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Communication from Italy concerning the case of KHLAIFIA AND OTHERS v. Italy (Application No. 16483/12) (appendices in Italian are available at the Secretariat upon request)

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Communication de l'Italie concernant l'affaire KHLAIFIA ET AUTRES c. Italie (requête n° 16483/12) (des annexes en italien sont disponibles auprès du Secrétariat sur demande) (**anglais uniquement**)



DGI

15 OCT. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Rappresentanza permanente d'Italia presso il Consiglio d'Europa

Action Report

Case Khlaifia

I - Cases Summary

The case concerns the retention within a hosting center, before, and on the ships, after, of there irregular immigrants disembarked on the Italian coast in 2011, within the context of the extraordinary flows of migrants to Italy related to the serious events occurred in some African countries known as << Arabic spring >>. By judgments released on 15.12.2016, the Grand Chamber found the violation of art.5, from the limb of the legal basis of the detention, the information to those retained and judicial scrutiny on this form of deprivation of liberty.

It also found that no violation of art. 3 has taken place during their stay retention on the ships, where they were temporarily accommodated due to the big fire exploded inside the hosting centre of Lampedusa, since their stay did not amount to any form of inhuman and degrading treatments.

The Court found a violation of art. 3 and 13 of the Convention not having been indicated a possible remedy at disposal of the applicants able to dispute the conditions of detention.

II – Individual measures

The just satisfaction awarded by the European Court was timely paid to the applicants. Therefore, the Government considers that no further individual measure is required in these cases.

III – General measures

Following the last assessment of the case by the Committee of Ministers, mainly focused on the legal framework of the irregular immigrants' detention and on the effective avenue for them to claim the conditions of detention, reference is made to the information already provided and further elements on these issues are indicated hereinafter.

Due to the different position held by those irregularly entered into the country and those irregularly entered and asylum seekers, specific elements will be provided in respect of each of these situations.

1) Detention of irregular foreigners

The fundamental discipline of the detention of foreigners irregularly present on the national territory is established by art. 14 of the Legislative Decree no. 286 of 25 July 1998, the Act on Immigration, as recently amended by the Law Decree n. 130/2020

Requirements

Detention is ordered when it is not possible to immediately carry out expulsion by means of accompaniment to the border or rejection, due to transitory situations that hinder the preparation of return or the implementation of removal.

The rule identifies as additional requirements

- (a) the risk of absconding
- (b) the need to provide assistance to the person;
- (c) the need to make additional enquiries concerning his identity or nationality;
- d) the need to acquire travel documents or the availability of a suitable means of transport.

The following categories of foreign nationals are the recipients of detention orders, with priority

- those who are considered a threat to public order and safety
- persons convicted, even with a non-definitive sentence, of crimes that are an obstacle to the issuance of entry visas and residence permits
- third-country nationals with whom cooperation agreements or other agreements on return are in force, or who come from them.

The detention order is taken by the Questore, who sends a copy of the acts to the competent Justice of the Peace, for validation, without delay and in any case within forty-eight hours from the adoption of the measure.

Together with the notification of the order, the individual concerned is informed that he/she has the legitimate faculty to submit, in person or by the counsel, defenses to judge of the validation procedure.

It's noteworthy that , when the person can be immediately identified since he/she has the passport or other document for identification and the expulsion cannot be immediately carried out, the Questore can adopt **alternative measures not implying retention**, such as the handing over the passport or other identity card, the obligation to reside at a place previously identified – where he/she could be easily reached - , or the obligation to go to a police station on the days and time specifically scheduled (art. 14 § 1.1.)

A **judicial scrutiny** on the order is also provided. The **judge shall validate** it by means of a motivated decree within the following forty-eight hours.

From the legal framework above stems, then, the establishment of a sort of principle of proportionality of the measure that could be adopted, so that the retention is adopted only when most favorable measures are unable to ensure that the person concerned doesn't evade the repatriation procedure and when the retention has this purpose.

Length of detention

The validation entails the stay in the center for a total period of thirty days. In any case, the maximum period of detention of the foreigner in the repatriation center, as redefined by the Law Decree no. 130 of 21 October 2020, converted, with amendments, by the Law no. 173 of 18 December 2020, cannot exceed ninety days and can be extended for another thirty days if the foreigner is a citizen of a country with which Italy has signed agreements on repatriation.

A foreigner who has already been detained in a prison for 90 days may be detained at the center for a maximum period of 30 days if he is a citizen of a country with which Italy has signed agreements on repatriation. The period may be extended by a further 15 days in cases of complexity of the identification and organization of returns procedures (Article 14, paragraph 5 of the Consolidated Immigration Act).

The conditions of the return centers

The detention could take place only in specific centers provided by art. 14 §2 Immigration which meet the condi

The standards of the return center are determined by art. 14, par. 2, of the cited Legislative Decree no. 286 of 1998. The provision, as amended by Law Decree no. 130 of 21 October 2020, converted, with amendments, by Law no. 173 of 18 December 2020, provides for adequate hygienic and housing standards in the center, in such a way as to ensure the necessary information on the status of the person concerned, assistance and full respect for his/her dignity. In any case, freedom of correspondence with the outside world, including by telephone, is ensured.

The detailed rules on the modalities of detention are laid down in art. 21 of the Presidential Decree no. 394 of 31 August 1999, implementing regulation of the Consolidated Act on Immigration.

This provision sets forth, inter alia, that the following must be guaranteed

- a) the freedom to talk inside the center and with visitors from outside, in particular with the lawyer assisting the foreigner, and with ministers of religion;
- (b) freedom of correspondence, including by telephone;
- (c) the fundamental rights of the person;

In addition to the services necessary for the maintenance and assistance of the detained foreigners, essential health services, socialization and freedom of worship are also ensured in the return centers.

Application to the National Guarantor of Prisoners' Rights

For the purpose of guaranteeing the protecting of the persons concerned, the above-mentioned Law Decree no. 130 of 2020 provides that a detained foreigner may address oral or written requests or complaints, also in sealed envelopes, to the National Guarantor and to the regional or local guarantors of the rights of persons deprived of their liberty.

The aforementioned Guarantor Authority has full access, without any restriction, to the return centers and hot-spots for the verification of compliance with the regulatory requirements related to the conditions of the aforementioned facilities (art. 7, par. 5, letter e), Law Decree no. 146 of 2013);

It also makes specific recommendations to the administration of the interior, if it finds founded the instances and the complaints submitted by the persons detained in the detention facilities (art. 7, paragraph 5, lett. f-bis), Decree-Law No. 146 of 2013).

Detention in "different and suitable facilities" available to the Public Security Authority

Art. 13, para 5-bis of the Consolidated Act on Immigration, in the case in which there is no availability of places in the Centers of Permanence for Repatriation (CPR), allows the temporary detention of the foreigner in different and suitable structures available to the Public Security Authority. This is possible, however, exclusively **on the basis of an order of the Justice of the Peace, at the request of the Questore**, and until validation procedure is concluded.

If the conditions referred to above persist also after the validation hearing, the **Judge can authorize the permanence**, in suitable premises at the border office concerned, until the execution of the effective removal, but, in any case, not later than 48 hours following the validation hearing. The structures and premises in question must, however, guarantee conditions of detention that ensure the respect of the dignity of the person. The above-mentioned Law Decree no. 130 of 2020 has also provided that all the guarantee provisions provided for the detention centers for repatriation by article 14, paragraph 2 of the Consolidated Act on Immigration apply to these facilities too.

2) Detention of asylum-seeker migrants

Pursuant to Article 6, of Legislative Decree No. 142 of 2015, an applicant cannot be detained for the sole purpose of examining his/her application.

Detention may be ordered in the return centers (CPR), referred to in Article 14 of Legislative Decree No. 286 of 1998, on the basis of a case-by-case assessment, when:

a) he/she falls into one of the causes of exclusion from protection, regulated by article 1, paragraph F of the Geneva Convention on refugee status and by articles 12 and 16 of the Legislative Decree no. 251 of 19 November 2007

(b) has submitted a subsequent application, during the execution of a removal order, pursuant to article 29-bis of Legislative Decree no. 25 of 2008;

b) is the addressee of an expulsion order issued by the Minister of the Interior for reasons of public order or State security, or by the Prefect with regard to the addressees of measures of prevention (Art. 13, paras. 1 and 2, letter c) or, however, issued for reasons of prevention of terrorism (Art. 3, para 1, of the Decree-Law N° 144 of 2005;

c) constitutes a danger to public order and safety;

d) there is a risk of the applicant absconding.

The applicant may also be detained, for the time strictly necessary, and in any case not exceeding thirty days in the "hot-spot" crisis points, for the determination or verification of identity' or citizenship (Article 6, paragraph 3-bis, Legislative Decree no. 142 of 2015).

In particular, in the case of the Lampedusa hotspot, the length of stay in the facility is strictly related both to the complexity of such procedures and, in the specific case of Lampedusa, to the particular geographical position of the island, which is connected to the mainland (Porto Empedocle) by ferries that cannot always guarantee scheduled departures, in the presence of frequent adverse weather conditions.

Judicial remedies

Every detention order and its extensions are subject to validation by the Judge within 48 hours from its issuance (Article 14, paras. 3 and 4 of the Legislative Decree no. 286 of 1998).

In the case of an asylum seeker, the competence to validate is up to the Court where is the specialized section on immigration, international protection and free movement of EU citizens (Article 3(1)(c) of Decree-Law No. 13 of 2017).

As to the judicial remedies, it has to be noted that the national legal system provides also judicial tools allowing the person concerned to complaint of the detention conditions.

As already communicated to the Committee the system provides the art. 700 cpc, a general interim measure according to which *Out of the cases settled in the preceding sections of this chapter , those who have founded reason to fear that during the time necessary to assert their right in the ordinary way, this is threatened by imminent and irreparable prejudice , may apply to the Court for interim measures which, in accordance with the circumstances, are more appropriate to provisionally ensure the effects of the decision on the substance of the matter*

Therefore, it could be pursued in any case there is a founded fear to suffer an imminent infringement of his/her right and it offers the opportunity to claim the adoption of the most appropriate measure to protect a right against the risk of an imminent harm.

As to the efficacy of such a remedy, reference is made to the recent order pursuant art. 700 cpc by the Court of Milano (see ASGI-ONG website [21 03 15 Trib-Milano-accoglimento-telefono-cryptato.pdf \(asgi.it\)](#)), by which, upon request of the applicant, who had been deprived of the mobile phone during his administrative detention, the Court has acknowledged his right to correspondence by phone and granted the remedy claimed by ordering the restitution of the advice to the respondent party.

The other judicial avenue is the general damages action provided for by art. 2043 cc (action for damages restore) , according to *which Any act, intentional or negligent, which causes unjust damage to others, obliges the person who committed the act to compensate for the damage.*

A set of judgements have been released on the ground of this judicial action, pursued by persons complaining of the unlawfulness of their detention.

The circumstance that such a judicial procedure has been successfully instituted to complain of the conditions of the detention demonstrates the subsistence within the domestic system of an effective remedy in favour of those subjected to administrative detention.

In particular, reference is made to the following judgments concerning complaints about conditions of detention:

- judgment no. 7206/2019, whereby the Court of Appeal of Rome - Person, Family and Minors Section, condemned the Ministry of the Interior for "unlawful detention of the foreigner", ordering compensation for the non-pecuniary damage suffered, with legal interest (attachment 1);

- sentence no. 2454/2021, by which the Court of Appeal of Rome - First Section, condemned the Ministry of Interior for "unlawful detention at the C.I.E. of Ponte Galeria", ordering the compensation of non-pecuniary damage, with legal interests (attachment 2).

- sentence no. 60999/2019, by which the Court of Rome upheld the complaint and condemned the Presidency of Council of Minister for unlawful detention, ordering the compensation for non-pecuniary damages in favor of the applicants;

- Court of Cassation Joint Section , no 22788/2012, according to ordinary court is competent to rule on damages compensation for unlawful extension of the person detention, in consideration of the fact that in this case of limitation of freedom the Administration activity does not result in any authoritative act.

Although the aforementioned judgments concern cases of unlawful detention in repatriation center, the general legal principle established by the Joint Section of the Court of Cassation could be applied to all cases in which the Administration accomplishes acts of

limitation of personal freedom without a legal title, and, thus, also when that occurs during the Hotspot procedure.

Conclusively, in the light of the foregoing it's evident that on the retention of persons for migration purposes there is always a judicial control:

in the phase of the application, through a procedure of validation of the Order respectful of the constitutional principles on the personal freedom (art. 13 Cost... *in exceptional cases of necessity and urgency, as required by law, the public security authority may take interim measures, which must be communicated within 48 hours to the judicial authority and, if it does not validate them in subsequent 48 hours, they shall be deemed revoked and shall have no effect.*), and where the lawfulness of the measure could be disputed by the individual concerned; and

during and after the retention to claim for the protection of the rights involved, through the proceedings for interim measures or for damages compensation provided by the legal system; which also implies that the persons subjected to administrative detention have at disposal also judicial remedies to the infringement of their rights.

3) Reception in hotspots

These "crisis points", provided for by the European Agenda for Migration of 2015, as part of the "Hotspot approach", have been introduced in the national legislation, Legislative Decree no. 286/1998, art. 10-ter, with rescue, health and identification purposes.

According to art. 10 ter of the Immigration Act, in case of reiterated refusal to undergo the identification findings provided by the law, the person concerned is subjected to administrative detention by order of the Questore validated by the judge or the court dealing with international protection in case of asylum seeker and the measure is implemented in repatriation center. Moreover, in this case the person concerned is promptly informed of the rights and faculties deriving from the procedure of validation of the detention decree in a language known or, where impossible, in English, French or Spanish.

The Standard Operating Procedures (SOPs) (annex 3) regulate the phases related to the reception of migrants on the Italian coasts, ensuring the uniformity of actions, timeliness and professionalism of interventions with priority to rescue and assistance.

The mechanism regulating entry and exit from the hotspots provides that guests must be present in the center during meal times and to use the accommodation provided for overnight stays, with the possibility of leaving the facility at different times.

Moreover, the hotspot, in addition to not being closed facilities, they are subjected to the surveillance of independent entities as the Guarantor of Prisoners' rights.

Thus, contrary to what observed by the NGOs intervened, the accommodation in the hotspot is intended to a first assistance and to the identification of the migrants irregularly entered into the country having a specific legal basis in the Immigration Act.

In the episodic cases of particularly intense migratory flows, such as those linked to the Arab Spring in question, the massive arrivals of migrants in the same period of time can put the first reception system under considerable stress with an unavoidable impact on the assistance and identification procedures and the time to process all the positions of those newly arrived.

But the hotspot system is intended to be a point of first management of the arrivals of migrants, who then are directed towards the different courses examined above.

And the temporary accommodation on the ships, which occurred during the events in question, was an absolutely extraordinary event following the fire of the center of Lampedusa, for which the Court itself considered that there was no violation of art. 3

Health procedures

At the hotspots, the managing body, which has been awarded the specific contract by the competent Prefecture, is required to provide migrants with initial material assistance, individual health screening in a special fixed medical facility.

Information and linguistic mediation services, social and psychological assistance and transport services from the place of disembarkation/landing to the center are also ensured, all activities subject to control.

In application of Article 7 of Legislative Decree 142/2015, applicants whose health conditions or vulnerability are incompatible with detention cannot be detained. The information service

Information to migrants

Information to migrants, also provided with the help of cultural mediators present in the hotspots, concerns the identification procedures, age verification (in case of doubt about the minor age), information on the reception system for asylum seekers and on the procedures for the recognition of international protection, the procedures for determining the State responsible for examining applications for international protection and the detention hypotheses provided for in Article 6 of Legislative Decree 142/2015.

Endowments

Migrants hosted in hotspots receive goods in kind including food, linen, personal hygiene products, a first entry kit, including clothing based on the gender and age of applicants and a telephone card. A pocket-money is also provided by the hotspot authority.

Security in the centers

In the SOPs, the activities carried out by the Public Security Authority (Police Headquarters), with specialized personnel (Mobile Squad, Digos and Forensic Police) in these facilities, are also precisely identified, mainly aimed at analyzing the individual situation of each migrant and adopting, therefore, the immediate consequent measures, consisting in the initiation of expulsion procedures from the national territory or transfer to long-term reception facilities dedicated to this purpose, in accordance with the current legislation (point A.4. page 5 and point D page 20).

In the exercise of these functions, law enforcement agencies provide support to anyone whose fundamental rights have been violated and who wishes to lodge a complaint.

Controls in hotspots

In order to make the control regime more effective, even without prior notice, the Prefectures are in charge of the constant supervision of the correct payment of the services provided by the reception agencies, in order to improve their quality and efficiency, with the application of specific penalties in case of non-compliance.

The internal control bodies of the hotspots also conduct confidential individual interviews with the migrants, with the help of mediators and/or interpreters, during which the migrants present in the hotspots have full opportunity to raise grievances related to their reception conditions.

The monitoring activities of the Prefectures are also carried out by means of inspection units specifically established with the participation, depending on the territorial specificities, of the Police Forces, the Fire Brigade and, in general, of representatives of other interested Administrations (e.g. Asl, local authorities, labour inspectorate), in order to ensure a wider and deeper evaluation of the different areas of monitoring.

Protection of migrants detained in hotspots

In the hotspots, the Guarantor of the rights of persons detained or deprived of their liberty exercises all the powers of verification of compliance with the fulfilments related to the rights of the foreigner and of access referred to in Article 7, par. 5, letter e), of the Decree-Law no. 146 of 23 December 2013, converted, with amendments, by the Law no. 10 of 21 February 2014 (containing "Urgent measures on the protection of the fundamental rights of detainees and the controlled reduction of the prison population").

In addition to the prerogatives granted to the Guarantor for persons deprived of their liberty (further enhanced by art. 19, par. 3, Law Decree no. 13/47), according to art. 7, par. 2, Legislative Decree 142/2015, in the CPRs and in the centers mentioned in art. 10 ter, where cases of deprivation of liberty occur, it is also "allowed the access to the representatives of UNHCR or to the organizations working on behalf of UNHCR".

On this point, it is also worth noting - as a further tool to monitor compliance with the standards of reception and protection of the rights of migrants - that international organizations such as UNHCR and IOM, constantly present during the phases of disembarkation to provide information and support on the rights of migrants and minors, routinely access all reception centers and report any deficiencies or failures in the reception procedures, ascertained directly or as a result of individual interviews with migrants, by making direct contact with the competent local Prefectures.

In any case the migrants hosted in the hotspots have the right to have recourse to the jurisdictional safeguards provided for by the Code of Civil Procedure, such as, for example, the possibility to initiate the emergency procedure under article 700 of the Code of Civil Procedure.

4) Reception of migrants in hotspots during the period of the covid-19 emergency

NGOs reported that the use of the hotspots as quarantine centers "*from March 2020 and for the entire duration of the epidemiological emergency, even for longer periods than those provided for by the anti-Covid-19 provisions*", resulted in an additional limitation of personal freedom.

In this regard, it should be noted that the hotspots were used in the early stages of the emergency, as places for the implementation of the preventive measure of isolation for at least 14 days, in order to ensure that migrants arrived without infectious diseases or symptoms related to the Covid-19 virus.

These operations took place in full compliance with the technical notes sent by the Ministry of Health, including those addressed to the Offices of Maritime, Air and Border Health (USMAF), competent to carry out the first health interventions and as provided by the Decree of the Minister of Infrastructure and Transport and the Minister of Health of 17 March 2020.

Subsequently, following the indications issued by the Ministry of Health, contained in the document entitled "*Interim operational indications for the management of facilities with people with high fragility and socio-health marginalization in the context of the COVID-19 epidemic*", edited by the National Institute for the Health Promotion of Migrant Populations and for the Fight against Disease and Poverty (NIHMP) and the Operational Protocol for the management of migrants arriving by sea (c. d. Protocol USMAF), all migrants entering Italy are subjected to the Coronavirus swab and to health surveillance, for at least 10 days.

The prolongation of the anti-Covid isolation period at the Lampedusa hotspot, every time new migrants arrived at the facility, was limited to the beginning of the epidemiological emergency and, in any case, for an extremely limited period of time, aimed at identifying facilities and ships where migrants could spend the quarantine period.

To date, all guests remain in the Lampedusa hotspot for the time strictly necessary to transfer them to quarantine centers or ships; health surveillance measures are still carried out, on board ships chartered for this purpose or in facilities specifically identified by the Prefects,

pursuant to the Decree of the Head of the Civil Protection Department (DCDPC) no. 1287 of 12 April 2020, supplemented by DCDPCs no. 2944 of 18 August 2020 and no. 2966 of 21 August 2020.

During their stay in the Lampedusa hotspot, pending transfer to quarantine centers or ships, guests were provided with personal protective equipment and received information on the correct behavior to adopt, both by means of posters and through the intervention of cultural mediators.

The increase in "autonomous" landings recorded on the island of Lampedusa in the summer of 2020 and, in particular, also in the period mentioned by "ASGI" and "A Buon Diritto", between 20 August and 1 September (with a total of 2. 225), made it necessary, as well as a priority, to have immediate transfers to facilities and ships where quarantine measures could be carried out; only in this way, it was possible to ensure the constant alleviation of the presence on the island of Lampedusa, affected by a significantly high number of landings.

With regard to the condition of migrants who, during the quarantine period, have remained ... *"in a condition of unlawful detention of their freedom which, in some cases, lasts more than 15 days, beyond what is provided for by the measures to prevent contagion, without a maximum limit"*, it is stated that the stay in the facilities intended for the quarantine of migrants subjected to the measures of isolation of trust, does not constitute, contrary to what is represented by ASGI and A Buon Diritto, a restriction of personal freedom for which a validation measure by the judicial authority is necessary. Indeed, it is a temporary measure for the protection of individual and collective health ordered against anyone who enters Italy irregularly from third countries, adopted in compliance with the provisions issued as a result of the state of health emergency, which provide general rules for the containment of COVID-19 infection.

Any isolation of COVID-19-positive individuals, arranged with active surveillance, is exclusively aimed at safeguarding the safety of collective health, in compliance with the modalities set out in the circular of the Ministry of Health of 12 October 2020.

In terms of assistance to migrants offered in Lampedusa, during the epidemiological emergency, it should be noted that in addition to the staff of the managing body, intended to ensure material assistance services, health, socio-psychological, as well as cultural mediation, a UNHCR team of 2 persons (one legal expert and one cultural mediator) was permanently present at the above mentioned structure, which ensured the performance of all support activities to the information and timely identification and reporting of vulnerabilities.

Moreover, without prejudice to the implementation of all the necessary preventive measures to contain the Covid-19 virus, as well as the maximum liaison with the local authorities, an additional psychological first aid service was ensured in the structure, in order to ensure a further verification of the physical and psychological health conditions of the shipwrecked migrants, with the help of psychologists and cultural mediators from the team of Doctors Without Borders (MSF) and the staff of the Italian Red Cross.

Finally, it should be noted that the Strasbourg Court has cancelled, under Article 37 of the Convention, some appeals filed in 2020 by migrants who complained about the conditions of detention suffered, during the emergency period from Covid-19, in the various Centers of Permanence for Repatriation, in violation of Article 3 of the Convention.

5) Conclusion

In the light of the foregoing, the Government draws the attention of the Secretariat and of the whole Committee of Ministers on the steps taken on the subject matter and the full compliance of the system with the judgment of the Court and with the Convention.

It has been thoroughly demonstrated that the administrative detention for migration purposes has a specific legal basis and that such a measure is under the control of the judiciary, that has to validate it within a very short-term.

The length is very limited in time and every extension is always subjected to a judicial scrutiny. It has been also remarked that the individual concerned has different judicial avenues to claim the alleged unlawfulness of the administrative retention and to submit to a court the detention conditions.

As to the detention condition, the Government firmly remarks that in the case at hand the Grand Chamber has considered the conditions of the applicants stay after their arrival and their treatment fully compliant with art. 3.

Thus the examination of the case is only from the limb of the subsistence in principle of possible remedy to claim the detention conditions.

In any case, it has been also argued that the judicial remedy to complain of the retention conditions before national courts exists and is also effective.

Therefore, the efforts made and the measures put in place could be considered positive and compliant with principles set in the Convention also from this viewpoint.

The Government observes, then, that all the necessary measures in the execution of this judgment have been adopted and the positive obligations under art 46 of the Convention have been duly fulfilled, so that there are all the grounds for the Committee of Ministers to adopt a final resolution and close the examination of the case.

Strasbourg, 15.10.2021