

Controlling Migration through De Facto Detention: The Case of the ‘Diciotti’ Italian Ship

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Guest post by [Francesca Cancellaro](#) and [Stefano Zirulia](#). Francesca received a PhD in Law from the University of Bologna and works as Lawyer specialised in criminal law and human rights. Stefano is Lecturer in European Criminal Law at the University of Milano, currently a visiting scholar at Lund University. Both authors participated in the proceedings before the European Court of Human Rights (ECHR) as counsels for the applicants in the *Khlaifia and others v. Italy* case.

In December 2016, the Grand Chamber of the European Court of Human Rights delivered a seminal judgement on immigration detention (*Khlaifia and others v. Italy*, application no. 16483/12). The case concerned the pre-admittance detention and subsequent expulsion of three migrants who arrived in Italy by sea in September 2011, following the ‘Arab Spring’ events in Tunisia. The migrants were intercepted by the Italian coastguard and transferred to the ‘Early reception and aid centre’ (CSPA) located on the island of Lampedusa, where they were kept for few days. When the centre was partially destroyed by a fire, the migrants were transferred aboard two ships moored in the Palermo harbour, always under the custody of border authorities. Finally, they were returned to Tunisia. The European Court of Human Rights found, inter alia, a violation of art. 5 of the Convention, for the migrants had been illegally deprived of their personal liberty within both the centre and the ships.

In August 2018, the case of the migrants held on the Diciotti Italian military ship inflamed the public debate in Italy yet another time. More than one hundred people coming from Eritrea and other African countries were rescued at high sea by patrol boats of the Italian coastguard and immediately transferred aboard a larger boat, Diciotti. The Italian Government granted to Diciotti the permission to dock in Catania harbour; however, for several days the Ministry of the Interior refused to let migrants disembark, claiming that the EU, and not Italy alone, should take care of people arrived from Africa by boat.

What do the two cases – *Khlaifia* and *Diciotti* – have in common? And, more importantly, is the *Khlaifia* ruling relevant when assessing the legitimacy of the Italian Government’s conducts in *Diciotti*?



MIGRANTS DISEMBARKING FROM DICIOTTI

Both cases deal with migrants who were deprived of their personal liberty for several days aboard a ship; in other words, a de facto detention carried out by border authorities without a detention order. In the *Khlaifia* case, migrants were detained for

nine days; almost ten days had passed before migrants were released and allowed to disembark from the Diciotti ship.

That said, since the binding effects of the ECHR rulings go beyond the specific individual case (see Grand Chamber, 13 Dec. 2013, Paposhvili v. Belgium, application no. 41738/2010, § 130), the principles expressed in the Khlaifia case also apply to the situation of the Diciotti ship. The European Convention allows the use of detention in migration management (Article 5, § 1, lett. f). Nonetheless, under the same provision the deprivation of personal liberty is legitimate only if a series of requirements are satisfied: above all, the detention order has to be based on national law, and shall be validated by a national judge. The Italian Constitution provides that no one shall be detained for more than 96 hours in the absence of a judicial review (Article 13). Moreover, under the Italian law on immigration, the legitimacy of detention is attached to the following requirements: a) migrants can be detained only for the purpose of executing a deportation order; b) less invasive restrictive measures to enforce the repatriation shall not be available; c) detention is only allowed within 'deportation centres' (the CPRs, Centri di Permanenza per il Rimpatrio; formerly CIE, Centri di Identificazione ed Espulsione); d) detention shall be validated by a judge in a hearing (see Articles 13 and 14 of Legislative Decree n. 286 of 1998, the Italian Immigration Act). None of these conditions was met in the Lampedusa centre, nor on the ships moored in the Palermo harbour where the applicants of the Khlaifia case were held; similarly, none of these conditions were met as regards the migrants who were held on the Diciotti.

The Italian Government has justified its behaviour with regard to the Diciotti case by invoking the need to defend Italian borders in a context of emergency allegedly caused by the massive arrival of migrants and by the inertia of other EU Member States. Yet, the 'state of emergency' argument had already been rejected by the Court as a justification for detention in the Khlaifia case. At that time, the Italian Government was dealing with far more remarkable numbers of people migrating from North Africa. In fact, between January and September 2011, 55.000 arrivals were recorded, as opposed to 20.000 arrivals for the same period in 2018. In Khlaifia, the Court emphasized that the aim of Article 5 is 'to ensure that no one should be deprived of his or her liberty in an arbitrary fashion', and that such principle shall apply 'even in the context of a migration crisis' (§ 106). Indeed, if fundamental rights could be disregarded every time a Government majority unilaterally claims to be in an emergency situation, the protection that they offer would end up being – quoting the European Court – 'theoretical and illusory', instead of 'practical and effective.'

Briefly, the core principle of the Khlaifia judgment is that no human being, with or without valid documents, can be deprived of their right to the habeas corpus. In light of that, the conduct of the Italian government in the Diciotti case represents, at best, the ignorance of basic procedural safeguards, as provided by the Constitution and the European Convention of Human Rights; at worst, it is a political choice to manage migration outside the guarantees of the rule of law.

Could, then, the migrants of the Diciotti be entitled to obtain a favourable ruling before the Strasbourg Court, just as the applicants in Khlaifia? In order to answer this question, first we need to consider the 'exhaustion of domestic remedies' rule, provided by article 35 of the European Convention. According to this rule, anybody who alleges to be the victim of one or more conventional violations by a State, shall first seek redress before the national jurisdictions. In the Khlaifia case, the applicants demonstrated that no domestic remedy

was available to object the unlawfulness of their detention; therefore, their application to the Strasbourg Court was considered admissible.

The situation is slightly different with regard to the Diciotti case. In fact, Italian prosecutors have charged the current Deputy Prime Minister and Minister of the Interior, Matteo Salvini, for the offence of unlawful deprivation of liberty as provided by article 605 of the Italian penal code. If Salvini is convicted, migrants will obtain a redress, thus losing their 'victim status' for the purposes of an application to Strasbourg. However, according to Constitutional law n. 1/1989, it is for the Italian Parliament to decide whether or not the criminal proceedings against a government minister can be initiated. If the authorisation to prosecute Minister Salvini is denied (which is the most probable outcome, since he is supported by the majority of the Parliament), then the migrants of the Diciotti could be entitled to lodge an application before the Strasbourg Court for the violation of article 5 of the Convention. If the Court finds that there was indeed a violation, the consequences could be twofold. First, the applicants might be awarded compensation for the non-pecuniary damage, just as happened to the applicants in Khlaifia. Second, according to article 46 of the Convention, the Court might decide, to impose to Italy the adoption of general measures in order to prevent further similar violations of article 5, such as the introduction of a legislation dealing with deprivation of liberty and its guarantees in the context of pre-admittance procedures at the borders.

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