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

Press Release
issued by the Registrar of the Court

ECHR 406 (2016)
15.12.2016

Holding of irregular migrants on Lampedusa and on ships in Palermo harbour

In today's **Grand Chamber** judgment[1] in the case of **Khlaifia and Others v. Italy** (application no. 16483/12) the European Court of Human Rights held,

- unanimously, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights;

a violation of Article 5 § 2 (right to be informed promptly of the reasons for deprivation of liberty) of the Convention;

a violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention);

no violation of Article 3 (prohibition of inhuman or degrading treatment) as regards the conditions in the Lampedusa reception centre;

no violation of Article 3 as regards the conditions on the ships in Palermo harbour; and

- by sixteen votes to one, that there had been **no violation of Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsion of aliens);**

- unanimously, that there had been a **violation of Article 13 (right to an effective remedy) taken together with Article 3;**

- by sixteen votes to one, that there had been **no violation of Article 13 taken together with Article 4 of Protocol No. 4.**

The case concerns the holding, in a reception centre on the island of Lampedusa then on ships in Palermo harbour (Sicily), of irregular migrants who arrived in Italy in 2011 following the "Arab Spring" events in their country, and their subsequent removal to Tunisia.

The Court observed that their deprivation of liberty without any clear and accessible basis did not satisfy the general principle of legal certainty and was incompatible with the need to protect the individual against arbitrariness. The refusal-of-entry orders issued by the Italian authorities had made no reference to the legal and factual reasons for the applicants' detention and they had not been notified of them "promptly". The Court lastly noted that the Italian legal system had not provided them with any remedy by which they could have obtained a judicial decision on the lawfulness of their detention.

The Court found, however, that the conditions of the applicants' detention in the Lampedusa centre and on the ships in Palermo harbour had not constituted inhuman or degrading treatment.

As to the prohibition of the collective expulsion of aliens, the Court found that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances. The requirements of that provision were satisfied where each alien had the possibility of raising arguments against his or her expulsion and where those arguments had been examined by the authorities of the respondent State. Having been identified on two occasions, and their nationality having been established, the applicants had had a genuine and effective possibility of raising arguments against their expulsion.

The Court lastly observed that the lack of suspensive effect of a remedy against a removal decision did not in itself constitute a violation of Article 13 where the applicants did not allege a real risk of a violation of the rights guaranteed by Articles 2 and 3 of the Convention in the destination country.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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Principal facts

The applicants, Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar, are three Tunisian nationals who were born in 1983, 1987 and 1988 respectively. Mr Khlaifia lives in Om Laarass (Tunisia); Mr Tabal and Mr Sfar live in El Mahdia (Tunisia)

In September 2011 they left Tunisia with others on makeshift boats heading for the Italian coast. Their vessels were intercepted by the Italian coastguard, which escorted them to a port on the island of Lampedusa. The applicants were transferred to an Early Reception and Aid Centre ("CSPA") on Lampedusa at Contrada Imbriacola, where the authorities proceeded with their identification. The applicants claimed to have been held in overcrowded and dirty conditions.

On 20 September 2011 a violent revolt broke out among the migrants in the CSPA. The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa. They then managed to evade police surveillance and reach the village of Lampedusa, from where, with about 1,800 other migrants, they started a demonstration through the streets of the island. After being stopped by the police, the applicants were taken first back to the reception centre and then to Lampedusa airport.

On 22 September 2011 Mr Khlaifia, Mr Tabal and Mr Sfar were flown to Palermo. After disembarking they were transferred to ships that were moored in the harbour there. Mr Khlaifia was placed on the *Vincent*, with some 190 other people, while the other applicants were put on board the *Audace* among about 150 other migrants. The applicants remained on the ships for a few days.

On 27 September 2011 Mr Tabal and Mr Sfar were taken to Palermo airport pending their removal to Tunisia; Mr Khlaifia was removed on 29 September. Before boarding the planes for Tunisia, the migrants were received by the Tunisian Consul, who, according to the applicants, merely recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011. The applicants also asserted that at no time during their stay in Italy had they been issued with any document. Annexed to their observations, the Government, however, produced three refusal-of-entry orders that had been issued in respect of the applicants. Those orders were accompanied by a record indicating that the addressee had refused to sign or receive a copy. On their arrival at Tunis airport, Mr Khlaifia, Mr Tabal and Mr Sfar were released.

A number of anti-racism associations filed a complaint about the treatment to which the migrants had been subjected on board three ships in Palermo harbour. Criminal proceedings for abuse of power and unlawful arrest were opened against a person or persons unknown. In a decision of 1 June 2012 the Palermo preliminary investigations judge dropped the charges.

Two other migrants in respect of whom a refusal-of-entry order had been issued challenged those orders before the Agrigento Justice of the Peace, who annulled them. The judge observed that the complainants had been found on Italian territory on 6 May and 18 September 2011 respectively and that the orders at issue had been adopted only on 16 May and 24 September 2011. While acknowledging that the law did not indicate any time-frame for such orders, the judge found that a measure which by its very nature restricted the freedom of the person concerned had to be taken within a reasonably short time after his or her identification, otherwise the *de facto* detention would be permitted in the absence of any reasoned decision of the authority.

Complaints, procedure and composition of the Court

The applicants alleged that they had been deprived of their liberty in a manner that was contrary to Article 5 § 1 (right to liberty and security) of the Convention. Relying on Article 5 § 2 (right to be promptly informed of the reasons for deprivation of liberty) they complained of the lack of any communication with the Italian authorities during their confinement in Italy. Under Article 5 § 4

(right to a speedy decision on the lawfulness of detention), they alleged that they had not had any possibility of challenging the lawfulness of their deprivation of liberty. Relying on Article 3 (prohibition of inhuman or degrading treatment) they complained that the conditions in which they had been held in the reception centre on Lampedusa and on board the ships in Palermo harbour had amounted to inhuman and degrading treatment. They also submitted under Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) that they had been subjected to collective expulsion. Lastly, relying on Article 13 (right to an effective remedy), taken together with Articles 3 and 5 and with Article 4 of Protocol No. 4, they complained that they had had no effective remedy under Italian law by which to complain of the violation of their rights.

The application was lodged with the European Court of Human Rights on 9 March 2012.

On 1 September 2015 a Chamber of the Court's Second Section delivered a judgment, finding, unanimously, that there had been a violation of Article 5 §§ 1, 2 and 4 of the Convention and no violation of Article 3 as to the conditions in which the applicants were held on board the ships *Vincent* and *Audace*. By five votes to two, the Chamber also found a violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the reception centre, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 of the Convention, taken together with Article 3 and with Article 4 of Protocol No. 4.

On 1 December 2015 the Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 1 February 2016 the panel of the Grand Chamber accepted that request. Written comments were received from four associations belonging to the Coordination Française pour le droit d'asile (French coalition for the right of asylum), and from the Centre for Human Rights and Legal Pluralism of McGill University, the AIRE Centre and the European Council on Refugees and Exiles (ECRE). A hearing was held in Strasbourg on 22 June 2016.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luis **López Guerra** (Spain), *President*,
Guido **Raimondi** (Italy),
Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
Angelika **Nußberger** (Germany),
Khanlar **Hajiyev** (Azerbaijan),
Kristina **Pardalos** (San Marino),
Linos-Alexandre **Sicilianos** (Greece),
Erik **Møse** (Norway),
Krzysztof **Wojtyczek** (Poland),
Dmitry **Dedov** (Russia),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 5 § 1

Like the Chamber, the Court accepted that the applicants' deprivation of liberty fell within sub-paragraph (f) of Article 5 § 1[2].

As Article 14 of the applicable Legislative Decree (no. 286 of 1998) could not have constituted the legal basis for the applicants' deprivation of liberty – because they had been held in a CSPA and not in a facility provided for under that instrument, an identification and removal centre (CIE) – the Court observed that the Government had put forward, as the legal basis for the applicants' stay on Lampedusa, the April 2011 bilateral agreement between Italy and Tunisia. The Court noted, however, that the full text of that agreement had not been made public and that it had not therefore been accessible to the applicants, who accordingly could not have foreseen the consequences of its application. It was thus difficult to understand how the scant information available as to the agreements entered into at different times between Italy and Tunisia could have constituted a clear and foreseeable legal basis for the applicants' detention.

The finding that the applicants' detention was devoid of legal basis in Italian law had been confirmed by the report of the Senate's Special Commission, which had noted that stays at the Lampedusa centre sometimes extended to over 20 days "without there being any formal decision as to the legal status of the person being held". It was also noted that the PACE Ad Hoc Sub-Committee had expressly recommended that the Italian authorities should "clarify the legal basis for the *de facto* detention in the reception centres in Lampedusa".

The Court observed that persons placed in a CSPA could not have the benefit of the safeguards applicable to placement in a CIE, which for its part had to be validated by an administrative decision subject to review by the Justice of the Peace. In his decision of 1 June 2012, the Palermo preliminary investigations judge had stated that the police authority had merely registered the presence of the migrants in the CSPA without ordering their placement and that the same was true for the migrants' transfer to the ships. Consequently, the applicants had not only been deprived of their liberty without a clear and accessible legal basis, they had also been unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down, for example, in Article 13 of the Italian Constitution. Since the applicants' detention had not been validated by any decision, whether judicial or administrative, they had been deprived of those important safeguards, thus leading the Court to find that the provisions applying to the detention of irregular migrants were lacking in precision.

In conclusion, the applicants' deprivation of liberty had not satisfied the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness. As it had not been "lawful", there had been a violation of Article 5 § 1 of the Convention.

Article 5 § 2

Having already observed, under Article 5 § 1 of the Convention, that the applicants' detention had no clear and accessible legal basis in Italian law, the Court failed to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or thus have provided them with sufficient information to enable them to challenge the grounds for the measure before a court. The Court had examined the relevant orders without finding any reference in them to the applicants' detention or to the legal and factual reasons for such a measure. It was also noted that the applicants had apparently been notified of those orders very belatedly. Therefore they did not satisfy the condition of "prompt" information and there had been a violation of Article 5 § 2.

[2] "(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

Article 5 § 4

Having regard to the Court's finding under Article 5 § 2 that the legal reasons for the applicants' deprivation of liberty, both in the CSPA and on the ships, had not been notified to them, the Court concluded that the Italian legal system had not provided them with a remedy whereby they could have obtained a decision by a court on the lawfulness of their deprivation of liberty. There had thus been a violation of Article 5 § 4.

Article 3

As regards the conditions in which the applicants had been held in the Lampedusa CSPA, the Court acknowledged that this centre was not suited to stays of several days. However, two days after the arrival there of Mr Tabal and Mr Sfar, a mutiny had broken out among the migrants and the centre had been gutted by fire. It could not be presumed that the Italian authorities had been inactive or negligent, or that the migrants should have been transferred in less than two to three days. The Court further observed that the applicants did not claim that they had been deliberately ill-treated by the authorities in the centre, or that there had been insufficient food or water. The Court thus concluded that the treatment they complained of had not exceeded the level of severity required for it to fall within Article 3 of the Convention. It followed that the conditions in which the applicants had been held at the Lampedusa CSPA had not constituted inhuman or degrading treatment and had not therefore entailed a violation of Article 3.

Concerning the conditions in which they had been held on the ships *Vincent* and *Audace*, the Court noted that the applicants' allegations had not been based on any objective element other than their own testimony. The Court pointed out that the burden of proof was on the Government when allegations of ill-treatment were arguable and based on corroborating evidence, but observed that there was no such evidence in the present case.

Lastly, the Court attached decisive weight to the fact that the Government had adduced before it a judicial decision contradicting the applicants' account, namely that of the Palermo preliminary investigations judge dated 1 June 2012. As to the appeal of 28 September 2011 by Médecins sans Frontières, expressing concern and asking to be able to visit the ships, the Court noted that on that date the return of the migrants who had been held on the ships was already in progress. It followed that the conditions in which the applicants had been held on the ships *Vincent* and *Audace* did not constitute inhuman or degrading treatment. There had accordingly been no violation of Article 3 of the Convention under this head.

Article 4 of Protocol No. 4

As the Court had previously observed, the fact that a number of aliens were subject to similar decisions did not in itself lead to the conclusion that there had been a collective expulsion if each person concerned had been given the opportunity to put arguments against his or her expulsion to the competent authorities on an individual basis.

The Court observed that the applicants had not disputed the fact that they had undergone identification on two occasions: by Italian civil servants and by the Tunisian Consul. As to the conditions of the first identification on their arrival at the CSPA, the Government argued that it had consisted of a genuine individual interview, carried out in the presence of an interpreter or cultural mediator, following which the authorities had filled out an "information sheet" containing personal data and any circumstances specific to each migrant. The Government had provided a plausible explanation to justify their inability to produce the applicants' information sheets, namely the fact that those documents had been destroyed in the fire at the reception centre. The applicants did not dispute the Government's submission that 99 "social operators", three social workers, three psychologists, and eight interpreters and cultural mediators worked at the centre. The Court found it reasonable to assume that those persons had intervened to facilitate communication and mutual understanding between the migrants and the Italian authorities.

The Court was of the opinion that any time during their confinement in the CSPA and on board the ships, the applicants had had an opportunity to notify the authorities of reasons why they should remain in Italy or why they should not be returned. 72 migrants held in the CSPA at the time of the fire had expressed their wish to apply for asylum, thus halting their return and resulting in their transfer to other reception centres. There was no reason to assume that the Italian authorities would have remained unreceptive in response to the submission of other legitimate and legally arguable impediments to their removal.

The Court pointed out that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances. The requirements of that provision were satisfied where each alien had the possibility of raising arguments against his or her expulsion and where those arguments had been examined by the authorities of the respondent State.

The applicants, who could reasonably have expected to be returned to Tunisia, had remained for between nine and 12 days in Italy and during that not insignificant period of time they had had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy. In addition, the second identity check in the presence of the Italian Consul had enabled the migrants' nationality to be confirmed and had given them a last chance to raise objections to their expulsion.

As regards the relatively simple and standardised nature of the refusal-of-entry orders, the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. Those orders had thus been justified merely by the applicants' nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in the relevant Legislative Decree. It followed that the virtually simultaneous removal of the three applicants did not lead to the conclusion that their expulsion had been "collective" in nature.

Having undergone identification on two occasions and their nationality having been established, the applicants had been afforded a genuine and effective possibility of submitting arguments against their expulsion. There had therefore been no violation of Article 4 of Protocol No. 4.

Article 13 taken together with Article 3

The Court observed that the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the CSPA or on the ships. It followed that there had been a violation of Article 13 taken together with Article 3 of the Convention.

Article 13 taken together with Article 4 of Protocol No. 4

The Court noted that the refusal-of-entry orders had indicated expressly that the individuals concerned could have appealed against them to the Agrigento Justice of the Peace. In that context the judge could examine any complaint about a failure to take account of the migrant's personal situation and thus about the "collective" nature of the expulsion. That kind of appeal would not, however, have suspended the enforcement of the refusal-of-entry orders.

The Court took the view that where an applicant did not allege that he or she faced violations of Articles 2 or 3 of the Convention in the destination country, removal from the territory of the respondent State would not expose him or her to harm of a potentially irreversible nature. There would be no risk of such harm, for example, where it was argued that the expulsion would breach the person's right to respect for his or her private and family life. Similar considerations applied where an applicant alleged that the expulsion procedure was "collective" in nature, but without claiming at the same time that it exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention.

The Convention did not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely required that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. The Court found that the Agrigento Justice of the Peace satisfied those requirements. The lack of suspensive effect of a remedy against a removal decision did not in itself constitute a violation of Article 13 where the applicants did not allege a real risk of a violation of the rights guaranteed by Articles 2 or 3 of the Convention in the destination country. There had not therefore been a violation of Article 13 taken together with Article 4 of Protocol No. 4.

Just satisfaction (Article 41)

The Court held, by fifteen votes to two, that Italy was to pay each applicant 2,500 euros (EUR) in respect of non-pecuniary damage and, unanimously, that it had to pay EUR 15,000 to the applicants jointly in respect of costs and expenses.

Separate opinions

Judge Raimondi expressed a concurring opinion and Judges Dedov and Serghides each expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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