to Libya also violated Article 3 of the Convention because it exposed the applicants to the risk of arbitrary repatriation.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

159. The applicants stated that they had been the subject of a collective expulsion having no basis in law. They relied on Article 4 of Protocol No. 4 to the Convention, which provides:

> "Collective expulsion of aliens is prohibited."

A. The parties' submissions

1. *The Government*

160. The Government submitted that Article 4 of Protocol No. 4 was not applicable in the instant case. They argued that the guarantee provided by that provision came into play only in the event of the expulsion of persons on the territory of a State or who had crossed the national border illegally. In the instant case, the measure in issue was a refusal to authorise entry into national territory rather than "expulsion".

2. *The applicants*

161. While acknowledging that the word "expulsion" might seemingly constitute an obstacle to the applicability of Article 4 of Protocol No. 4, the applicants submitted that an evolutive approach should lead the Court to recognise the applicability of Article 4 of Protocol No. 4 in the present case.

162. In particular, the applicants sought a functional and teleological interpretation of that provision. In their view, the primary purpose of prohibiting collective expulsions was to prevent States from forcibly transferring groups of aliens to other States without examining their individual circumstances, even summarily. Such a prohibition should also apply to measures to push back migrants on the high seas, carried out without any preliminary formal decision, in so far as such measures could constitute "hidden expulsions". A teleological and "extraterritorial" interpretation of that provision would render it practical and effective rather than theoretical and illusory.

163. According to the applicants, even if the Court were to decide to make the prohibition established by Article 4 of Protocol No. 4 strictly territorial in scope, their return to Libya would in any case fall within the scope of application of that Article because it had occurred on a vessel flying the Italian flag, which, under Article 4 of the Italian Navigation Code, was considered to be "Italian territory".

Their return to Libya, carried out with no prior identification and no examination of the personal circumstances of each applicant, had constituted a removal measure that was, in substance, "collective".

3. *Third-party interveners*

164. The United Nations High Commissioner for Human Rights (OHCHR), whose submissions were shared by UNHCR, argued that Article 4 of Protocol No. 4 was applicable in the instant case. They submitted that the issue was of key importance, having regard to the potentially significant effects of a broad interpretation of that provision in the field of international migration.

Having pointed out that collective expulsions of aliens, including those in an irregular situation, were generally prohibited by international and Community law, the OHCHR argued that persons intercepted on the high seas should be able to benefit from protection against that kind of expulsion, even though they had not been able to reach a State's border.

Collective expulsions on the high seas were prohibited having regard to the principle of good faith, in the light of which the Convention provisions must be interpreted. To allow States to push back migrants intercepted on the high seas without complying with the guarantee enshrined in Article 4 of Protocol No. 4 would amount to accepting that States were able to evade their obligations under the Convention by advancing their border-control operations.

Moreover, recognition of the extraterritorial exercise of a Contracting State's jurisdiction over actions taking place on the high seas would, according to the OHCHR, entail a presumption that all the rights guaranteed by the Convention and its Protocols would be applicable.

165. The Columbia Law School Human Rights Clinic pointed out the importance of procedural guarantees in the area of protection of the human rights of refugees. States were bound to examine the situation of each individual on a case-by-case basis in order to guarantee effective protection of the fundamental rights of the parties concerned and to avoid removing them while there was a risk of harm.

The Columbia Law School Human Rights Clinic submitted that clandestine immigration by sea was not a new phenomenon but that the international community had increasingly recognised the need to identify constraints on State immigration-control practices, including interception at sea. The principle of *non-refoulement* required States to refrain from removing individuals without having assessed their circumstances on a case-by-case basis.

Various bodies of the United Nations, such as the Committee Against Torture, had clearly stated that such practices risked breaching international human rights standards and had emphasised the importance of individual identification and assessment to prevent people being returned to situations where they would be at risk. The Inter-American Commission for Human Rights had recognised the importance of these procedural guarantees in *The Haitian Centre for Human Rights et al. v. United States* (Case no. 10.675, report no. 51/96, § 163), in which it had expressed the opinion that the United States had impermissibly returned interdicted Haitian migrants without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as refugees. That decision was of particular significance as it contradicted the earlier position of the Supreme Court of the United States in *Sale v. Haitian Centers Council* (113 S. Ct., 2549, 1993).

B. The Court's assessment

1. Admissibility

166. The Court must first examine the question of the applicability of Article 4 of Protocol No. 4. In *Becker v. Denmark* (no. 7011/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 4, p. 236) concerning the repatriation of a group of approximately two hundred Vietnamese children by the Danish authorities, the Commission defined, for the first time, the "collective expulsion of aliens" as being "any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".

167. That definition was used subsequently by the Convention bodies in other cases concerning Article 4 of Protocol No. 4. The Court observes that the majority of such cases involved persons who were on the territory in issue (see *K.G. v. the Federal Republic of Germany*, no. 7704/76, Commission decision of 11 March 1977, unreported; *O. and Others v. Luxembourg*, no. 7757/77, Commission decision of 3 March 1978, unreported; *A. and Others v. the Netherlands*, no. 14209/88, Commission decision of 16 December 1988, DR 59, p. 274; *Andric v. Sweden* (dec.), no. 45917/99, 23 February 1999; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I; *Davydov v. Estonia* (dec.), no. 16387/03, 31 May 2005; *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 18670/03, ECHR 2005-VIII; *Sultani v. France*, no. 45223/05, ECHR 2007-IV; *Ghulami v. France* (dec.), no. 45302/05, 7 April 2009; and *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011).

168. The case of *Xhavara and Others v. Italy and Albania* ((dec.), no. 39473/98, 11 January 2001), however, concerned Albanian nationals who had attempted to enter Italy illegally on board an Albanian vessel and who had been intercepted by an Italian warship approximately 35 nautical miles off the Italian coast. The Italian ship had attempted to prevent the parties concerned from disembarking on national territory, leading to the death of fifty-eight people, including the applicants' parents, as a result of a collision. In that case, the applicants complained in particular of Legislative Decree no. 60 of 1997, which provided for the immediate expulsion of irregular aliens, a measure subject only to appeal without suspensive effect. They considered that that constituted a breach of the guarantee afforded by Article 4 of Protocol No. 4. The Court rejected the complaint on the ground of incompatibility *ratione personae*, as the provision in question had not been applied to their case, and did not rule on the applicability of Article 4 of Protocol No. 4 to the case in issue.

169. Therefore, in the instant case, the Court must, for the first time, examine whether Article 4 of Protocol No. 4 applies to a case involving the removal of aliens to a third State carried out outside national territory. It must ascertain whether the transfer of the applicants to Libya constituted a "collective expulsion of aliens" within the meaning of the provision in issue.

170. In interpreting the provisions of the Convention, the Court draws on Articles 31 to 33 of the Vienna Convention on the Law of Treaties (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 65, ECHR 2008; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008).

171. Pursuant to the Vienna Convention on the Law of Treaties, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must take account of the fact that the provision in issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3 (c) of the Vienna Convention). The Court may also have recourse to supplementary means of interpretation, notably the *travaux préparatoires* of the Convention, either to confirm the meaning determined in accordance with the methods referred to above or to clarify the meaning when it would otherwise be ambiguous, obscure or manifestly absurd and unreasonable (see Article 32 of the Vienna Convention).

172. The Government submitted that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 in the instant case, namely the fact that the applicants were not on Italian territory at the time of their transfer to Libya so that measure, in the Government's view, could not be considered to be an "expulsion" within the ordinary meaning of the term.

173. The Court does not share the Government's opinion on this point. It notes, firstly, that, while the cases thus far examined have concerned individuals who were already, in various forms, on the territory of the country concerned, the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of "territory", whereas the wording of Article 3 of the same Protocol, on the contrary,

specifically refers to the territorial scope of the prohibition on the expulsion of nationals. Likewise, Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State. In the Court's view, that wording cannot be ignored.

174. The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history". Thus, it was "agreed that the adoption of [Article 4] and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past". The commentary on the draft reveals that, according to the Committee of Experts, the aliens to whom the Article refers are not only those lawfully resident on the territory but "all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality" (Article 4 of the final Committee draft, p. 505, § 34). Lastly, according to the drafters of Protocol No. 4, the word "expulsion" should be interpreted "in the generic meaning, in current use (to drive away from a place)". While that last definition is contained in the section relating to Article 3 of the Protocol, the Court considers that it can also be applied to Article 4 of the same Protocol. It follows that the *travaux préparatoires* do not preclude extraterritorial application of Article 4 of Protocol No. 4.

175. It remains to be seen, however, whether such an application is justified. To reply to that question, account must be taken of the purpose and meaning of the provision in issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, for example, *Soering*, cited above, § 102; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *X, Y and Z v. the United Kingdom*, 22 April 1997, *Reports* 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I). Furthermore, it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI).

176. A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing

use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration.

The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.

177. The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

178. It is therefore clear that, while the notion of "jurisdiction" is principally territorial and is presumed to be exercised on the national territory of States (see paragraph 71 above), the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (see *Medvedyev and Others*, cited above, § 81).