A template for protecting human rights during the 'refugee crisis'? Immigration detention and the expulsion of migrants in a recent ECtHR Grand Chamber ruling

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Introduction

On the 15th of December 2016 the European Court of Human Rights Grand Chamber handed down its judgment in the case of *Khlaifia and Others v. Italy*, which partially reversed the Chamber ruling issued on the 1st of September 2015. The case is about immigration detention at the Italian borders (including the island of Lampedusa) and the expulsion of aliens from Italy to Tunisia. Whilst the events took place in 2011, during that peculiar time which was in the immediate aftermath of the Arab Spring, the issues raised before the Court by the applicants and the principle outlined by the judgments appears relevant to the current refugee crisis and its management by the European Union Institutions and Member States.

1. The Facts

The applicants are three Tunisian nationals who, just like thousands of migrants every year, attempted to enter Europe by crossing the Mediterranean Sea from northern Africa to the Italian coast on board rudimentary vessels. The events took place in September 2011, when the flux of migrations was particularly high due to the revolutionary riots (so-called Arab Spring), which had just taken place in some North African countries. While heading to Lampedusa, the applicants were intercepted by the

Italian coastguard and brought to the "Early Reception and Aid Centre" ("Centro di Soccorso e Prima Accoglienza" or "CSPA") located on the island. They were kept at the centre for several days: the first applicant from the 17th to the 20th of September; and the second and the third applicants from the 18th to the 20th of September. When a fire partially damaged the centre, the migrants were first taken to a sports facility and then they escaped and proceeded to move around the island. On the 22nd of September, after having been stopped by the police, the applicants were transferred by airplane to Palermo (Sicily), where they were confined on board ships moored in the harbour for a few days, together with hundreds of other migrants. On the 27th of September, dozens of these migrants, including the second and third applicants, were taken by bus from the ships to the Palermo airport, where they briefly met the Tunisian Consul and immediately afterwards were returned to Tunisia. On the 29th of September, the first applicant followed the same procedure and was returned to Tunisia as well.

2. The Application to the ECHR and the Chamber Judgment

The applicants have alleged that Italian Government violated several of their rights as provided by the ECHR. Firstly, their right to liberty (Article 5 ECHR) was violated because the Lampedusa reception centre and the ships had been used as detention centres without any legal basis (Article 5 § 1), without providing any information to the detainees (Article 5 § 2), nor granting them access to judicial review (Article 5 § 4). Secondly, their right not to be subjected to inhuman and degrading treatment (Article 3) was violated on account of the overcrowding and the poor health and hygiene conditions in which they were held both in the reception centre and on board the ships. Thirdly, their right not to be subjected to collective expulsion (Article 4 of Protocol No. 4 to the Convention) was violated because their forced returns had been decided according to a bilateral agreement signed between Italy and Tunisia in April 2011, i.e. on the sole basis of their nationality, without any consideration of their individual situations. Finally, their right to an effective remedy (Article 13), taken together with Article 3 and Article of 4 Protocol No. 4 was violated because they could neither effectively challenge before a national court the conditions of their detention nor the return procedure.

The Chamber judgment was handed down on the 1st of September 2015. The Court unanimously found violations of Article 5 with regard to § 1, § 2 and § 4. As to Article 3, the Court majority (five votes to two) found a violation in relation to the conditions in which the applicants were held at the Lampedusa reception centre, but not in relation to those conditions in which the applicants were held on board the ships moored in Palermo. The same majority also pointed out a series of factors indicating that the

expulsion was collective in nature and, thus, in breach of Article 4 of Protocol No. 4 (see § 156: «the refusal-of-entry orders did not contain any reference to the personal situations of the applicants; the Government failed to produce any document capable of proving that individual interviews concerning the specific situation of each applicant had taken place prior to the issuance of the orders; a large number of individuals of the same origin, around the time of the facts at issue, were subjected to the same outcome as the applicants; and the bilateral agreements with Tunisia, which have not been made public, provided for the return of unlawful migrants through simplified procedures, on the basis of the mere identification of the person concerned by the Tunisian consular authorities»). Finally, again the majority held that there had also been a violation of Article 13 taken together with Article 3, due to the lack of any effective remedy to challenge the conditions of confinement; and another breach of Article 13 taken together with Article 4 of Protocol No. 4, because the refusal-of-entry orders issued against the applicants expressly stated that the lodging of an appeal would not have suspended their enforcement.

3. The Grand Chamber Judgment

In February 2016, the Italian Government request of referral to the Grand Chamber was accepted. The public hearing took place on the 22nd of June 2016 and the final judgment was delivered on the 15th of December 2016. The Grand Chamber confirmed the violations of Article 5 § 1, § 2 and § 4 and confirmed a violation of Article 13 taken together with Article 3.

3.1. Statements Concerning Immigration Detention

Just as the Chamber had previously determined, the Grand Chamber found unanimously that there had been violations of Article 5 § 1, § 2 and § 4.

The Government had objected arguing that the applicants were not deprived of their liberty (and thus the Court lacked jurisdiction ratione materiae under Article 5), since neither the Lampedusa reception centre nor the ships moored in Palermo were designed for detention but rather to provide first aid and assistance (in terms of health and hygiene) to the migrants for the time necessary to identify them and to proceed with their return (§§ 58-60). The Court rejected the argument by recalling that, «in order to determine whether a person has been deprived of liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question» (§ 64). With regard to the present case, the Court began by noting that it was not in dispute between the parties, and it was also confirmed by reports issued by the Parliamentary Assembly of the Council of Europe and the Italian Senate’s Special Commission for Human Rights, that the reception centre was under

surveillance and that the migrants were prohibited from leaving the centre (§ 65), and that the same happened with the ships, which the Government considered "a natural extension of the reception centre" (§ 66-69). Additionally, the Court noted that the deprivation of liberty was not insignificant in duration: indeed, summing up the period spent in the Lampedusa reception centre and the period on board the ships, the confinement lasted for about twelve days in the case of the first applicant and about nine days in that of the second and third applicants (§ 70). Finally, the Court emphasized that neither the classification of the confinement under domestic law, nor the authorities' alleged aim to assist the applicants and ensure their safety, could alter the nature of the constraining measures imposed. Indeed, «even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty» (§ 71).

Having stated that Article 5 applied to the case, the Court concluded that its provisions had been violated by the Italian Government. With regard to Article 5 § 1, even if the detention of the applicants under the provision of letter (f) was to control the liberty of aliens in an immigration context (§ 96), the Court noted that it was devoid of any legal basis. According to Italian immigration law, immigration detention is only possible within dedicated centres (the CIE, "Centres for Identification and Expulsion of Aliens") and under certain strict circumstances (for instance, where a refusal-of-entry measure or an expulsion cannot be implemented immediately, because it is necessary to provide assistance to the alien, to conduct additional identity checks, or to wait for travel documents or the availability of a carrier): in the present case, the Government itself admitted that the applicants had not been held within a CIE because those conditions were not met, thus conceding that their detention was not authorized under Italian law (§ 98). Furthermore, the Court stated that the bilateral agreement for readmission of aliens signed between Italy and Tunisia could not provide a proper legal basis for detention, above all because its full text had not been made public and, thus, it was not accessible to the applicants (§ 102-103).

With regard to Article 5 § 2, having already found that the applicants' detention had no clear and accessible legal basis in Italian law, the Court failed to see «how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or thus have provided them with sufficient information to enable them to challenge the grounds for the measure before a court» (§ 117); to be clear, the Court pointed out that «information about the legal status of a migrant or about the possible removal measures that could be implemented cannot satisfy the need for information as to the legal basis for the migrant's deprivation of liberty» (§ 118).

With regard to Article 5 § 4, the Court recalled that, where detainees are not informed of the reasons for their deprivation of liberty, their right to appeal against their

detention is deprived of all effective substance (§ 132). Therefore, the Court considered that its finding under Article 5 § 2 constituted sufficient grounds to conclude that the Italian legal system did not provide the applicants with an effective remedy to challenge the lawfulness of their deprivation of liberty (§ 133). It must also be emphasized that, in the part of the judgment addressing the issue of Article 5 § 1, the Court already pointed out the unavailability of effective remedies by arguing that, since the Lampedusa reception centre and the boats were formally regarded as reception facilities, the applicants could not have enjoyed the safeguards of habeas corpus applicable to placement inside the Italian detention centres for migrants (the CIE), i.e. the validation by an administrative decision subject to review by a competent court (§ 105).

3.2. Statements Concerning Inhuman and Degrading Treatment

With regard to Article 3, the Grand Chamber confirmed the Chamber judgment as to the conditions on board the ships and reversed it with regard to the Lampedusa reception centre, thus declaring that in neither situation did the applicants suffer inhuman or degrading treatment.

As a general statement, the Grand Chamber pointed out that, without prejudice to the absolute character of Article 3 and the related principle that an increasing influx of migrants cannot absolve a State of its obligations under that provision, yet «it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose» (§ 185). The Court took into consideration that the situation in 2011 was exceptional (§ 180) and therefore decided to make its assessment bearing in mind that «the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time» (§ 185).

As to the confinement in Lampedusa, the Grand Chamber found that, having considered the situation taken as a whole, as well as the specific circumstances of the applicants' case, the treatment they complained of did not exceed the level of severity required for it to fall within Article 3 of the Convention (§§ 190-198). Among other factors, the Court specifically stressed that, «even though the number of square metres per person in the centre's rooms has not been established [...] the freedom of movement enjoyed by the applicants in the CSPA must have alleviated in part, or even to a significant extent, the constraints caused by the fact that the centre's maximum capacity was exceeded» (§ 193). Moreover, the Grand Chamber emphasized that the applicants had been confined within the reception centre only for three and four days respectively, and that their cases could be distinguished from those where the violation was recognized in spite of the short duration of the confinement (§ 195-196).

As to the confinement on board the ships moored in Palermo the Grand Chamber pointed out that the applicants had not presented any objective proof of their allegations (overcrowding and extreme health and hygiene conditions) and it refused their request to shift the burden of proof upon the Government: «the burden of proof in this area may be reversed where allegations of ill-treatment at the hands of the police or other similar agents of the State are arguable and based on corroborating factors, such as the existence of injuries of unknown and unexplained origin» (§ 206). Furthermore, the Grand Chamber attached «decisive weight» to the fact that the Government had produced before it a judicial decision rendered by an Italian court contradicting the applicants' account. Although the applicants criticized this decision with regard to its evidentiary basis (they highlighted that the decision was mainly based on the statements of a member of the Italian Parliament to the press and not reiterated at the hearing, and that the police had been present when the member of the Parliament visited the ships), the Court ruled that mere speculation cannot call into question the assessment of the facts by an independent domestic court (§§ 207-208).

3.3. Statements Concerning Collective Expulsions

By a vote of sixteen to one, the majority of the Grand Chamber reversed the ruling of the Chamber and declared that no violation of Article 4 of Protocol No. 4 to the Convention had occurred.

The Grand Chamber first recalled that, according to its case-law, collective expulsion is to be understood as «any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group» (§237). The purpose of this provision is in fact «to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority» (§ 238).

With regard to the present case, the Court noted that, on the one hand, it was undisputed that the applicants underwent identification on two occasions (i.e. immediately after their arrival, by the Italian authorities at the reception centre; and before they boarded the planes for Tunis, by the Tunisian consul); on the other hand, the parties disagreed with regard to the conditions of the first identification. The applicants alleged that the Italian authorities had merely recorded their identities and fingerprints, without taking their personal situations into account, while the Government instead argued that the identification had consisted of a genuine individual interview, carried out in the presence of an interpreter or cultural mediator,

following which the authorities filled out an "information sheet" containing personal data and any circumstances specific to each migrant. Although the Government was unable to produce the applicants' "information sheets", the Court accepted its version, considering it a «plausible explanation» that those documents had been destroyed in the fire at the reception centre (§ 246).

Additionally, the Grand Chamber stated that «Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State» (§ 248). Noting that the applicants remained between nine and twelve days in Italy, the Court concluded that «during that not insignificant period of time the applicants had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy» (§ 249). Moreover, the Court emphasized that, before boarding the planes for Tunis, the applicants were received by the Tunisian Consul, and that this later check «gave them a last chance to raise arguments against their expulsion» (§ 250).

The Grand Chamber then addressed other factors which the Chamber had considered relevant to prove the collective nature of the expulsion, i.e. the fact that the refusal-of-entry orders had been drafted in comparable terms, only differing as to the personal data of each migrant, and that a large number of aliens of the same origin had been expelled at the relevant time. In this regard, the Grand Chamber referred to case law according to which such scenarios do not automatically lead to a violation if each person concerned had been given the opportunity to make arguments against his expulsion to the competent authorities on an individual basis (§§ 239 and 251).

The Court then further noted and called into question the usefulness of an individual interview in the present case, by observing that «the applicants' representatives, both in their written observations and at the public hearing, were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients' presence on Italian territory and preclude their removal» (§ 253).

Finally, the Court considered it «unnecessary [...] to address the question whether, as the Government argued, the April 2011 agreement between Italy and Tunisia, which has not been made public, can be regarded as a "readmission" agreement within the meaning of the Return Directive, and whether this could have implications under Article 4 of Protocol No. 4» (§ 255).

3.4. Statements Concerning the Availability of Effective Remedies at National Level

The Grand Chamber confirmed the Chamber judgment on the violation of Article 13 taken together with Article 3, but reversed it with regard to a violation of Article 13 taken together with Article 4 of Protocol No. 4.

As to inhuman and degrading treatments, the Grand Chamber observed that the Government did not indicate any remedy by which the applicants could have complained about the conditions in which they were held both in Lampedusa and on board the ships. For instance, an appeal to the competent court against the refusal-of-entry orders would have served only to challenge the lawfulness of their removal (§ 270).

As to collective expulsion, given that a remedy was available under national law, the Court examined whether the fact that such remedy did not provide an automatic suspensive effect of the removal order constituted itself a violation of Article 13. While the Chamber answered this question in the affirmative, the Grand Chamber held the opposite opinion: relying on the case-law De Souza Ribeiro v. France, Čonka v. Belgium and Hirsi Jamaa and Others v. Italy, the Grand Chamber stated that an obligation for States to provide for such a remedy (i.e. an appeal with automatic suspensive effect) only arises «where the person concerned alleges that the enforcement of the expulsion would expose him or her to a real risk of ill-treatment in breach of Article 3 of the Convention or of a violation of his or her right to life under Article 2, on account of the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialised» (§ 276). Given that in the present case the applicants did not claim any of those risks, the Court concluded that the absence of an automatic suspensive effect did not entail a violation of Article 13 taken together with Article 4 of Protocol No. 4.

4. Comment

Due to its scope and abundance of content, the *Khlaifia and Others* judgment deserves more thorough deliberation than that which follows. However, it is worthwhile to highlight herein some of the strengths and weaknesses, which arise in its interpretation. An Annex summarises the implications for interpretation of EU law in this field.

With reference to rulings relating to Article 5, the judgment represents a major step forward in the process of improving the protection for those people, even today, who are crossing the European borders despite not having any valid entry documentation. Suffice it, in this regard, to refer to October 2016, when Amnesty International released a report wherein it denounced, among other things, the practices of arbitrary detention

carried out within the new “Hotspots” located at the European borders (see Amnesty International, Hotspot Italy. How EU’s flagship approach leads to violations of refugee and migrant rights, p. 26-29). Hereinafter, if the Member States continue to find the deprivation of liberty as a necessary tool to contrast illegal migration, they must adopt laws, which clearly and precisely govern the substantive requirements and procedural guarantees with particular reference the right to habeas corpus. The European Court, indeed, has established that no de facto deprivation of liberty exempt from judicial review is compatible with the aim of Article 5, explicitly stating that this applies "even in the context of a migration crisis" (§ 106).

With reference to ECHR Article 3, it is necessary to consider the judgment excerpt wherein the Court highlights the necessity to take into consideration the emergency situation that began in 2011 due to the increased migration as a consequence of the Arab Spring. While, from one side, such a statement is troubling because it seems like an attack on the mandatory character of Article 3, as well as signalling a step backwards with respect to the principles established in the *M.S.S. v. Belgium and Greece* (§ 223) and *Hirsi Jamaa and Others v. Italy* (§§ 122 and 176) cases; on the other side, its scope must be defined in light of the characteristics of the case, namely, to a situation in which - at least according to the findings of the Court - the respondent State had not deliberately violated the prohibition against inhuman and degrading treatment, but rather found itself faced with the objective inability to provide better immigration reception conditions. The ratio decidendi, therefore, complies with the logic of the principle ad impossibilia nemo tenetur. In a key criticism, however, it is possible to see how the unlawful deprivation of liberty inflicted by the Italian Government on migrants had contributed to aggravating the consequences of the humanitarian emergency in terms of overcrowding and the poor health and hygiene conditions of the places where the migrants have been confined: the Grand Chamber could perhaps have taken greater consideration of this circumstance in assessing the existence of a violation of Article 3.

Turning, finally, to the aspects related to the prohibition against collective expulsions and the availability of domestic remedies to challenge them, it is notable how the judgment is thwarted by a fundamental ambiguity with regard to the scope of Article 4 of Protocol No. 4 (and its relationship with Article 13).

It is unclear whether the Court denied the existence of the collective expulsion because it determined that the applicants had benefited from individual interviews (according to the version provided by the Government and deemed reliable by the Court), or because the Court determined that the Government had no obligation to conduct individual interviews because no risk arose to the life or physical well being of the applicants according to Articles 2 and 3 of the Convention. The simplest and most

plausible solution is that the Court intended to settle both issues cumulatively. That being said, the assertion that the obligation to conduct individual interviews exists only in the presence of risks to life or physical well being itself is open to criticism. This interpretation, in fact, makes the provision of Article 4 of Protocol No. 4 virtually useless (interpretatio abrogans), assuming that the same identical result is reached by directly applying the principle of non-refoulement arising from Articles 2 and 3 (according to the established case law starting from the famous case of *Soering v. United Kingdom*).

For this reason, the restrictive interpretation of Article 4 of Protocol No. 4 proposed by the Court does not seem reasonable and sound. The same is true with reference to the guarantees arising from Article 13 in relation to Article 4 of Protocol No. 4: if the automatic suspensive effect was mandatory only in the presence of risk of harm, then the protection provided by Article 13 in relation with Article 2 and 3 would be enough. The most persuasive interpretation of Article 4 of Protocol No. 4 seems, instead, to be that which was proposed by the applicants - and also supported by the third parties that intervened before the Grand Chamber (see in particular §§ 234-236), as well as by the partially dissenting opinion of Judge Serghides – according to which, Article 4 of Protocol No. 4 provides procedural guarantees that are independent from the concrete situation of the individual applicant because it is designed to ascertain such situation. Therefore, the only effective domestic remedy pursuant to Article 13 to prevent the violation of such procedural guarantee is necessarily one that envisages an automatic suspensive effect of the expulsion. A third party (see § 265) and the aforementioned dissenting opinion expressed their opinions to this effect (see in particular §§ 73-74 of the opinion, where the judge refers to the De Souza Ribeiro, Čonka and Hirsi Jamaa and Others case law in order to highlight how, in hindsight, they offered arguments supporting the opposite conclusions than those of the majority).

Therefore, valid arguments exist to support that the violations of Article 4 of Protocol No. 4 and Article 13 in relation to it, are integrated in each case in which the applicants are not given the opportunity to "put forward arguments" in support of their condition, nor are they granted a remedy having suspensive effect, regardless of any prediction concerning the contents of the statements they might have made to the authorities, as well as, any evaluation regarding the "safe country" nature of the destination country (without prejudice to the fact that, if risks to life and physical well being of the foreigner actually arise, his expulsion could lead to different and further violations of Articles 2 and 3).

This interpretation, in addition to being consistent with the text and the general scheme of the Convention, is the only one able to protect migrants without valid

documents from potential abuses and arbitrary decisions by the border authorities: in this context, therefore, it seems that the Strasbourg Court has missed an important opportunity to impose a substantial level of protection of fundamental rights with regard to the current immigration crisis that Europe is facing.

Barnard & Peers: chapter 26

JHA4: chapter I:7

Photo: detention on Lampedusa

Photo credit: UNHCR

Annex: the EU law implications

Professor Steve Peers

Neither the main judgment in this case nor the concurring and dissenting judgments discuss EU law aspects in any detail. Nevertheless, in light of the ECJ's tendency to take account of Strasbourg judgments, the ruling will have consequences for the interpretation of EU law, particularly in the context of the perceived 'migration crisis' which the ECtHR refers to.

First of all, the ruling that being kept in asylum reception centres and ships may amount to detention is significant for interpreting the EU's reception conditions Directive (as regards detention of asylum-seekers) and the Returns Directive (as regards the detention of irregular migrants, given that the ECJ has already ruled that the ECtHR's interpretation of 'detention' is relevant for applying the EU law on the European Arrest Warrant.

Secondly, the interpretation of 'lawfulness' of detention under the ECHR is also relevant, given that the EU legislation requires such detention to be lawful as well.

Thirdly, the insistence that judicial control of detention is essential 'even in the context of a migration crisis' makes clear that there is no 'crisis' excuse to avoid judicial review of migration or asylum detention (for the most recent ECJ case law on this issue, see discussion here). The ruling on the breach of Article 5(4) ECHR regarding judicial review follows from the breach of Article 5(2), and is relevant to the interpretation of Article 9(3) of the reception conditions Directive and Article 15(2) of the Returns Directive.

Fourthly, as for the breach of Article 5(2) ECHR because the migrants were not told why they were detained (it being irrelevant that they know they were entering illegally) confirms the wording of Article 9(4) of the reception conditions Directive, but adds to

the wording of Article 15(2) of the Returns Directive, which contains no express requirement to inform.

Fifth, the ruling that there was no breach of Article 3 as regards conditions in either reception centres or ships, giving states some latitude in the context of the migration crisis, is relevant to the interpretation of the rules in the reception conditions Directive and the Returns Directive on the conditions of detention.

Sixth, the Returns Directive and the asylum procedures Directive do not ban collective expulsion explicitly, but it is implicit from the requirement of individual decision-making and the obligation to comply with the EU Charter of Rights, which bans collective expulsion expressly. The ECtHR judgment is therefore relevant in that it confirms that the ban on collective expulsion also applies if States define it as a refusal of entry, but also as regards the ruling that the ECHR is not breached in the absence of individual interviews as long as they can make a case against expulsion. This falls well below the standard in the asylum procedures Directive as regards the asylum process, and also probably below the 'right to be heard' guaranteed by the ECJ case law regarding irregular migrants and the Returns Directive.

Seventh, the breach of Article 13 ECHR as regards the lack of an effective remedy regarding detention conditions could be relevant to EU law. Although a remedy on this issue is not expressly mentioned in Article 10 of the reception conditions Directive or Article 16 of the Returns Directive, it follows from Article 47 of the Charter (the 'effective remedies' clause) that such a remedy must be available.

Finally, the compliance with Article 13 ECHR as regards the lack of a right to of a right of suspensive effect of an appeal as there was no allegation of a risk of breaching Articles 2 or 3 ECHR justifies the lack of suspensive effect of a challenge to an expulsion under the Returns Directive, except in special cases as defined by the ECJ. Conversely, it confirms that there must be either suspensive effect of an appeal or the possibility to request such suspensive effect in asylum cases, as set out in the procedures Directive.