Analysis

ECtHR/Italy: Khlaifa judgment reveals illegal detention and collective expulsion practices in Italy's treatment of Tunisians in 2011

Commission's plans for readmission agreements and summary returns contravene the ECHR

Introduction

In its decision of 1 September 2015 in Strasbourg in the *Khlaifia and others vs. Italy* case, the second section of the European Court of Human Rights found Italy in violation of articles 3 (five votes to two), 5.1, 5.2 and 5.4 of the European Convention of Human Rights (unanimously), of article 4 of the 4th protocol to the ECHR (5-2), and of article 13 in combination with articles 3 and 4 of the ECHR (5-2 for both). The ruling concerns the treatment of three Tunisian applicants who disembarked in Lampedusa on 17 and 18 September 2011, were flown to Palermo on 22 September and were held on board of two ships in Palermo's harbour before being returned to Tunisia on 27 and 29 September 2011. The court awarded the three plaintiffs 10,000 euros each for moral damages and 9,344.51 euros jointly to refund legal and other costs. The court also unanimously ruled that detention conditions on board of the *Vincent* and *Audace* ships did not violate art. 3 of the ECHR.

Three applicants, Saber Ben Mohamed Ben Ali Khlaifia, Falhreddine Ben Brahim Ben Mustapha Tabal and Mohamed Ben Habib Ben Jaber Sfar filed their application (no. 16483/12) on 9 March 2012. On 16 (Khlaifia) and 17 September 2011 (Tabal and Sfar), the applicants left the Tunisian coast in makeshift boats for the crossing towards the Italian coast and were intercepted by the Italian coastguard, which escorted them to Lampedusa, where they disembarked on 17 and 18 September respectively.

They were then transferred to the Contrada Imbriacola early reception and rescue centre (*centro di soccorso e prima accoglienza*, CSPA), where they underwent initial first aid upon arrival and were subsequently identified. They were kept in the part of the centre reserved for adult Tunisians, which the plaintiffs claim were overcrowded and filthy, and in which they had to sleep on the floor

due to a lack of beds and the poor conditions of the mattresses. Food was eaten while sitting on the floor, outside, and the police permanently surveilled the centre, while communications with the outside world were impossible. They stayed in the centre until 20 September, when a violent revolt broke out, the centre was ravaged by a fire and the applicants spent the night in a Lampedusa sports complex they were transferred to. At dawn on 21 September, they eluded the police surveillance and went to the village of Lampedusa with other migrants. They engaged in a protest demonstration in the streets as a group of around 1,800 migrants, before they were stopped by the police and first taken back to the reception centre and then to the airport.

On the morning of 22 September, the applicants were flown to Palermo (on the Sicilian mainland) and transferred onto two ships anchored in Palermo's port, Khlaifia on the *Vincent* ship on which around 190 people were held and Tabal and Sfar on the *Audace* ship, holding around 150 people. They claim that all the migrants were kept in the restaurant halls, while access to the cabins was forbidden. They slept on the floor and waited for several hours to use the toilets, and were only allowed on the open decks twice per day for a few minutes. Further, they claimed that they were insulted and mistreated by the police officers who surveilled them, without receiving any information from the authorities. They stayed on board until 27 and 29 September respectively, when they were transferred to Palermo airport to be returned. Before boarding their flights, they were seen by the Tunisian consul, who recorded their personal details, in accordance with the Italian-Tunisian agreements signed in April 2011.

Throughout their stay in Italy, they claim they did not receive any kind of document. The Italian government's response to the application included three "identical" repatriation orders dated 27 and 29 September issued against the applicants. The space reserved for their signatures had "refuses to sign and receive a copy" written in it. They were released upon arrival in Tunis airport.

Following a complaint by antiracist associations about the treatment migrants were subjected to on the *Audace*, *Vincent* and *Fantasy* ships after 20 September, a penal procedure began for unlawful arrest and abuse of competencies involving preliminary investigations by a judge in Palermo. The court asked for the case to be shelved without any charges being brought on 3 April 2012. On 1 June 2012, the judge for preliminary investigations (*gip*) accepted the Palermo court's request that the case be shelved.

The *gip* explained that migrants were placed in the CPSA for reception purposes, to assist them and face their hygienic needs for the strictly necessary time before transferring them to an identification and expulsion centre (CIE) or adopting measures in their favour. Migrants could enjoy legal assistance and obtain information on how to apply for asylum in the CSPA. Further, the *gip* shared the court's view that the interpretation of the conditions based on the reasons and length of migrants' stay in the CSPA was weak. Considering them entailed a multitude of factors which exclude the possibility that such facts constitute a penal infringement of the law. At the same time, it was noted that the Agrigento police chief's office (*questura*) recorded the presence of migrants in the CSPA without adopting any decisions ordering their detention.

In the *gip*'s view, the precarious balance achieved on the island of Lampedusa was broken on 20 September 2011 when a group of Tunisians caused a criminal fire, seriously damaging the Contrada Imbriacola CSPA's structure, rendering it ill-suited to requirements for the reception and rescue of migrants. The authorities then organised transfers by aircraft and ships to evacuate migrants from Lampedusa. There were clashes in the port between "the local population" and a group of migrants who threatened to blow up some gas canisters. In the *gip*'s view, this led to a

situation which risked degenerating, covered by the notion of a "state of necessity" envisaged by the penal code (art. 54), meaning that the immediate transfer of some of the migrants was necessary, using ships, among other means.

As for the failure to issue formal decisions for their detention on board of ships in this "urgent" situation, the *gip* argued that this could not be viewed as illegal arrest, while conditions to transfer them to CIEs were not fulfilled. In fact, on one hand the CIEs were already overcrowded and, on the other, agreements with the Tunisian suthorities made it likely that their return would be almost immediate. Nor did the *gip* deem the enforcement of a *respingimento* [refusal of entry entailing accompaniment to the border, hereafter referred to as a deportation or repatriation order] order against the applicants without any jurisdictional control several days after they disembarked to be unlawful. Calculating a reasonable delay for adopting such acts and for migrants' stay in the CSPA should take logistical difficulties (state of the sea, distance between the island of Lampedusa and the mainland) and the number of migrants into account, leading the *gip* to conclude that the law was not contravened. The authorities could not be deemed responsible for any harm because their conduct was inspired by the public interest, and hence the migrants had not suffered any unfair harm (*danno ingiusto*).

Regarding the applicants' complaint that their treatment had endangered their health, the *gip* noted that investigations had shown that none of the people in the boats had filed asylum applications. Those who had expressed an intention to do so in the CSPA, as well as vulnerable subjects, had been transferred to the centres in Trapani, Caltanissetta [both in Sicily] and Foggia [in Apulia]. Unaccompanied minors were placed in *ad hoc* facilities and there were no pregnant women on the boats. The latter groups were able to enjoy medical care, hot water, electricity, food and warm drinks. A press agency report dated 25 September 2011 showed that an MP had boarded one of the boats in the port of Palermo, ascertaining that the migrants were in good health, were assisted and slept in cabins with bed linen or reclinable armchairs. Some Tunisians were transferred to hospital, while others were treated by medical staff on board. Alongside the deputy police chief (*vice questore*) and police officials, the MP spoke with some migrants. He thus ascertained they had access to a places of worship, adequate nourishment and that the civil protection department had made some clothes available. Some migrants complained about a lack of razors, but the MP noted that it was a measure to prevent acts of self-harm.

The *gip* noted that although the migrants were neither in detention nor under arrest, a photograph appeared in the newspaper showing one of them in black plastic handcuffs, escorted by a police officer. Yet, he was part of a small group who had engaged in acts of self-harm and vandalism in a bus. Thus, the *gip* viewed the use of handcuffs as necessary to avoid cases of self-harm or of aggression against police officers who were unarmed and without coercive means. In any case, the police officers' acts were justified by a "state of necessity". Thus, the *gip* deemed that the case did not provide evidence of criminal offences envisaged by articles 323 [misuse of office] and 606 [unlawful arrest] of the penal code.

Two migrants subjected to repatriation orders appealed before the justice of the peace [honorary judge] in Agrigento. The justice of the peace issued two orders dated 4 July and 30 October 2011 which annulled the orders to return them. Among the reasons for the decision, the justice of the peace noted that the men in question had been in Italy, respectively, since 6 May and 18 September 2011 and their returns were only ordered on 16 May and 24 September 2011. While article 10 of legislative decree no. 286 of 1998 does not provide a time limit for the adoption of such decisions, the honorary judge deemed that, as an act which intrinsically limits its object's

liberty, it should be issued within a reasonably short delay from the moment when the irregular foreigner is held by the authorities [*fermo*]. Otherwise, he concluded, we would allow the migrant's *de facto* detention without a motivated decision by the authority, which would contravene the Constitution.

Relevant national law and documents

The unified text of provisions concerning the regulation of immigration and norms on the status of foreigners is legislative decree no. 286 of 1998 [hereafter leg. dec. 286/1998], as modified by laws no. 271 of 2004, no. 155 of 2005 and legislative decree no. 150 of 2011. Art. 10 provides that the border police may refuse entry and enact returns ordered by the city police chief (*questore*) for foreigners who are present at the border without complying with requirements for entry, who enter the state by avoiding border controls when they are stopped upon entry or soon afterwards, or who are allowed temporarily into the territory for reasons of public protection. It must not be applied in cases involving the provisions made for political asylum, the granting of refugee status or adoption of temporary protection measures for humanitarian reasons. Art. 13 allows the interior minister to order a foreigner's expulsion in cases including entry while avoiding border controls when a refusal of entry and return in accordance with art. 10 has not been enacted. An appeal before the judicial authorities may be lodged against an expulsion order. Art. 14 provides that, when it is not possible to swiftly execute an expulsion by escorting a foreigner to the border or returning them (due to a need to rescue them, carry out additional checks to ascertain their identity or nationality, or to obtain travel documents or carriers not being available), the *questore* may order their detention for the time that is strictly necessary in the nearest CIE.

The text of the Italian-Tunisian agreement reached on 5 April 2011 on cooperation to control the flow of irregular immigration was not publicly released. A press statement from the Italian interior ministry website on 6 April 2011 noted Tunisia's commitment to reinforce control of its borders to prevent the departure of "irregular" migrants, using logistical means made available by the Italian authorities. Tunisia also committed to accept the immediate return of Tunisians who arrived in Italy irregularly after the date when the agreement was reached, using simplified procedures involving the mere identification of the person concerned by Tunisian consular authorities.

On 6 March 2012 the Italian Senate's extraordinary commission on human rights approved a report on "the state of [respect for] human rights in penitentiary institutions and reception and detention centres for migrants in Italy". It includes a description of Lampedusa's CSPA, which the commission visited on 11 February 2011, noting that although stays in the centre should be limited to the shortest possible time to identify a migrant and reach a decision on the legality of their stay and possible removal:

"*the length of stays sometimes lasted more than twenty days without any formal decisions being adopted concerning the legal status of detained people. Lengthy detention, the impossibility of communicating with the exterior, lack of freedom of movement without any legal or administrative measures envisaging such restrictions, give rise to a very tense atmosphere which is often expressed through acts of self-harm*".

Noting frequent appeals by associations questioning the legality of the situation, the report describes conditions within the centre, with "rooms of five metres by six" used to "receive 12 people", in which there are "bunkbeds on four levels occupied by up to 25 people per room". Further, there were rubber foam mattresses along the corridor which had often been ripped up to use the foam as cushions, some mattresses for two people were on the stairs' landings, outside,

with makeshift canvas coverings. Light shades and bulbs were removed in places, toilets and lavatories lacked doors or adequate privacy, taps and waterpipes only provided water when the central system was switched on, and leaks resulted in liquids trickling along the floor in the corridor and rooms, with the smell of latrines invading all the spaces. People using the steel stairs to access the floor above would get wet, bringing moistness and dirtiness into their lodgings.

The Italian penal code's article 54.1 decrees that proportionate acts committed under the constraint of saving oneself or others from actual serious harm which has not been knowingly caused by themselves and cannot be avoided in another way may not be punished.

Relevant elements drawn from international law

The events in question occurred within the context of mass arrivals on the Italian coasts in 2011 following uprisings in Tunisia and then Libya. The Council of Europe's parliamentary assembly set up an *ad hoc* sub-commission "on the mass arrival of irregular migrants, asylum seekers and refugees on the southern European coasts". It undertook a fact-finding mission in Lampedusa on 23 and 24 May 2011, publishing a report on 30 September 2011.

The report highlighted that several episodes involving large scale influxes of migrants had occurred on the island due to its proximity to the African coasts, with more than 10,000 people arriving in each of the years from 2005 to 2008. Arrivals decreased considerably in 2009 and 2010, following an agreement between Italy and Libya, then ruled by Khadafi, which was widely criticised for enabling human rights violations, for the deplorable living conditions experienced by migrants, asylum seekers and refugees in Libya and for denying refugees and asylum seekers access to international protection. Yet it was effective, resulting in the closing of the island's reception centres and organisations working on the island suspending their activities, as 2,947 people arrived in 2009 and just 459 in 2010.

Following the upheavals in Tunisia and Libya in 2011, the island experienced large influxes of people on its shores again, first from Tunisia, as of 29 January 2011, and then in boats from Libya from which many women and young children disembarked. Italy declared a humanitarian state of emergency and called for solidarity among EU member states, granting emergency powers to manage the crisis to the prefect of Palermo [*prefetto*, the government official responsible for security]. By 21 September 2011, 55,298 people had arrived by sea (27,315 from Tunisia and 27,983 from Libya, particularly Nigerians, Ghanaians, Malians and people from the Ivory Coast).

The report also noted that the Agrigento prefect's office [*prefettura*] was responsible for any activities concerning the reception of those who arrived on the island until their transfer, including supervision of the private partner, "*Accoglienza*", which ran the island's two reception centres. The immigration police in Agrigento was in charge of identification, transfers and possible returns of those who arrived and, since 13 April 2011, the Italian civil protection department was responsible for managing migration flows from north Africa.

The international community mobilised, and there were UNHCR, OIM, Red Cross, Order of Malta and Save the Children teams working on the ground since February 2011. All except for the Order of Malta were involved in the *Praesidium* project to assist the management of mixed migration flows, and were authorised to have a permanent presence in the Lampedusa reception centres, making interpreters and cultural mediators available. The *Praesidium* project is deemed an example of best practices in Europe for managing mixed migration flows arriving by sea. Members of the *ad hoc* sub-committee noted that these actors cooperated towards the common goal of

saving lives during rescue operations, doing their best to receive those who arrive in decent conditions and to enable them to be swiftly transferred elsewhere in Italy.

Such transfers should be as swift as possible because the reception facilities on Lampedusa (Contrada Imbriacola and Base Loran) were insufficient for the numbers arriving and inadequate for longer stays than a few days. The Contrada Imbriacola CSPA has a capacity of between 400 and 1,000 places and it hosted 804 people at the time of the visit in "correct", albeit "basic" conditions, including mattresses piled up in the rooms and on the floor in prefabricated blocks whose rooms have windows, with adequate toilet facilities when it is not overcrowded. At the time of the visit the centre was split into two parts: one for people arriving from Libya and unaccompanied minors (including those who arrived from Tunisia), the other for Tunisian adults.

Medical checks were coordinated by the Palermo health authority chief, involving several regional medical teams and organisations (including the Red Cross, MSF and the Order of Malta). When coastguards find out about a boat that is arriving, they inform the medical coordinator of the numbers of people who are on board who mobilises the people concerned. The first medical checks take place during disembarkation at the port, while Order of Malta members/doctors accompany coastguards and customs officers during sea interception and rescue operations. They inform the medical teams mobilised in the port about the situation and any requirements for urgent and immediate needs for people to be taken into medical care upon arrival. Following disembarkation, people are sorted on the basis of their needs using colour codes, with people requiring transfers to hospital airlifted by helicopter to Palermo or elsewhere. When there is a lack of time to conduct medical checks on all those who arrive, they are completed in the reception centres, where there is a need for standard procedures. The most frequent ailments are sea-sickness, respiratory problems, burns, dehydration, general pains, psychological problems or acute stress. Some people from Libya suffered acute stress even before embarking, and the people arriving are viewed as extremely vulnerable as they may have suffered physical and/or psychological violence resulting from their treatment in Libya. Several women are pregnant and must be checked more thoroughly. Some cases of tubercolosis were identified and promptly quarantined in hospital. The medical checks on people arriving in Lampedusa are general, and personal evaluations take place following their transfer from the island, although people who ask to be visited may be checked. MSF and the Red Cross have expressed their concerns over hygienic conditions and overcrowding in the centres, stressing that Tunisians, who are kept apart from other people who arrive by a barrier, do not have direct access to the reception centre's medical teams.

With regards to asylum procedures, the UNHCR team provide succinct information, but Lampedusa is not the place where exhaustive information on this issue is provided, as such information and the procedural steps for applying for asylum are provided following transfer to other reception centres elsewhere in Italy. If people express their wish to apply for asylum, the UNHCR team informs the Italian police. It sometimes happens that, when the number of arrivals is considerable and transfers are enacted swiftly, that people are not informed of their right to apply for asylum. They are informed about this possibility following their transfer to reception centres, a situation which "may pose a problem insofar as people of certain nationalities are liable to be returned directly to their country of origin". Thus, generally speaking, those who arrive are not in a position to immediately receive detailed information on asylum procedures, as the urgency is that they are exhausted, disoriented and want to wash, eat and sleep.

Tunisians started arriving in February 2011, causing problems because arrivals had decreased considerably in the previous two years and the island's reception centres had been closed.

Tunisian migrants thus found themselves out in the street in “deplorable conditions” and, once the centres reopened, their capacity was immediately saturated. They were swiftly transferred to reception centres elsewhere in Italy and, after they were filled to saturation point, to other open reception centres for asylum seekers. As almost all Tunisians were economic migrants and organising immediate returns to Tunisia was difficult, the Italian authorities decided on 5 April 2011 to issue them temporary residence permits, valid for six months. Although 25,000 Tunisians had arrived in Italy, only 12,000 of them enjoyed the benefits of this measure, as the rest had already left the reception centres they were transferred to. As a result, there were tensions with France and the questioning of free movement within the Schengen area. On 5 April 2011, Italy and Tunisia reached an agreement whereby a daily quota for returns was set, for Tunisians who arrived following that date. The agreement was never published, but quotas of between 30 and 60 people per day were mentioned. At the time of the visit, returns to Tunisia had been suspended.

The consequence of this suspension was that there were around 190 Tunisians detained on the island, some of whom had been there for around twenty days, in a closed centre within the Contrada Imbriacola centre. Although the authorities stated that the people were not detained as they were not in cells, the visiting sub-committee members ascertained that they were subjected to measures comparable to detention and a deprivation of liberty. Although members of the sub-committee understand the Italian authorities’ wish to stem the tide of illegal immigration from Tunisia, they noted that some rules must be respected. The Contrada Imbriacola centre is ill-suited for the detention of “migrants in an irregular situation” and they are effectively imprisoned, without access to a judge. The Parliamentary Assembly’s Resolution 1707 (2010) states that “detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review”, conditions which are not met in Lampedusa, from where they should be transferred as swiftly as possible. The same Resolution also mentioned access to information detailing “the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention”. While it is true that the Tunisians met by the sub-commission knew they had entered Italy unlawfully, such rules must still apply.

A fire in the CSPA was apparently started by Tunisians protesting about their detention conditions and forced returns to Tunisia on 20 September, at a time when over 1,000 Tunisians were detained on Lampedusa. During the sub-commission’s visit, they were less than 200, yet its members were not allowed to visit them in the closed part of the centre for security reasons, due to tension and acts of self-harm. As this was the situation when there were fewer detainees, the report wonders why there were over 1,000 people in the same centre on 20 September.

The effects of the influx of migrants caused a disproportionate burden for Lampedusa, the 2011 tourist season was “catastrophic”, with lots of cancelled reservations. Clearing up and destroying boats was a difficult and costly task. Representatives of the island’s residents told the delegation that, while they did not intend to stop welcoming those who arrived, they expected fair compensation for the losses resulting from its role in providing refuge. They drafted a list of demands, noted by the commission, which invited the Italian authorities to consider them, in particular that envisaging a year when they would not pay taxes.

The ad hoc sub-commission invited the Italian authorities to continue to rescue people and provide international protection, including the rights to apply for asylum and not to be refouled; to enact flexible measures to increase capacity on Lampedusa; to improve reception conditions in existing centres and strictly monitor compliance with its duties by the private company running the centres; ensure that the people who arrive can contact their families; envisage adequate reception

structures for unaccompanied minors; clarify the *de facto* legal status of detention in Lampedusa's reception centres; insofar as Tunisians are concerned, not to keep migrants in an irregular situation in administrative detention in any other way than using a "procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review"; to continue guaranteeing swift transfers to reception centres elsewhere in Italy; to examine the Lampedusa residents' requests; and not to conclude bilateral readmission agreements with authorities of countries where the situation is not safe, in which the human rights of intercepted people are not adequately guaranteed, like Libya.

An Amnesty International report dated 21 April 2011, following a delegation's visit to Lampedusa and Mineo, is also mentioned. The sections referred to highlight that the humanitarian crisis on the island was of the "Italian authorities' own making", in view of the number of arrivals allowed to accumulate on the island although suitable facilities were not available; that there was an "inadequate number of people" providing basic information about asylum procedures and an "assumption that all Tunisian arrivals were economic migrants"; and that conditions in the centre were appalling, "including severe overcrowding and filthy, unusable sanitary facilities", resulting in some people preferring to sleep rough in the streets.

Most importantly, the AI report criticised the summary removal of Tunisians, as of 7 April 2011, when the Italian and Tunisian governments signed an agreement in which the latter committed to strengthening border controls and accepting fast-track readmissions. It argued that those subjected to direct repatriations using simplified procedures were "victims of collective summary removals". These were enacted within one or two days of arrival, making it unlikely that they would have had "the opportunity to assert that they should not be returned to Tunisia on international protection or other grounds". These removals, amounting to summary expulsions, are strictly forbidden "under international, regional and domestic human rights and refugee law and standards, and did not allow any effective remedies against removals, resulting in a likelihood of human rights violations constituting, in turn, "a breach of the non-refoulement principle".

Legal considerations - preliminary

In its additional observations submitted on 9 July 2013, the Italian government argued that the applicants had not exhausted internal remedies by failing to appeal against the expulsion order before a justice of the peace, as is allowed by art. 13 of the domestic immigration law (leg. dec. 268/1998). The applicants' response on 23 May 2013 to the government's first observations, dated 25 September 2012, noted that the Italian authorities argued that the application should be rejected in accordance with art. 35.1, but had not indicated what internal remedies they had failed to exhaust. In any case, they claimed that they had never had the opportunity to challenge the legality of their detention before the Italian judicial authorities. Filing a criminal claim concerning violation of their conventional rights would not have served as an effective remedy, as it does not have a suspensive effect.

The Court deemed that Italy had failed to adequately argue the case for non-admissibility, only addressing the issue of the applicants' failure to submit an appeal before a justice of the peace in its additional observations and those regarding just satisfaction. Thus, the case for the non-exhaustion of internal remedies can no longer be made.

- alleged violation of art. 5.1 ECHR (right to freedom)

The applicants claim that they were denied their freedom in a way that is incompatible with art. 5.1. The government opposed this claim by arguing that art. 5 was not applicable to this case, as the applicants were identified in accordance with relevant Italian and European norms. They were then received in a CSPA, which is not a detention centre, but a centre to provide first aid and assistance. Legal assistance was provided by organisations which were present in the CSPA, including about the procedures to be followed in order to apply for asylum. The ships onto which they were transferred should be deemed a "natural extension of the CSPA" to which they were transferred following the "criminal arson" caused by other migrants two or three days after the applicants' arrival in the CSPA. Facing urgent humanitarian and logistic problems, the Italian authorities had to find new reception spaces which should not be deemed places where migrants were either in detention or under arrest. Thus, the government claimed that the applicants were neither detained nor arrested, but rather, they were rescued "at sea and taken to Lampedusa to lend them assistance and provide physical safety". Italian law requires them to be rescued and identified, as they were in Italian territorial waters. Any measure they were subjected to may not be considered denial of freedom, as the necessary measures were adopted to face a humanitarian emergency and to strike a correct balance between the safety of migrants and that of the local population.

The applicants' reply accepted that Italian law deems CSPAs to be places of reception rather than detention. Yet, this does not mean that, in concrete terms, they were not stripped of their freedom on the CSPA and the *Vincent* and *Audace* ships. They note that they were forbidden from leaving these places and were constantly monitored by police forces, as confirmed by reports by the CoE Parliamentary Assembly's *ad hoc* sub-commission (APCE sub-commission hereafter) and the Senate's extraordinary commission (see above), which highlighted the use of "lengthy detention, the impossibility of communicating with the exterior and a lack of freedom of movement".

The Court recalled that the ECHR's art. 5.1 concerns a person's physical freedom and aims to ensure that nobody may be arbitrarily stripped of it. The difference between denial of freedom and restrictions on the freedom to move envisaged in art. 2 of Protocol no. 4 concerns "degree or intensity, rather than nature or essence", which makes it hard to distinguish between the two cases. Reaching a decision on whether someone has been denied their freedom requires considering their concrete situation and criteria including typology, length, effects and means of execution of a given measure.

Applying these general principles to the case, the Court noted that the government did not oppose the applicants' claim that they were forbidden from leaving the CSPA and the two ships, and that these were under constant police surveillance. Further, the APCE sub-commission report stated that "in spite of the authority's claim that the Tunisians are not in detention because they are not in cells … the conditions which they are subjected to resembled detention and a denial of freedom", and that the migrants were "*de facto* imprisoned, without access to a judge". The Senate's extraordinary commission confirmed concerns over lengthy detention, communications and a lack of freedom of movement, and the government failed to produce any evidence that the applicants were able to leave the Contrada Imbriacola CSPA. The Court noted the applicants' claim that they had managed to get around police surveillance following the fire on 20 September 2011, reaching the village of Lampedusa before they were stopped by the police and taken back to the CSPA. The government did not contradict this account, leading to the conclusion that they were held against

their will. Similar considerations apply to detention on board the *Vincent* and *Audace* ships, which the government deemed "natural extensions of the CSPA".

Thus, the Court cannot support the government's thesis according to which the applicants were neither detained nor under arrest. Rather, their being held in the CSPA and then on board the two ships may be deemed a "denial of freedom" in view of the restrictions they were subjected to and in spite of the legal definitions used in domestic law. Thus, it concluded that the applicants were denied their freedom. The exception raised by the government concerning the incompatibility of this complaint in view of the nature of what happened was thus dismissed, and in view of the absence of other elements to deem it inadmissible, the complaint was accepted.

The applicants' arguments concerning the concrete elements of the case highlight that for between 9 and 12 days, they were detained under surveillance in confined spaces to prevent them entering Italian territory in irregular fashion. The authorities failed to respect the legal procedures to do so, due to a lack of formal refusal of entry or expulsion procedures in accordance with domestic law being enacted against them, as their removal was executed following simplified procedures envisaged by the 2011 agreement between Italy and Tunisia. These was no judicial decision to justify the denial of their freedom.

They added that under Italian law (art. 14 of leg. dec. 286/1998) the only lawful way to deny freedom to foreigners in an irregular situation is detention in a CIE (identification and expulsion centre) which requires jurisdictional oversight, as envisaged by the ECHR's art. 5. By transforming the Contrada Imbriacola CSPA into a CIE, the Italian state removed the denial of the applicants' freedom from any judicial oversight, and this also applies to the ships in Palermo. Further, the applicants claimed that the treatment they were subjected cannot be justified on the basis of leg. dec. 286/1998's art. 10.2, which envisaged "deferred" refusal of entry when a foreigner entered Italian territory for reasons of public protection. It does not refer to any form of denial of freedom, nor any means of detention. Unlike what happens in some other states, Italian law only provides a legal basis for detention in CIEs, and any other form of detention of "irregular migrants" must thus be deemed unlawful, contravening the ECHR's art. 5.1.

Insofar as the government argues that the events in question resulted from an urgent situation or a state of absolute necessity, the applicants argue that the underlying reason for the problems on the island was a political decision to concentrate the detention of foreigners on Lampedusa. They believe that there was not any unsolvable organisational difficulty preventing the authorities from organising a regular service to transfer migrants elsewhere in Italy. There aren't any internal provisions, even in an emergency, allowing the denial foreigners' freedom without any jurisdictional control, and Italy did not seek to exercise its right to derogate from art. 5.1 of the ECHR. Finally, in spite of repeated criticism by national and international institutions, the means of managing arrivals by sea described in their claim continue to be practised, and this entails a structural violation of migrants' fundamental right to freedom.

The government replied that the matter at hand does not fall within the scope of art. 5.1f, as the applicants were neither expelled nor extradited, but rather, temporarily admitted into Italian territory. This is confirmed by their reception in a CSPA, rather than being sent to a CIE. In fact, they did not fulfil the conditions to be sent to a CIE, meaning that no further checks as to their identity were necessary. It recognised, as indicated by the Palermo judge for preliminary investigations' (*gip*) findings of 1 June 2012, that internal provisions did not expressly envisage the adoption of a detention measure for migrants placed in a CSPA. However, their presence in the

CSPA was duly recorded and each of the applicants had a deportation order issued against them which mentioned the date of their irregular entry in Italy. The applicants were duly informed of these decisions, and they were not subjected to the justice of the peace's oversight because it only applied in cases involving expulsion.

The court recalled that the ECHR's art. 5 concerns a fundamental right protecting individuals against any form of arbitrary threat to their right to freedom by a state. Letters a-f of art. 5.1 include an exhaustive list of reasons for which someone may be denied their freedom, outside of which such measures must be deemed irregular. Only a strict interpretation of this article is compatible with this provision's goal to ensure that nobody is arbitrarily denied their freedom. Art. 5.1f of the ECHR states that one of the exceptions to the right to freedom allows states to restrict foreigners' freedom within the framework of immigration controls. It does not require that detention must be deemed necessary for reasons including the risk of absconding or of committing an offence. Yet, denial of freedom based on the second phrase of this provision can only be justified by an expulsion or extradition procedure which is underway. If this is not the case, detention cannot be justified on the basis of art. 5.1f.

Denial of freedom must also comply with regulations. As regards the "regularity" of detention, including respect for legal procedures, national legislation applies under the ECHR, which also requires scrutiny of the underlying norms and procedure. It also requires that any denial of freedom must comply with protection of the individual from arbitrary acts, which is the goal of art. 5. By requiring that any denial of freedom be enacted "following legal procedures", art. 5.1 imposes the need for a legal basis in internal law for any form of arrest or detention. These conditions do not merely entail resolving claims on the basis of domestic law, but they also concern the quality of such law, which must be compatible with the "pre-eminence of law", a notion that is applicable to the ECHR as a whole.

The court stresses that, in dealing with a denial of freedom, it is especially important to satisfy the general principle of legal security. This makes it essential for the conditions for denial of freedom resulting from internal law to be clearly defined and for the application of such a law to be predictable, in order to fulfil the requirement of "legality" established by the ECHR. It requires that any law be sufficiently precise to enable citizens to predict, to a reasonable degree in light of the circumstances of a case, what consequences may result from a given act. Moreover, denial of freedom is a very serious measure which cannot be justified unless other measures which are less strict have been considered and deemed inadequate to safeguard the personal or public interest which requires detention. Thus, it does not suffice for detention to comply with national law, it must also be necessary in view of the circumstances.

Applying these general principles to the case, the court noted the government's claim that the applicants were neither expelled nor extradited and that, hence, the matter at hand did not fall within the remit of art. 5.1f which authorises regular detention or arrest. The government did not indicate any other justification drawn from art. 5.1 which may justify denial of the applicants' freedom. The ECtHR's jurisprudence shows that the list of reasons justifying the denial of freedom provided in art. 5 is exhaustive, meaning that any denial of freedom which is not covered by any of its provisions must be deemed to contravene the ECHR.

In spite of the government's claims, the court is willing to admit that the denial of the applicants' freedom resulted from letter f of art. 5.1, noting that "the applicants had irregularly entered Italian territory and a procedure was established to identify and repatriate them". Both parties agreed that

Italian law does not expressly envisage the detention of migrants placed in a CSPA. Art. 14 of leg. dec. 286/1998 envisages detention, but it only applies to foreigners who must be rescued or for those who require additional identity checks or the arrival of travel documents and the availablity of a carrier. This was not the case. Moreover, foreigners for whom this detention is applicable are placed in a CIE following an administrative decision, with oversight by a justice of the peace. Instead, the applicants were placed in a CSPA without any formal decision ordering that they be placed in detention being adopted. The court stressed that the Palermo *gip*'s findings stated that the Agrigento prefecture recorded the presence of migrants in the CSPA without adopting any decisions to order their detention, and that the same applies to their being held on board of ships.

This leads the court to conclude that the denial of freedom in question had no legal basis in Italian law.

The decision is corroborated by the Senate's extraordinary commission's report's findings. Although their stay in the Lampedusa CPSA was meant to be limited to the time that was "strictly necessary" to identify migrants and establish the legality of the presence in Italy, it sometimes lasted "for more than twenty days" without a formal decision concerning the legal status of the detainees being adopted. Lengthy detention without any judicial or administrative measure envisaging it resulted in a very tense atmosphere. The APCE sub-commission recommended that the "legal status of de facto detention in the Lampedusa reception centres be clarified" and, regarding Tunisians, not to keep migrants in an irregular situation in administrative detention outside of legally defined procedures, overseen by a judicial authority, with periodic judicial checks. Even accepting that the applicants' detention was allowed by the Italian-Tunisian bilateral agreement, the latter did not provide an adequate legal basis for detention under the ECHR's art. 5. Its content was not made public and, hence, it was not accessible to the interested parties, who could not have predicted the consequences of its application. Moreover, nothing guarantees that this agreement envisages adequate safeguards against arbitrary acts.

Thus, denial of the applicants' freedom did not fulfil the general principle of legal certainty and did not comply with the goal of protecting individuals from arbitrary acts, and can therefore not be deemed "regular" under article 5.1 of the ECHR, which was contravened in this case. This dispenses the court from verifying whether the denial of the applicants' freedom was necessary under the circumstances that existed.

- alleged violation of art. 5.2 ECHR (right to information)

The applicants lamented the absence of any communication with the Italian authorities during their stay in Italy, a claim the government rejects and which the court deemed admissible in view of its connection to the complaint dealt with above.

The applicants claimed that repatriation orders were only adopted at the time when the repatriation was enacted, at the end of their time in detention. Even if such orders had been issued to them, the guarantee of a "short delay" envisaged by art. 5.2 ECHR was not respected. Moreover, these orders merely stated the legal basis for repatriation in a summarised and standardised manner without mentioning the reason for detention. Further, the information which art. 5.2 concerns must come from the authority which undertakes an arrest or placement in detention, that is, from official sources. The fact that members of NGOs communicated with migrants about this issue does not means that these provisions were respected.

The government states that the applicants were informed about their status in a language that they understood by the police officers on the island, assisted by cultural mediators and interpreters. They were Tunisian citizens temporarily admitted into Italian territory for "public protection" purposes as envisaged by art. 10.2b of leg.dec. 286/1998, a status which envisaged their lawful repatriation to Tunisia, as demonstrated by the deportation orders which were issued. In any case, members of organisations which had access to the Contrada Imbriacola CSPA had informed migrants about their situation.

The court noted that the ECHR's art. 5.2 affirms the basic guarantee that a person must know what they have been arrested for. A person must be informed in simple language they understand of the legal and factual reasons for which they are denied their freedom, in order to allow them to challenge its lawfulness before a court, in accordance with art. 5.4. Such information must be provided as soon as possible, but the officers depriving them of their freedom may not provide it in its entirety in the field. The circumstances require examination to establish whether the information provided was sufficient and adequately prompt. The ECtHR has already ruled that the right to be informed as soon as possible is subject to an autonomous interpretation, beyond the framework of penal measures.

Applying these general principles to the case, the court notes that the applicants left Tunisia in makeshift boats to reach Italy. They had no visa and the nature of their journey showed their intention to circumvent immigration laws. The APCE sub-commission report confirmed that the Tunisians they spoke to were conscious that their entry in Italy was irregular. This is further confirmed by the applicants not explicitly contradicting the government's statement that they were informed of the staus that the authorities assigned them, namely that of Tunisian citizens temporarily admitted into Italian territory for public safety reasons.

Nonetheless, mere information as to their legal status does not comply with the ECHR art. 5.2 requirement that the people concerned be informed of the legal and actual reasons for denial of their freedom. The court (above) has already ruled that in this case the denial of the applicants' freedom did not have a legal basis under Italian law, on the basis of ECHR art. 5.1. In any case, the government has not produced any document provided to the applicants which detailed the factual and legal reasons for them being placed in detention. It is worth noting that the repatriation orders (technically refusing people entry into Italian territory by accompanying them to the border) merely stated that they had entered the country while avoiding border controls and that their repatriation had been ordered. They included no mention of their detention. The applicants were supposedly handed these orders between 27 and 29 September 2011, while they had been placed in the CSPA on 17 and 18 September. Thus, the information they received was not just incomplete and insufficient in relation to the ECHR's art. 5.2, it was not provided "within the shortest possible delay".

Therefore, the court concluded that there had been a violation of the ECHR's art. 5.2.

- alleged violation of art. 5.4 (appealing detention or arrest before a court)

The applicants claimed that they never had the opportunity of challenging the legality of the denial of their freedom. The government disagreed. The court noted that the complaint was connected to those examined above and deemed it admissible.

The applicants argued that although they could have appealed the repatriation orders issued against them, they had no opportunity of challenging their detention. They were not informed of the

decision to deny them their freedom, which means that they did not have a chance to challenge such decisions before a court. The repatriation orders did not concern their freedom, but their return, and they were adopted after the period they spent in detention. The government argued that their repatriation orders show that the applicants had the possibility of filing an appeal before the Agrigento justice of the peace. Some Tunisians have submitted such appeals and, within this framework, the Agrigento justice of the peace annulled two such measures in 2011. Thus, the government infers that the applicants did have an opportunity to address a court to contest the legality of the "alleged" denial of freedom they experienced.

The court laid out the general principle that ECHR art. 5.4 grants detainees a right of appeal to verify respect of the procedural and substantial requirements which are necessary to ensure the "legality", in accordance with art. 5.4, of the denial of their freedom. The concept of "legality" must comply with the first paragraph of ECHR art. 5.4, which requires that detainees have a right to have the "legality" of their detention checked from the viewpoint of both internal law and the ECHR, its general principles and the goals authorised by art. 5.1. The scope of art. 5.4 is not such as to allow the competent court to replace the view of the authority issuing the decision with its own on the totality of aspects which a case concerns, including considerations of opportunity. Yet, its does allow a wide enough scope to cover each of the indispensable conditions for a person's detention to be within "legality" in accordance with paragraph 1. The jurisdiction charged with this oversight function must not be simply "consultative", but rather, it must have "statutory" competence regarding the "legality" of detention and the possibility of ordering a release if it deems a detention "illegal". These forms of oversight may vary from one field to another and on the basis of the kind of denial of freedom in question. It is not up to the court to examine which system would be most appropriate in the this field.

Nonetheless, the appeal must exist and have a sufficient degree of certainty in theory and practice alike, without which its accessibility and effectiveness would be lacking. Article 5.4 also consacrates the right of arrested people or detainees to receive a judicial decision on the legality of their detention "within a brief delay". While matters concerning art. 6.1 set a limit of one year for every degree of judgement as an appropriate benchmark, those involving art. 5.4, which concerns issues of freedom, require a specific approach.

Applying these general principles to the case, the court noted that it had established that the applicants had not been informed of the reasons for which they were denied their freedom. As such, their right to have the legality of their detention examined was "entirely emptied of its substance". This is sufficient to conclude that the Italian judicial system did not make an appeal available to the applicants through which they may have obtained jurisdictional oversight of the legality of the denial of their freedom. This dispensed the court from examining whether the appeals available under Italian law may have offered the applicants sufficient guarantees for the purposes of art. 5.4 of the ECHR. Moreover, the court recalled that the repatriation orders did not mention the legal and substantive grounds for the applicants' detention, and they were issued on 27 and 29 September, shortly before their deportation by airplane, that is, when the denial of their freedom was about to end. It follows that even if the court were to suppose that in some cases an appeal before the justice of the peace against the refusal of entry order may be deemed to offer indirect oversight over the legality of the restrictions of freedom imposed on the foreigners concerned, in this case such a control, if sought, could only have occurred following the applicants' release and return to Tunisia.

Hence, the court concluded that there was a violation of article 5.4.

- on the alleged violation of art. 3 (torture, inhumane and degrading treatment)

The applicants claimed they were subjected to inhumane and degrading treatment during their detention in the Contrada Imbriacola CSPA and on board the *Vincent* and *Audace*, an allegation which the government rejects. Concerning the complaint's admissibility, the court noted that the allegation of a violation of art. 3 of the ECHR was first submitted in their observations of 23 May 2013 which answered the government's reply to the original claim. It stated that, at the time, the ships were turned into floating detention centres, anchored in the port of Palermo and away from view of the public and media. Access to the vessels was forbidden, not just for journalists but also humanitarian organisations, and judicial authorities failed to collect migrants' testimonies. The applicants deem this incompatible with the obligation to conduct an effective investigation into allegations of art. 3 violations. Further, the complaint was only raised on 23 May 2013, while the facts occurred until 27 and 29 September 2011 at the latest, when the applicants were repatriated to Tunisia. This means the six-month deadline envisaged by art. 35.1 of the ECHR had expired and the complaint on the procedural aspects of art. 3 was thus rejected. Yet, the complaint regarding the material aspect of art. 3 was not deemed to be manifestly unfounded and did not give rise to further grounds not to be admitted. It was thus admitted by the court.

The applicants argued that the CSPA was overcrowded and held over 1,200 people at the time, three times more than its normal capacity (381) and more than its maximum capacity in urgent situations (804). The government confirmed these figures, indicating that between 16 and 20 September the figures ranged between 1,399 and 1,017 people. Hygienic and sanitary conditions were unacceptable: lack of space in rooms, the applicants had to sleep in the open, outside, on the tarmac due to the smell coming from the mattresses. The CSPA did not have a canteen and the toilets were overburdened and often unusable. The applicants claimed that these points were not denied by the government. The applicants also alleged they endured psychological suffering due to the lack of information regarding their legal status, the length of detention and the impossibility of communicating with the outside world. They referred to the Senate's extraordinary commission report stating that some migrants were held for over 20 days without any formal decisions regarding them being adopted. The report also raised criticism regarding reception and hygiene. **They did not complain about any blows or injuries, but about their conditions of detention.** Thus, the government's reply about them having to produce medical certificates is not relevant. The applicants claimed that the media and national and international bodies competent for human rights issues had established that the crisis situation on the island of Lampedusa started well before 2011 and continued in the following years. This resulted in a situation of structural and systematic violation of migrants' rights guaranteed by the ECHR's art. 3. They deemed that in this context the conditions they lodged their complaint about may not have resulted mainly from the urgent need to tackle considerable migrant inflows resulting from the "Arab Spring" revolts.

As for detention on the *Vincent* and *Audace*, the applicants claim they were placed in overcrowded halls without reasonable access to toilets, meals were distributed by throwing them on the floor, they could only go out in the open air for a few minutes per day, they did not receive relevant information or explanations, and law enforcement officers sometimes mistreated or insulted them. They felt that these allegations fit within the logic of events on the island of Lampedusa and that the ruling by the Palermo judge for preliminary investigations (*gip*) of 1 June 2012, stating that the ships' facilities were adapted, had hot water and electricity, and that full medical assistance was provided to migrants, does not suffice to contradict them. The applicants observed that, among other sources, the *gip* relied on the statements by an MP who boarded the ships accompanied by the authorities.

The government raised several preliminary observations. It took charge of the situation in Lampedusa in the 2011-2012 period, intervening at both the factual and legislative levels to coordinate and implement necessary measures to rescue and assist migrants. NGOs, UNHCR and the Red Cross were involved in the *Praesidium* project and had free access to the reception facilities. On 28 May 2013 a protocol agreement with Terre des Hommes was signed to provide psychological assistance. On 4 June 2013 an agreement was signed by the interior ministry and the European Asylum Support Office (EASO) to coordinate the modes of reception of migrants. Since July 2013, MSF began working to train the CSPA's staff and that of the ships charged with enacting rescues at sea. Rescuing migrants at sea is not just Italy's problem, but of all the EU's member states, who should define a true common policy in this field, according to the government. The local Lampedusan institutions funded the construction of new CSPAs. During the UNHCR delegate for southern Europe's visit on 23-24 June 2013, satisfaction was expressed concerning the work undertaken by national and local institutions to improve the general situation on the island.

The mass arrival of migrants from north Africa in 2011 gave rise to an emergency. From 12 February to 31 December 2011, 51,537 third-country nationals disembarked on the islands of Lampedusa and Linosa. This was explained by the APCE sub-commission's report, which detailed the Italian authorities's efforts in cooperation with other organisations to create the necessary facilities to receive and assist migrants, including vulnerable people. The government noted that, at the time, the Contrada Imbriacola CSPA was fully operative and had the necessary human and material resources to ensure reception and first aid for migrants. Its staff included the director, two deputy directors, 99 social workers and cleaning staff, three social counsellors, three psychologists, eight interpreters and cultural mediators, eight administrative staff, and three department managers who oversaw activities in the structure. Three doctors and three nurses provided medical care in *ad hoc* facilities. An inspection conducted by the Palermo health authority in April 2011 found the hygienic conditions adequate, as were the quality and quantity of the food provided. A further inspection following the fire on 20 September 2011 noted that provision of drinking water was guaranteed using bottled water and that the kitchen was fit to prepare meals.

The government claimed that the applicants and all other migrants were informed of the possibility of filing an asylum application, but simply decided not to do so. Instead, 72 other migrants who were on Lampedusa at the time of the fire expressed their intention to apply for asylum and, on 22 September, they were taken to reception centres in Trapani, Caltanissetta and Foggia to define their situation. The Palermo *gip*'s decision found that the measures adopted to tackle the presence of migrants in Lampedusa complied with national and international law and were adopted with the swiftness required by an urgent situation. The *gip* also deemed conditions on board of the *Vincent* and *Audace* adequate. The government stressed that international cooperation on illegal immigration is regulated by art. 11 of leg. dec. 286/1998 within respect for multilateral conventions and bilateral agreements. The government also complained that allegations of mistreatment by the police were not backed by any evidence such as medical certificates.

The court noted that its jurisprudence requires ill-treatment to attain a minimum degree of seriousness in order for art. 3 to be applicable. Appreciating the entity of this minimum degree of seriousness depends on elements including the full facts of a case, such as the length of time during which ill-treatment occurred, its physical and psychological effects, as well as the victim's gender, age and state of health. Allegations of ill-treatment must be supported by suitable evidence. To appreciate these elements, the court uses the principle of proof "beyond any reasonable doubt", although such proof may result from a cluster of evidence or presumptions

which are not contradicted that are adequately serious, accurate and in agreement. Determining whether a treatment was "degrading" requires that the court examine whether its goal was to humiliate and demean someone. Yet, the absence of such a goal does not suffice to definitively exclude that a violation of art. 3 has occurred. It is inevitable that measures denying people their freedom entail suffering and humiliation but this, *per se*, does not mean that art. 3 has been contravened. States are nonetheless required to ensure that any person is detained in conditions which respect their human dignity, that means of detention do not subject them to distress or situations that are intense beyond the level of suffering which is inevitable for such a measure, and that their health and well-being are adequately ensured.

While states are authorised to place potential migrants in detention due to their undeniable right to control the entry and residence of foreigners on their territory, this right must be exercised in ways which comply with the ECHR. The court must focus on these persons' individual circumstances when it must check the modes of execution of detention measures using conventional provisions. Regarding detention conditions, the court considers their cumulative effects as well as the applicants' specific allegations, especially the time during which a person was detained in conditions which are deemed to be unlawful. When overcrowding reaches a certain level, the lack space in a facility may constitute the central element to be considered in assessing the compliance of a given situation with art. 3. When it has faced claims involving severe overcrowding, the court has deemed this element sufficient, on its own, to conclude that art. 3 had been contravened. As a general rule, although the UN's Committee for the Prevention of Torture (CPT) deems that a minimum of four square metres is desirable for collective cells, these were cases in which applicants had less than three square metres of personal space.

In cases where overcrowding was not such as to raise a problem under art. 3 on its own, the court also evaluated other aspects of detention conditions in examining respect for this provision. These include the possibility of using toilets with a degree of privacy, ventilation, access to lighting and open air, the quality of heating and respect for basic sanitary requirements. Even in some cases in which each detainee had between three and four square metres of personal space, the court ruled that a violation of art. 3 had occurred when lack of space was accompanied by lack of ventilation and air, limited access to be able to walk in the open, or a total lack of intimacy in cells.

Applying these basic principles to the case, the court noted that it is unquestionable that Lampedusa experienced an exceptional situation in 2011. The APCE sub-commission report noted that following the uprisings in Tunisia and Libya, new inflows of arrivals by sea led Italy to declare a humanitarian emergency on the island and to call for solidarity between EU member states. By 21 September 2011, when the applicants were on Lampedusa, 55,298 people had arrived by sea. This state of urgency caused organisational and logistic difficulties for the Italian government. The reception capacity on Lampedusa was insufficient for such a large number of arrivals and was ill-suited for stays lasting several days. The local authorities and the international community deployed important efforts to face this humanitarian crisis.

Specific problems occurred after the applicants' arrival which worsened the situation, including a violent revolt among migrants in the Contrada Imbriacola CSPA on 20 September 2011 and a case of criminal arson which damaged the facilities. On the next day, around 1,800 migrants held a demonstration in the streets and there were clashes with locals in the port area, while a group of migrants threatened to set some gas canisters alight. Instances of self-harm and degradation occurred. This worsened the existing difficulties and heightened tensions, leading the Palermo *gip* to consider that the immediate transfer of migrants was justified by art. 54 of the penal code,

according to which acts resulting from the need to protect others from an actual danger of serious physical harm cannot be punished.

The court noted that it does not underestimate the problems that signatory states experience during exceptional inflows of migrants like the one this case concerns. It is also conscious of the many obligations which burdened the Italian authorities which simultaneously had to guarantee rescues at sea, the health and reception of migrants and keeping public order on an island with a very small population. Yet, these factors do not exonerate the defendant state from its obligation to guarantee that anyone, including the applicants, who is denied their freedom must enjoy conditions which are compatible with respect for their human dignity. Art. 3 is deemed one of the key clauses in the ECHR, enshrining one of the fundamental values of the democratic societies which comprise the Council of Europe. In contrast with other provisions, art. 3 is worded in absolute terms which do not envisage exceptions nor limits, and by virtue of art. 15 ECHR, it cannot be derogated.

To determine if the applicants suffered a violation of art. 3, the court had to examine two situations separately, first the reception conditions in the Contrada Imbriacola CSPA and then those on board of the *Vincent* and *Audace*. The applicants were in the CSPA from 17 or 18 September 2012 where they stayed for three or four days until 20 September, when the fire and revolt occurred, and they were then moved to the Lampedusa sports grounds. They complained about serious problems of overcrowding, hygiene and lack of contact with the outside world. Their allegations on the general state of the facilities are corroborated by reports by the Senate's extraordinary commission (detailed above) and AI, which noted "appalling [detention] conditions", considerable overcrowding, a general lack of hygiene, smells and toilets which could not be used.

The court does not question these findings, especially those by an institution of the defendant state. It also recalls that it has often considered information contained in reports by international human rights associations such as AI. Further, the APCE sub-commission noted that the Contrada Imbriacola CSPA had a capacity of between 400 and 1,000 places (800 according to AI), and the government did not contest figures provided by the applicants as to the occupancy rate in the CSPA between 17 and 20 September ranging between 1,017 and 1,399 detainees. The personal space enjoyed by each migrants cannot be established, but these data confirm the applicants' claims about overcrowding. The quick saturation of the Lampedusa reception centres was highlighted by the APCE sub-commission, which also noted concerns raised by MSF and the Red Cross regarding sanitary conditions and overcrowding. These elements describe detention conditions which were below those envisaged by norms in international texts and the requirements of art. 3. It is true that the applicants only stayed in the CPSA for a short time, so that their lack of contact with the outside world could not have serious consequences for their situation. Yet, the court does not disregard the fact that they had just faced a difficult journey by sea and were in a vulnerable situation. Thus, their detention in conditions which affected their human dignity must be examined as a degrading treatment which contravenes art. 3.

The court found that the reception conditions in the Contrada Imbriacola CSPA amounted to a violation of art. 3.

As for detention conditions on the *Vincent* and *Audace* ships in the port of Palermo, the court noted that the first applicant was placed on the *Vincent* with around 190 other migrants, whereas the second and third applicants were taken to the *Audace*, on which around 150 were held. Detention on these ships began on 22 September 2011 and lasted for around eight days in the first applicant's case, and for around six days for the two other applicants. They claimed they were

grouped in the restaurant halls and were forbidden access to the cabins, they slept on the floor, had to wait for several hours to use the toilet and were only allowed out on the decks twice a day for a few minutes.

Such claims are at least partly contradicted by the Palermo *gip*'s findings of 1 June 2012 which established that the migrants enjoyed good health, were assisted by medical staff and slept in cabins equipped with bed linen or on reclinable armchairs. They also had access to places of worship, meals were adequate and some clothes were made available, and the ships were equipped with hot water, electricity, and hot meals and drinks could be distributed. These findings partly relied on statements by an MP who boarded the ships and had spoken with some migrants. The court deemed that the fact that this MP was accompanied by the deputy chief of police and some police officials does not mean it can doubt their independence or the truthfulness of their account.

These elements make it possible to rule out that conditions on board of the two ships contravened art. 3 of the ECHR.

The court was nonetheless ready to admit that the lack of information or relevant explanations provided by the authorities concerning migrants' detention on board of the ships may have caused concerns and restlessness among them. Yet, these were not sufficient to attain the minimum threshold of seriousness required for art. 3 to be applicable. Moreover, their allegations of mistreatment and insults received from police officers, or that meals were distributed by throwing them on the floor were not based on any objective elements other than what the applicants state, leading the court to disregard them. **In light of the above, the applicants' reception conditions on board of the *Vincent* and *Audace* ships did not contravene art. 3.**

- alleged violation of art. 4 of the 4th protocol to the ECHR (forbidding collective expulsions)

The applicants claimed they were victims of a collective expulsion, a claim which the government rejects. The court admitted the complaint.

The applicants claimed they were expelled collectively, merely on the basis of their origin and without any consideration of their personal situation. Summary removal procedures enacted within the framework of bilateral agreements with Tunisia do not respect the safeguards provided by art. 4 of the 4th protocol to the ECHR. Such procedures merely require establishing a foreigner's nationality, disregarding their personal situation. The applicants noted that immediately after disembarking, the Italian border authorities recorded their arrival and fingerprinted them. They did not have any further verbal contact with the authorities in question until they were made to board the aircraft which carried them to Tunis. They were invited to state their identity again, this time with the Tunisian consul present. In such conditions, the applicants do not understand when the Italian authorities could have collected the necessary information to carefully assess their individual situations. The repatriation orders did not contain any hint of such an assessment. They were standard documents which merely indicated the interested parties' civil status and nationality, and a formula printed on them in advance ruled out the existence of cases [detailed in] art. 10.4 of leg. dec. 286/1998 [which excludes cases involving political asylum from the scope of art. 10].

The applicants highlighted further elements which they viewed as evidence of a collective expulsion being enacted: the large number of Tunisians who faced the same experience; the fact that before the operation they complained about, an interior ministry note had announced such operations on 6 April 2011; the identical wording of the repatriation orders [technically refusal of

entry orders involving accompaniment to the border]; the difficulty for the people concerned to contact a lawyer.

The government denied that any collective expulsion occurred, as the repatriation orders are individual acts separately prepared for each of the applicants. These orders were adopted following careful evaluation of each applicant's situation, they were translated into Arabic and handed to the people concerned, who refused to sign the document certifying they had been notified. The government recalled the Palermo *gip*'s ruling that the returns were legitimate and that the delay in adopting the orders should be interpreted while considering the particular situation which existed. The time which elapsed between their arrival and return was twelve days for the first applicants and nine for the second and third respectively, which the government does not deem excessive. Personal *laissez-passer* documents were issued to enable the applicants' return to Tunisia. Past agreements between Italy and Tunisia contributed to repressing migrant trafficking, which the United Nations Convention to fight transnational organised crime deems desirable. The government noted that, upon arrival, the "irregular" migrants were identified by the police in personal interviews during which interpreters and cultural mediators were present, and their photographs and fingerprints were taken.

The court noted that the applicants had individual repatriation orders issued against them, yet these were drafted using identical wording, except for their personal details. The fact that similar decisions were adopted regarding several foreigners does not, in itself, mean that a collective expulsion has occurred without them being able to argue against their expulsion before the competent authorities. Nor may the court conclude that there has been a violation of art. 4 of the 4th protocol if the lack of an individual deportation measure results from the concerned people's behaviour. Further, the court noted that, unlike in the *Hirsi Jamaa et al* case, and as happened to all the migrants who disembarked in Lampedusa in September 2011, the applicants were subjected to identification procedures. Thus, the applicants were aware that immediately after their arrival the Italian police had recorded their identity and fingerprinted them.

Nonetheless, the court noted that the mere existence of an identification procedure does not suffice to exclude the existence of a collective expulsion. Several elements lead it to consider that in this case, the expulsion which is being challenged was of a collective nature. Specifically, the repatriation decrees did not contain references to the personal situation of the people concerned; the government did not produce any documents proving that individual interviews concerning the specific position of each of the applicants were held before the issuing of orders for their return; a large number of people with similar origins experienced the same fate; and the bilateral agreement between Italy and Tunisia was not released and envisaged the repatriation of irregular Tunisian migrants using simplified procedures on the basis of their mere identification by Tunisian consular authorities. These elements were deemed sufficient to exclude the existence of sufficient safeguards that the individual situation of each of the people concerned was considered in a real and differentiated manner. **The court thus concluded that the removal of the applicants was collective in nature and thus contravened art. 4 of the 4th protocol to the ECHR.**

- on the alleged violation of art. 13 in combination with arts. 3 and 5 and art. 4 of the 4th protocol to the ECHR (availability of effective remedies in Italian law)

The applicants complained that Italian law did not provide them with an effective remedy to argue their complaints based on arts. 3 and 5 of the ECHR and on art. 4 of the 4th protocol to the ECHR, an allegation which the government rejected. The court recalled that its jurisprudence deems that

the ECHR's art. 5.4 constitutes a *lex specialis* in relation to the general requirements of art. 13. The facts which the applicants complain about on the basis of art. 13 in combination with art. 5 are identical to those examined from the perspective of art. 5.4 and thus fall within the conclusions reached by the court in that regard. Insofar as the applicants invoke art. 13 of the ECHR in combination with its art. 3 and art. 4 of the 4th protocol to the ECHR, their complaint is connected to those examined above and are therefore admissible.

The applicants observed that the repatriation orders stated that they could be contested within a 60-day deadline before the Agrigento justice of the peace, and they also explained that such appeals did not have a suspensive effect. The applicants deem that the court's jurisprudence establishes that the suspensive nature of an appeal in this field is a condition for its effectiveness. Moreover, they deny receiving copies of their deportation order, as is shown by the fact that their signatures do not feature in the document certifying their notification. Neither did they have the possibility of contacting legal counsel, because lawyers did not have access to their places of detention and could not be contacted by telephone.

Regarding the ruling of the Agrigento justice of the peace which annulled two repatriation orders, the applicants noted that they concerned two migrants whose expulsion was not executed and who, in application of art. 14 of leg. dec. 286/1998, were detained in CIEs. They had contested both the legality of their return and the legal basis for their detention in a CIE, and had only been able to do so because they were still in Italian territory. The applicants argued that, unlike them, they could only have appealed the legal basis for their repatriation orders, an option that would only have been available to them after their return to Tunisia. The government confirmed its claim that the applicants could have appealed their repatriation order before the Agrigento justice of the peace.

The court noted that art. 13 of the ECHR guarantees the existence in domestic law of an appeal to safeguard the rights and freedoms enshrined in the ECHR. This means that an internal appeal procedure must exist enabling the examination of a "defendable complaint" based on the ECHR and offering appropriate redress. The scope of this obligation varies depending on the nature of the complaint. Such appeals must be effective in law and in pratice alike and this "effectiveness" does not depend on the certainty of a positive outcome. The authority before which such appeals may be filed does not have to be a judicial authority, but in such cases, its powers and the guarantees it offers must be considered to appreciate the effectiveness of any appeals submitted before it. The combination of available appeals under domestic law may fulfil the requirements of art. 13 even if none of them guarantee all of them on their own. The court also recalled that, in its *De Souza Ribeiro vs. France* case (22689/07, sentence of 2012), it ruled that the effectiveness of an appeal under art. 13 requires an independent and rigorous examination and an appeal which has a full suspensive effect. This applies to cases involving: a) a complaint according to which expulsion would expose the person concerned to a real risk of treatment contravening art. 3 of the ECHR or a threat to their right to life under its art. 2; and b) complaints involving art. 4 of the 4th protocol to the ECHR.

Applying these principles to the case, the court recalled admitting the applicants' complaints resulting from a lack of knowledge of the material aspect of art. 3 and art. 4 of the 4th protocol to the ECHR. It also ruled that the latter provision was contravened, as had art. 3, with regards to the reception conditions experienced by the applicants in the Contrada Imbriacola CSPA. Hence, such complaints are "defendable" insofar as the goals of the ECHR's art. 13 are concerned. It further notes that the Italian government did not indicate any means of appeal through which the

applicants could have denounced the reception conditions in the CSPA and on board of the *Vincent* and *Audace*. An appeal before the justice of the peace against the deportation orders would have only served to contest the legality of their repatriation to Tunisia, and they were only issued at the end of their terms in detention.

Consequently, there was a violation of art. 13 in connection with art. 3.

Insofar as the applicants complained that there was no effective remedy available to oppose their expulsion from the viewpoint of its collective nature, the court deemed that it was not proven that such an issue could not have been raised within the framework of an appeal against their repatriation orders before the justice of the peace. The Agrigento justice of the peace's decisions submitted by the Italian government show that the magistrate focussed on the procedure for the adoption of the appealed repatriation orders, evaluating their legality from the perspective of domestic law and the Constitution. There is no reason to infer that a possible complaint based on the failure to consider the personal situation of the people concerned would have been disregarded by the justice of the peace. Nonetheless, the deportation orders explicitly stated that any appeals before the justice of the peace would not have had a suspensive effect, which means that such appeals would not have complied with art. 13 of the ECHR's requirements insofar as they did not satisfy the criterion of their suspensive effect which was upheld in the *De Souza Ribeiro* case. The court recalls that the obligation deriving from art. 13 that deferring the execution of the measure against which an appeal has been lodged cannot be envisaged as an accessory measure.

Thus, there has been a violation of art. 13 of the ECHR in combination with art. 4 of the 4th protocol to the ECHR.

Personal opinions

Four judges of the court also produced their own concurring and partly dissenting opinions. In the first case, judge Keller's concurring opinion expressed her willingness to discuss a point which the sentence failed to discuss. Points 126-127 of the sentence rested on the Italian government's submission of the Palermo *gip*'s findings whereby a "state of necessity" in the Italian penal code justified the impossibility of punishing any officers or officials for acts committed to protect others from a real danger of serious personal harm. This issue was raised in reference to the decision to transfer migrants from the CSPA following the revolt, fire and disturbances between locals and migrants. Point 127 noted that the court does not underestimate the problems that states may face when there are exceptional inflows of migrants and the many obligations which burdened the Italian state in that context. Yet, she stressed that the Palermo *gip*'s findings only concerned individual officials' penal responsibility, whereas art. 54 of the penal code is not relevant to assessing a state's responsibility vis-à-vis the ECHR. Articles on the responsibility of states for acts deemed unlawful at an international level include situations of "distress", whereby responsibility is excluded if there are no other reasonable means to save one's life or that of others it is tasked to protect. Yet circumstances excluding responsibility are deferred due to the ECHR's special rules, and a criterion of "necessity" is included in several key articles of the ECHR. The only article which allows contracting parties to derogate from their ECHR obligations is art. 15, in a state of urgency. Italy did not invoke it and, most importantly, such derogations can never affect facts concerning art. 3.

Judges Sajó and Vučinić issued a partly dissenting opinion stating that although they voted with the majority in finding a violation of art. 5.1, 5.2 and 5.4, they deemed that conditions at the CSPA in Lampedusa did not reach the threshold required for a violation of art. 3. This was because the

duration of the ill-treatment in question is important in establishing this point and the court has ruled against art. 3 violations when detention periods were too brief, and did the same in cases involving longer periods of detention than those experienced by the applicants. When the court did find such violations in spite of short detention periods, there were further circumstances which outweighed the short period of detention. These includes cases involving particularly vulnerable individuals, due to sickness or mental health conditions, and exceptionally egregious conditions such as overnight stays in confined areas with no place to lie down, lack of access to sanitary facilities, or confinement in locked cells which were unsuited for habitation or dangerous. Several aggravating elements were necessary in these cases and, even in such circumstances, only three cases concerned detentions as short as those of the applicants. The applicants are healthy young men, they did not allege ill-treatment by Italian officials, they had access to food and facilities, they could move around within the centre and they were there for less than four days. Moreover, their placement in the CSPA occurred in the context of an emergency situation on an island which lacked an adequate infrastructure. They concede that conditions on the island were "distressing and unfit for long-term stays". Yet, conditions which may reach the threshold of art. 3 with regards to long-term stays may fail to reach this threshold in the case of short stays, because "a short duration can minimise the harm caused by poor conditions", which is why they found that there was no violation of art. 3.

They also disagreed with the majority conclusion that art. 4 of the 4th protocol to the ECHR was contravened, detailing their understanding of the nature of a "collective expulsion". They deem it "vital" to set apart cases involving the "expulsion of many individuals in similar situations (which is permitted) and the expulsion of a group *qua* group (which is prohibited)." These violations have rarely been recognised by the court, adhering to the historical definition of removals in which "expulsion took place on the basis of group removal rather than on an individual basis". They identify two sets of circumstances which are necessary to identify this kind of violation, neither of which apply: when members of a group are targeted for expulsion on the basis of their group membership; when an entire group of people are pushed back from a territory without considering their individual identities. The rare cases in which this violation was recognised involved the targeting of specific population groups for removal (the Roma in *Čonka vs. Belgium* and Georgians in *Georgia vs. Russia*) or the pushback of an entire group of people without adequate identification of the group members' individual identities (in the *Hirsi Jamaa et al vs. Italy* and *Sharifi et al vs. Italy and Greece* cases).

The two judges argued that the applicants were not expelled due to membership of an "ethnic, religious or national group", that they were returned to a safe country and that, in any case, they were not asylum seekers and thus there was no problem of *non-refoulement*. Their unlawful entry in Italy and their ineligibility to do so, meant that any checks other than identity, nationality and existence of a safe state to return them to was unnecessary. Identification was enacted on an individual basis upon arrival and again in the presence of Tunisian consular authorities, followed by the issuing of individual deportation orders by the Italian judicial authority, and they were returned in accordance with the treaty between the two countries. They deemed that the streamlined process did not disregard the rights of individual migrants, but took into account the relevant considerations when deciding on deportation.

Referring back to a restrictive reading of collective refoulement limited to "the national genocidal policies of the twentieth century", they deemed that the majority decision does "a grave disservice" to Italy's attempts to police its borders, "misrepresenting" the situation that both the Italian

authorities and migrants faced. They ruled out the applicability of art. 4 of the 4th protocol to the ECHR "in the present case of non-discriminatory and procedurally regular deportation".

Judge Lemmens agreed with all the majority findings concerning violations of the ECHR, but deemed the applicants were granted excessive damage compensation payments.

By Yasha Maccinico (February 2016)

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