Third Party Intervention in the ECHR's case H.A. v. Italy. Application no. 26049/18

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1. Introduction

This Third-Party Intervention (hereinafter: TPI) is submitted by the Legal Clinic on Human Rights and Migration Law of the International University College of Turin (IUC) and the Migration Law Clinic of the Vrije Universiteit Amsterdam. The intervener submits that – given the found systematic deficiencies/shortcomings in Italy – it is most likely that in the case of HA v Italy Article 3, Article 5(1), Article 5(2) and Article 5(4) of the European Convention on Human Rights (hereinafter: the ECHR or the Convention) have been violated. According to the intervener:

a. The reported overcrowding and poor material conditions in the Lampedusa hotspot support the applicant's claim that Article 3 ECHR has been violated;

b. Article 5(1) ECHR was violated by the unlawful and arbitrary detention of the applicant in the Lampedusa hotspot, as well as in the police station in Ventimiglia and during the bus transportation from Ventimiglia to the hotspot of Taranto (hereinafter: the bus transportation);

c. Article 5(2) was violated by the failure to promptly inform the applicant of the reasons for their detention in the Lampedusa and Taranto hotspots, in the police station in Ventimiglia and during the bus transportation;

d. Article 5(4) was violated by the lack of opportunity for the applicant to appeal their detention in the Lampedusa hotspot, in the police station in Ventimiglia and

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during the bus transportation. Moreover, there are systematic procedural shortcomings in the judicial review of the detention in the Pre-removal detention centre (hereinafter: CPR) in Bari, which may lead to a violation of Article 5(4) ECHR.

In this TPI we will address the alleged violations in the order mentioned above. With regard to each complaint, we will first set out the legal criteria as developed by the Court. Subsequently the situation in Italy will be described on the basis of reports and information gathered by the interveners. Finally, the legal criteria will be applied to the information found.

2. The complaint regarding a violation of Article 3: Detention conditions

It will be argued in sections 17 and 18 of this TPI that migrants in the Lampedusa hotspot are subjected to *de facto* detention. It is the intervener's submission that Italy violates Article 3 ECHR because of the conditions in this hotspot, including severe overcrowding and other poor material conditions compounded by a prolonged length of stay. In Torreggiani and Others v Italy, the Court highlighted that in cases concerning detention conditions the burden of proof should be shared between the applicant and the State, because it is most often only the State, which has the necessary information at its disposal[1].

In M.S.S. v Belgium and Greece, the Court stated that "detention conditions [must be] compatible with respect for human dignity"[2]. Member States have positive obligations "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment"[3]. To breach Article 3, "ill-treatment must attain a

[1] Torreggiani and Others v Italy, Appl. nos. 43517/09, 46882/09, 55400/09 et al (ECtHR, 8 January 2013) para 72.
[2] M.S.S. v Belgium and Greece, Appl. No. 30696/09 (ECtHR, 21 January 2011) para 221.
[3] Mubilanzila Mayeka and Kaniki Mitunga v Belgium, Appl. No. 13178/03 (ECtHR, 12 January 2007) para 53; Rahimi v Greece, Appl. No. 8687/08 (ECtHR, 5 June 2011) para 62.

minimum level of severity" the assessment of which is relative[4]. In its assessment whether detention conditions amount to degrading treatment, the Court applies the same criteria irrespective of whether it concerns hotspots or prisons[5]. The Court has regard to the 'cumulative effect' of conditions and the 'specific allegations' of the complainant[6]. The Court held that cases of serious overcrowding can be sufficient to breach Article 3[7]. Whether overcrowding amounts to degrading treatment depends on "the length and extent of restriction, the degree of freedom of movement and the adequacy of out-of-cell activities, as well as whether or not the conditions of detention in the particular facility are generally decent"[8]. Where the overcrowding is compounded by a lack of privacy, ventilation, heating, natural light and air and open space to walk around, as well as a lack of respect for detainees' basic health needs, which further an individual's suffering, the minimum level of severity will be reached[9]. The Court similarly noted in Tarakhel v Switzerland with regard to the reception conditions of asylum applicants (not involving detention) that a violation of Article 3 ECHR may occur, where asylum seekers are "accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions"[10].

In the context of its assessment of detention conditions in the light of Article 3 ECHR, the Court affords significant weight to the length of the detention. In Khlaifia and Others v Italy, it found that the conditions of detention in Lampedusa in 2011 did not violate Article 3 due to the short stay of the applicant and overcrowding that was not comparable "to that of individuals detained in a prison"[11]. The Court noted, however, that the conditions were only

[4] M.S.S. v Belgium and Greece, Appl. no. 30696/09 (ECtHR, 21 January 2011) para 219.
[5] Compare the considerations in Torreggiani and Others v Italy, para 65 (concerning a prison) and M.S.S. v Belgium and Greece, para 221 (concerning detention of asylum applicants), which are almost identical.
[6] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 163.
[7] Torreggiani and Others v Italy Appl nos 43517/09, 46882/09, 55400/09 et al (ECtHR, 8 January 2013) para 67.
[8] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 166.
[9] Torreggiani and Others v Italy, Appl. Nos. 43517/09, 46882/09, 55400/09 et al (ECtHR, 8 January 2013) paras 67 and 69; Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 167.
[10] Tarakhel v Switzerland, Appl. no. 29217/12 (ECtHR, 4 November 2014) para 115.
[11] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) paras 193 and 200. See also J.R and Others v Greece, Appl. no. 22696/16 (ECtHR, 25 January 2018), which concerned a stay of one month in a Greek hotspot.

suitable for a short stay and that there exists an obligation "to take steps to find other satisfactory reception facilities [...] and to transfer [...] migrants to those facilities"[12].

Finally, the Court is particularly sensitive to the context in which the alleged degrading treatment occurred, such as the existence of a declared state of "humanitarian emergency"[13] or "an exceptional and brutal increase of migration flows"[14]. In Khalaifia, the Court noted that in 2011, over 51,573 people landed on the islands of Lampedusa and Linosa, an unprecedented increase as a result of the Arab Spring[15]. In J.R v Greece, arrivals on the Greek hotspots had increased suddenly as a result of the EU-Turkey Deal[16]. These factors may sometimes be combined with "specific problems" such as revolts, arson attacks and protests[17]. Taken together, the fact that the situation of the authorities is particularly difficult, enters into the Court's assessment of Article 3 ECHR.

3. Conditions in the Lampedusa hotspot

Various reports mention overcrowding and lack of privacy in the Lampedusa hotspot[18]. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) reported that between 1 February and 1 June 2017 "the centre operated in excess of its 250-person capacity [...] for more than 75% of the time" and that "during almost half of the time [...] the occupancy was even more than double the bed

[12] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 197.
[13] *Ibidem*, para 178.
[14] J.R and Others v Greece, Appl. no. 22696/16 (ECtHR, 25 January 2018) para 138 (translation is our own). See also Kaak and Others v Greece, Appl. no. 34215/16 (ECtHR, 3 October 2019) and O.S.A. and Others v Greece, Appl. no. 39065/16 (ECtHR, 21 March 2019).
[15] Khlaifia and Others v Italy Appl no 16483/12 (ECtHR, 15 December 2016) para 179.
[16] J.R and Others v Greece, Appl. no. 22696/16 (ECtHR, 25 January 2018) para 38.
[17] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 182.
[18] Commissione Parlamentare di inchiesta sul sistema di accoglienza, *Relazione sul sistema di identificazione e di prima accoglienza nell'ambito dei centri «hotspot»* (26 October 2016) available at <www.camera.it/leg17/491?idLegislatura=17&categoria=022bis&tipologiaDoc=documento&numero=008&doc=intero>accessed 17 October 2020 (own translation). Hereinafter: Commissione Parlamentare (2016).

capacity"[19]. There are reports that male quarters are divided into rooms of 9, 12 and even 24 bunk beds in very small spaces and without other furniture[20] and that rooms can accommodate up to 36 people, without any separation between men, women and minors[21].

The Italian National Guarantor of the Rights of Persons Detained or Deprived of Personal Liberty (the NPM) found in a report of 2017 that the "general environment in the Lampedusa hotspot was squalid and unkempt"[22]. The Italian Parliamentary Commission of Inquiry into the Reception System stated in 2016 that migrants in the Lampedusa hotspot were housed in

> dilapidated prefabricated structures, which were not thermally insulated and lacked an adequate ventilation system. Moreover, the toilets were in a poor state of repair, were decidedly unhygienic and were numerically insufficient (about 10 bathrooms in total, for an average of 300 migrants)[23]

Also ASGI and others found that the toilets, mattresses and sheets were dirty and shabby[24]. The CPT noted a need for swift repairs to the sanitary areas[25]. There are also several reports of a lack of running (warm) water in the Lampedusa hotspot[26]. In a report of 2018, ASGI and others wrote that hot water was only guaranteed for one hour a day and that running water in the bathrooms was cut off from 9pm to 7am[27].

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[19] CPT, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, (10 April 2018), available at https://rm.coe.int/16807b6d56, paras 11 and 19. Hereinafter: CPT (2018). See also AIDA, *Country Report: Italy, 2017 Update* (March 2018) available at http://www.asylumineurope.org/sites/default/files/report-download/aida_it_2017update.pdf, p 126. Hereinafter AIDA (2018).

[20] Commissione Parlamentare (2016).

[21] ASGI, CILD, INDIEWATCH (2018) *Dossier Lampedusa: Hotspot e Centri di Permanenza per i Rimpatri Violazioni dei diritti umani e dei diritti di difesa dei migranti* (10 April 2018) available at https://cild.eu/wp-content/uploads/2018/04/Dossier-Lampedusa.pdf, p 2. Hereinafter ASGI and Others (2018).

[22] Garante Nazionale dei diritti delle persone detenute o private della libertà nazionale (2017) *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia*, (11 March 2017) available at www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/6f1e672a7da965c06482090d4dca4f9c.pdf pp 7 and 30 (own translation). Hereinafter: NPM (2017).

[23] Commissione Parlamentare (2016).

[24] ASGI and Others (2018) p 2.

[25] CPT (2018).

[26] Commissione Parlamentare (2016) (own translation).

[27] This finding is corroborated by Commissione Parlamentare (2016).

Migrants are confined to the reception centre and thus do not enjoy any degree of personal liberty[28]. Moreover, recreational activities and a common area are absent[29]. There is also no canteen and the food is of a very poor quality. The migrants only received one bottle of water throughout the day. There were no distributors or outlets to purchase drinks or food or other goods[30]. Finally, it was remarked that the security conditions are practically non-existent[31].

The CPT found that the conditions at Lampedusa were only "acceptable for short stays"[32]. However, while on average migrants stay in Lampedusa during a period of 7 to 10 days, there are reports that many migrants stay a lot longer, up to a period of three months[33].

Finally, in 2017, Italy recorded 119 310 disembarkation of migrants at the Italian coasts, of which 9 057 arrivals to Lampedusa. This was a notable decline from 2016, when 181,436 migrants disembarked on its territory. Consequently, Italy did not declare a state of 'emergency', nor did it face an unprecedented increase in arrivals in Lampedusa, but rather a notable decrease[34].

4. Application to the present case

Other than in the judgments in *Khalaifia* and *J.R*, Italy was not facing a humanitarian emergency nor an exceptional increase in migration flows at the time the applicant was staying in Lampedusa. There was rather a decrease in arrivals. Despite this, the Italian government had remained 'inactive and negligent' in complying with their positive

[28] NPM (2017) p 7.
[29] CPT (2018) para 20.
[30] ASGI and others (2018) p 2.
[31] *Ibidem*.
[32] CPT (2018) para 18.
[33] Commissione Parlamentare (2016), NPM (2017) pp 7 and 30.
[34] Italian Ministry of Internal Affairs, Statistics about disembarkation in Italy in 2017, http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/cruscotto_statistico_giornaliero_31-12-2017.pdf.

obligations and securing satisfactory facilities for migrants[35]. Migrants faced *de facto* detention, the situation of overcrowding was severe and was not compensated by recreational activities or generally acceptable conditions. Finally, many migrants, including the applicant, who alleges a stay of 24 days in Lampedusa, stayed in Lampedusa for extended periods of time. As a result, we conclude that the reports on the detention conditions in the Lampedusa hotspot support the applicant's claim that there has been a violation of Article 3 ECHR.

5. The complaint regarding a violation of Article 5(1) ECHR: Lack of a legal basis for detention

5.1. Detention or restriction of freedom of movement?

In the context of Article 5 ECHR it should first be examined whether the applicant was detained by the Italian authorities. Italy has recognised that the applicant's stay in the CPR amounts to detention[36]. Article 10-ter (3) of Legislative Decree 286/1998 provides that migrants can be detained in a CPR, provided that they have repeatedly refused to have their fingerprints taken. According to Italian law, detention is justified on this ground, because a failure of identification increases the risk of absconding. Furthermore, Article 14 of Legislative Decree 286/1998[37] allows for pre-removal detention, if it is not possible to proceed with an administrative expulsion[38]. There is no further provision in Italian law relevant to the present case that provides for the detention of migrants.

Specifically, Italian law does not provide for the detention of migrants in the Lampedusa and Taranto hotspots, in the police station in Ventimiglia and during the bus transportation. However, the Court has considered that the lack of a legal basis in national law does not prevent a finding of *de facto* detention: "the classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures

[35] Khlaifia and Others v Italy, Appl. No. 16483/12 (ECtHR, 15 December 2016) para 197.
[36] See also Judgment 105/2001 of the Italian Constitutional Court.
[37] Legislative Decree (decreto legislativo) no 286 of 1998 (Consolidated text of provisions concerning immigration regulations and rules on the status of aliens).
[38] Global Detention Project (2019) *Italy Immigration Detention Profile* (October 2019) available at https://www.globaldetentionproject.org/countries/europe/italy#country-report. Hereinafter: Global Detention Project (2019).

imposed on them"[39]. Therefore, it should be examined whether the applicants' stay in these locations amounts to *de facto* detention.

According to the Court, "the difference between deprivation of liberty and restrictions on freedom of movement is merely one of degree or intensity, and not one of nature or substance"[40]. In the determination whether an applicant has been deprived of his liberty, account must be taken of criteria such as "the type, duration, effects and manner of implementation of the measure in question"[41]. Factors indicative of (*de facto*) detention generally include, *inter alia*, the level of control to which detainees are subjected and the absence of a real possibility of their leaving the area of confinement[42]. The Court has stated that Article 5 ECHR applies during periods of questioning in a police station[43] and police escorts[44], and that it may apply in a hotspot or transit zone[45].

In the assessment whether holding the applicant in a hotspot, the police station in Ventimiglia and during the bus transportation can be defined as detention, four factors are particularly relevant:

> i) the applicant's individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants[46]

[39] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 71.
[40] *Ibidem*, para 64,
[41] *Ibidem*.
[42] ZA and Others v Russia, Appl. no. 61411/15, 61420/15, 61427/15, 3028/16 (ECtHR, 21 November 2019) para 156.
[43] Cazan v Romania, Appl. no. 30050/12 (ECtHR, 5 April 2016);Iorgov II v Bulgaria Appl no 36295/02 (ECtHR, 21 February 2011); Osypenko v Ukraine, Appl. no. 4634/04 (ECtHR, 9 November 2010); Farhad Aliyev v Azerbaijan, Appl. no. 31138/06 (ECtHR, 9 November 2010); Creangă v Romania, Appl. no. 29226/03 (ECtHR, 23 February 2012).
[44] Rozhkov v Russia (No. 2), Appl. no. 38898/04 (ECtHR, 31 January 2017); Tsvetkova and Others v Russia Appl. No. 54381/08 (ECtHR, 10 April 2018).
[45] Ilias and Ahmed v Hungary, Appl. No. 47287/15 (ECtHR, 21 November 2019)
[46] *Ibidem*, para 217.

In regard to the latter, it is relevant whether the migrant is held in a closed area which cannot be left, even in order to leave the country voluntarily[47]. Further, where an applicant leaves a hotspot, but is apprehended by authorities and returned, this indicates that they are "being held involuntarily"[48].

5.2. The Lampedusa hotspot

In Khlaifia the Court considered the applicant's stay in the centre on Lampedusa in 2011 to be detention[49]. Many international bodies, such as the Fundamental Rights Agency[50] and NGOs, such as ASGI/AIDA[51] have found that also after 2011 migrants have been (*de facto*) detained in the Lampedusa hotspot. The NPM found that the hotspot on Lampedusa is "isolated [and has] bars, gates and metal fencing"[52] and that foreign nationals are confined to the reception centre[53]. It is not possible for migrants to formally leave at will.

The CPT found that migrants were not allowed to leave the establishment prior to their identification[54]. The Parliamentary Commission found "that migrants are effectively detained from the moment of disembarkation inside the hotspot area for as long as necessary to carry out the photo-signalling and registration procedures and that they have no freedom of movement before the completion of these procedures"[55]. According to a circular from the

[47] Ilias and Ahmed v Hungary, Appl. no. 47287/15 (ECtHR, 21 November 2019) paras 240-241; see also Amuur v France, Appl. no. 19776/92 (ECtHR, 25 June 1996) paras 46-48 and J.R. v Greece, Appl. no. 22696/16 (ECtHR, 25 January 2018) paras 83-87.

[48] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 68.

[49] *Ibidem*, para 72.

[50] Fundamental Rights Agency (2019) *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy* (February 2019) available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf, pp 14 and 59.

[51] AIDA (2018).

[52] NPM (2017) p 30.

[53] NPM (2017) p 7. See also regarding similar situations in Taranto: Sostegno ai Transitanti Accoglienza Migranti e Profughi (2017) *Dossier storie di Hotspot 'Hotspot Leaks: Dossier sullafrontera di Taranto'* (11 April 2017) available at https://www.unponteper.it/wp-content/uploads/2017/07/DOSSIER-stamp.pdf, pp 15, 21 and 29.

[54] CPT (2018) para 12 with regard to migrants not being able to leave. See also para 14 with regard to fencing and guards.

[55] Commissione Parlamentare (2016).

Ministry of Interior, identification should take place between 24 and 48 hours[56]. However, there is evidence that the photo-signalling and registration procedures last much longer than 48 hours. The Parliamentary Commission found that the average time of detention amounts to 7 to 10 days, but it has reached peaks of 2 to 3 months[57]. Moreover, NPM found that even after the conclusion of identification and registration procedures, migrants are not allowed to leave the centre[58].

5.3. The Ventimiglia police station and the bus transportation to the Taranto hotspot

Migrants who are apprehended at the French-Italian border are typically brought to the local police station in Ventimiglia or the local offices of the Italian border police. They are held in these locations for several hours before they are transferred by bus to the hotspot of Taranto. No legal document or specific information is handed to the migrants before the transfer[59]. According to the Senate Committee for Human Rights, this was part of a larger campaign, which the Head of the Italian State Police declared in August 2016 necessary in order "to relieve" the pressure and to ensure public order[60] at the border territories in the north of Italy (such as Ventimiglia, Como and Milano) and where third-country nationals were traced and forcibly taken to Taranto to be identified[61]. There is systematic transportation of migrants with no distinction being made between those with varying immigration statuses,

[56] Ministero dell'interno, Dipartimento per le libertà civili e l'immigrazione, circolare n. 14106, 6.10.2015, available at http://www.asgi.it/bancadati/circolare-del-ministero-dellinterno-del-6-ottobre-2015-n-14106.

[57] Commissione Parlamentare (2016), p 40. See also Coalizione Italiana Libertà e Diritti Civili (2018), *Nell'Hotspot di Lampedusa condizioni disumane e violazioni dei diritti* (9 March 2018) available at https://cild.eu/blog/2018/03/09/nellhotspot-di-lampedusa-condizioni-disumane-e-violazioni-dei-diritti-umani/.

[58] NPM (2017) p 36.

[59] As highlighted for example in the ECtHR case A.D. v Italy, Appl. No. 18941/17 (still pending), where Sudanese Nationals have been taken from Ventimiglia to Taranto. See also AIDA (2018) p 23.

[60] La Stampa, *Il capo della polizia: "Decomprimiamo, portiamo via le persone da Ventimiglia* (17 August 2016) available at https://www.lastampa.it/cronaca/2016/08/17/news/il-capo-della-polizia-decomprimiamo-portiamo-via-le-persone-da-ventimiglia-1.34817510.

[61] Extraordinary Commission for the Protection and Promotion of Human Rights of the Italian Senate (2017) *Rapporto sui CIE in Italia* (January 2017) available at https://www.senato.it/application/xmanager/projects/leg17/file/repository/commissioni/dirittiumaniXVII/allegati/Cie_rapporto_aggiornato_2_gennaio_2017.pdf, p 27.

including asylum seekers, beneficiaries of international protection and unaccompanied minors[62]. Some even had some form of accommodation in the Northern city where they were found[63]. Transportations usually take place once or twice a week. In 2017, there were a total of 38 bus transportations, with 1284 apprehended migrants transported. In 2018, 1059 migrants were transferred from Ventimiglia to the hotspots of Taranto and Crotone in 43 bus transportations[64].

The distance from Ventimiglia to Taranto is 1188 km and the journey can take as long as twenty hours. Police officers are typically present on the coach alongside migrants, and additional officers travel alongside the coaches in separate vehicles. The coaches stop several times during the journey. The officers accompany migrants to use the bathroom facilities, remaining with them at all times to prevent their departure from the convoy[65]. Migrants remain under the exclusive control of the police from the time of apprehension at the French-Italian border, during transportation to the hotspots and any subsequent transportation to a CPR.

Once the buses arrive in the Taranto hotspot, the migrants are identified (or, if previously identified, they are reidentified) by the local authorities. They are taken to wait in an outside area within the hotspot's external boundary fence. In this area there are also containers housing officers from the immigration office of the local Taranto police headquarters, as well as representatives from Frontex, EASO, IOM and UNHCR. The migrants are not permitted to leave this area until after they have been identified and given instructions to leave the hotspot[66]. Removal decisions do not appear to be made until after

[62] AIDA (2018) p 109.

[63] European Parliament (2017) *Background Information for the LIBE Delegation on Migration and Asylum in Italy* (April 2017) available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2017)583136, p 16.

[64] Questura of Imperia, Protocol number 21728-20 (27 August 2018).

[65] This is particularly demonstrated by the video published by the Italian newspaper La Repubblica on 22 December 2018, see: https://video.repubblica.it/edizione/genova/migranti-odissea-ventimiglia-taranto-l-inutile-e-costosa-deportazione/323113/323734?. See also "Panorama", *Mentone-Taranto: il folle viaggio (di Stato) dei migranti* (24 July 2017) available at https://www.panorama.it/news/mentone-taranto-il-folle-viaggio-di-stato-dei-migranti.

[66] Euronomade (2017) *I Confini della Mobilità Forzata Lungo L'Asse Ventimiglia/Taranto. Traferimenti Coatti ed Esercizi di Libertà* (5 September 2017) available at http://www.euronomade.info/?p=9649&fbclid=IwAR2Hd1g7ASI0plHl1V3fSMSjbpG-qgkcQ16JKQOeT4IOLXEmTVzaYA1U0HI accessed 13 November 2020. Hereinafter: Euronomade (2017).

arrival at the Taranto hotspot facility, and some migrants are released at Taranto and return north without attempts being made to remove them from Italian territory[67].

5.4. Detention or restriction of freedom of movement in the present case

In light of the foregoing, taken into account that migrants are surveyed by the police, they are not allowed to leave the establishment at their will, the place is surrounded by metal fences and all the main gates are locked, it should be concluded that migrants are *de facto* detained at the hotspot of Lampedusa.

Further, given that the migrants are under the control of the police from the time of apprehension at the French-Italian border, during their stay at the Ventimiglia police station, the bus transportation to the hotspots and any subsequent transportation to a CPR, which takes more than 24 hours, it should be concluded that they are deprived of their liberty and thus detained during that process.

5.5. Legal basis for the detention measure

Article 5 ECHR requires that detention be according to "a procedure prescribed by law". There must therefore be a domestic legal basis and adherence to the rule of law[68]. The law must be "sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness [and] to allow the person [...] to foresee […] the consequences which a given action may entail"[69]. Detention is unlawful other than in the enumerated exceptions, of which only Article 5(1)(f) ECHR is relevant in this instance: "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

The Court has stated that to avoid arbitrariness, detention must:

[67] Parole Sul Confine, *Mappe del confine: #2 Riviera Trasporti e trasferimenti forzati* (17 January 2019) available at https://parolesulconfine.com/riviera-trasporti-trasferimenti-forzati/.
[68] Amuur v France, Appl. no. 19776/92 (ECtHR, 25 June 1996) para 50.
[69] Del Rio Prada v Spain, Appl. no. 42750/09 (ECtHR, 10 July 2012) para 125.

> be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued[70].

5.6. Legal basis for detention under Italian law

In 2017, the hotspots were governed by Article 10-ter of Legislative Decree 286/1998[71]. According to Article 10-ter(1) foreigners apprehended during an irregular crossing of internal or external border, or rescued following SAR operations, shall be brought to front line reception facilities, where they undergo a pre-identification procedure and are provided with first aid, assistance and information on asylum procedures. Article 10-ter (2) adds that identification procedures are carried out also with regard to foreigners found to be irregularly on national territory. As noted in para 13 of this TPI, detention is allowed under article 10-ter (3) when migrants have repeatedly refused to have their fingerprints taken. However, this can only take place inside CPRs. This provision can therefore not justify a deprivation of liberty in a hotspot, police station or during bus transportation.

It should be concluded that there is no specific legal basis for holding migrants at the police station in Ventimiglia or the bus transportation. Article 10-ter can be read only as authorising the apprehension of migrants at hotspots for first aid and emergency needs and for identification. It does not offer a legal basis for detention during transportation or at the hotspots. Indeed, the CPT confirmed that the hotspots "[were] not conceived as places of deprivation of liberty' and thus Article 10-ter did not 'provide a legal basis for deprivation of liberty in the 'hotspots'"[72].

Further, due to the lack of a legal basis, it is not clear to what extent the placement in the hotspots, the police station or the bus transportation serve one of the two purposes laid out in Art 5(1)(f), namely the prevention of unauthorised entry or action with a view to deportation. The bus transportation may be conducted for reasons of public order, but this has

[70] Saadi v Italy, Appl. no. 37201/06 (ECtHR 28 February 2008) para 74.
[71] This section was introduced by Section 17 of Legislative Decree 13/2017, converted into Law No. 46/2017.
[72] CPT (2018) para 12.

never clearly stated. Moreover, it is questionable whether public order would justify detention under Art 5(1)(f), in particular in light of the fact that the transportations and re-identifications are conducted indiscriminately without regard to legal status and without consistently leading to attempts to effectuate removal (see above para 19 of this TPI).

5.6. Application to the present case

In light of the foregoing considerations, it should be concluded that migrants are unlawfully detained at the hotspot of Lampedusa and the Ventimiglia police station as well as during the bus transportation in breach of Art 5(1) ECHR. Even if it were to be found that the reasons for detention are sufficiently connected to one of the warranted purposes and could therefore be based on Article 5(1)(f) ECHR, the lack of a legal basis in Italian law negates any reliance the Italian government may place on that Article.

6. The complaint regarding a violation of Article 5(2) ECHR: Information on the reasons for detention

Article 5(2) ECHR requires that when arrested, the person concerned be informed promptly, in a language he understands, of the reasons for his arrest. According to the Court, it is an elementary safeguard that "any person who has been arrested should know why he is being deprived of his liberty"[73]. In Khlaifia the Court clarified that "any person who has been arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness"[74]. Moreover, it held 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"[75]. Where

[73] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 115
[74] *Ibidem*.
[75] *Ibidem*, para 118,

there are no lawful reasons for detention under Article 5(1) ECHR, it is per definition impossible to inform a person of the reasons for detention or to keep a record of those reasons[76].

6.1. Information on the reasons for detention in the Italian detention system

Italian law provides that migrants who are detained in a CPR have the right to be informed, in a language they understand, of the reasons for detention[77]. As Italy does not recognise that migrants are detained in the hotspots or the police station in Ventimiglia or during the bus transportation, Italian law does not provide for such a right to information for these migrants. On the basis of this, it may be assumed that migrants are indeed not informed of the reasons for the detention (or the stay in the hotspots, the police station and the bus transportation) or any available remedies in a language they understand in practice.

6.2. The Lampedusa and Taranto hotspots

There is very little information available about the extent to which migrants are informed about the reasons for their placement in the hotspots or the Ventimiglia police station and for the bus transportation. However, there are indications that migrants do not know what is happening to them and why. The CPT noted in general terms that "a stay in the 'hotspots' was not formally regarded as deprivation of liberty by the Italian authorities and, therefore, no detention order was issued"[78]. The Fundamental Rights Agency reported in 2019 specifically with regard to Lampedusa that migrants staying for more than 48 hours in the hotspot did not receive a detention order[79]. Moreover, ASGI found during a visit to the Taranto hotspot in July 2017 that unaccompanied minors and adults were *de facto* detained in

[76] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 84.
[77] CPT (2018) p 29.
[78] CPT (2018) p 16.
[79] Fundamental Rights Agency, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy* (February 2019) available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-hotspots-update-03-2019_en.pdf, p 59.

a tent "surrounded by high metal grids and guarded by army soldiers, without any written detention order"[80].

6.3. Ventimiglia police station and bus transportation

As regards the transfer from Ventimiglia to Taranto, the authorities typically fail to issue a written explanation of the reasons for the detention[81]. As a result, migrants are transferred without any kind of awareness of the reasons and the outcomes of such a long journey. Once the transport arrives in the Taranto hotspot, individuals are identified (or reidentified) by the local authorities. Afterwards, those deemed to be irregular migrants are usually issued with expulsion orders, which may be followed by a transfer to a CPR[82].

6.4. Application to the present case

On the basis of the lack of a requirement under Italian law to inform migrants of the reasons for their placement in the hotspots or the police station in Ventimiglia and the bus transportation and the reports about a lack of a detention order or information in practice, it may be assumed that the Italian authorities have violated Article 5(2) ECHR in the applicant's case.

7. The complaint regarding a violation of Article 5(4): lack of speedy judicial review

Article 5(4) ECHR guarantees the right to take proceedings by which the lawfulness of a detention measure shall be decided speedily by a court and release ordered if the detention is not lawful. The ECtHR has held that a violation of Article 5(4) ECHR occurs, if applicants find themselves in a legal vacuum, because no detention order is taken and no

[80]AIDA (2018) p 106. See also, Amnesty International, *Hotspot Italy* (2016) available at http://www.asylumineurope.org/sites/default/files/resources/eur3050042016english.pdf, p 28.
[81] Euronomade (2017).
[82] Euronomade (2017).

remedy provided under national law. This may apply even if the applicant was only detained for a very short period of time[83]. The Court clarified in Khlaifia that "the existence of a remedy must [...] be sufficiently certain, not only in theory but also in practice"[84]. It held that "where detainees [have] not been informed of the reasons for their deprivation of liberty […] their right to appeal against their detention was deprived of all effective substance"[85]. The finding that Article 5(2) ECHR has been violated because of a failure to inform individuals about the legal reasons for their detention, is thus sufficient to conclude that also Article 5(4) ECHR has been violated[86].

The proceedings under Article 5(4) ECHR "must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question"[87]. The court reviewing the detention measures should be independent and impartial[88]. Moreover, the review should be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5(1) ECHR[89]. It must consider not only 'lawfulness' within domestic law, but also under the Convention[90].

According to the Court, under Article 5(4) ECHR "it is essential that the person concerned should have the opportunity to be heard either in person or, where necessary, through some form of representation"[91]. A hearing is not necessary, if this could not lead to further clarifications[92]. Proceedings under Article 5(4) ECHR need to be adversarial and respect the principle of equality of arms. This implies amongst others that applicants and their lawyers need to be informed in time of the hearing before the court[93].

[83] Popov v France, Appl. no. 39474/07 (ECtHR, 19 January 2012) para 124 and Moustahi v France, Appl. no. 9347/14 (ECtHR, 25 June 2020) para 103 (which concerned unaccompanied minors, who were detained for several hours).
[84] Khlaifia and Others v Italy, Appl. no. 16483/12 (ECtHR, 15 December 2016) para 130.
[85] *Ibidem*, para 132.
[86] *Ibidem*, paras 132-133.
[87] D.N. v Switzerland, Appl. no. 27154/95 (ECtHR, 29 March 2001) para 41.
[88] *Ibidem*, para 42.
[89] Popov v France, , Appl. no. 39474/07 (ECtHR, 19 January 2012) para 122.
[90] *Ibidem*, para 128.
[91] Winterwerp v the Netherlands, Appl. no.6301/73 (ECtHR, 24 October 1979) para 60.
[92] Derungs v Switzerland, Appl. no. 52089/09 (ECtHR, 10 May 2016) para 75.
[93] Venet v Belgium, Appl. no. 27703/16 (ECtHR, 22 October 2019) para 45.

8. Accessibility and quality of review in the Italian system

As was underlined above, migrants are not provided with a document explaining the reasons for their placement in the hotspots or the police station in Ventimiglia or their transportation from the French-Italian border. Moreover, no remedy against this placement is available under Italian law.

Article 14 of Legislative Decree 286/1998 provides that the authorities are required to notify the *Giudice di Pace* (Justice of the Peace) within 48 hours, if a migrant is brought to a CPR on the ground of a detention order following a return decision. A 'validation hearing' will then occur, where migrants are entitled to legal representation, and detention can be allowed for an initial period of 30 days. The authorities can request that this period be extended[94]. According to Article 14(6) of Legislative Decree 286/1998, a migrant may lodge an appeal against the detention and/or the extension order with the Court of Cassation.

Structural problems have been highlighted with the review system provided by the *Giudice di Pace* of detention in the CPRs. A *Giudice di Pace* is a "non-specialist small-claims judge, who is in charge of resolving minor cases or disputes under civil, administrative or criminal law"[95] and has not received any specific training in immigration law. In the proceedings before the *Giudice di Pace*, critical failures have been identified, which undermine their effectiveness[96]. According to the Monitoring Centre on Judicial Control of Migrants' Removal, "[d]etention proceedings are usually marked with poor quality of judges' and lawyers' performance, on one side, and inadequacy of lawfulness assessment, on the other, often resulting in decisions lacking legal reasoning or omitting crucial objections raised by the defence"[97]. It found that legal reasoning was often standard and even omitted in over

[94] Global Detention Project (2019) section 2.8.

[95] Osir-Ogada and others, '"I am Eighteen, Why Am I Inside Here?": A Reflection upon the Detention and Criminalisation of Migrants under Italian Administrative Law' (2014) 11 *Ameri Quests* nr. 2 available at https://ejournals.library.vanderbilt.edu/index.php/ameriquests/issue/view/198 p 10. Hereinafter: Osir-Ogada and Others (2014).

[96] Monitoring Centre on Judicial Control of Migrants' Removal (2017) *Executive Summary 2016* (1 January 2017) available at http://www.lexilium.it/wp-content/uploads/ES_GdP2016_ENG.pdf. Hereinafter: Monitoring Centre (2017).

[97] Monitoring Centre (2017) p 3.

30% of cases[98]. In Bari, detention orders were approved by the *Giudice di Pace* in 86% of cases[99]. Ogada-Osir and others mentioned in 2014 that allegations were made that at the validation hearings there is "a common attitude amongst the *Giudici di Pace*, whereby there is an implicit assumption that the detention will be validated"[100].

Migrants get very limited opportunities to participate in the proceedings before the *Giudice di Pace*. The validation hearings are often quick, formal and superficial and migrants are not heard by the judges[101]. The Monitoring Centre on Judicial Control of Migrants' Removal found that in Bari, 75% of the hearings were held without an interpreter[102]. In 2014, Ogada-Osir and others noted that the effectiveness of the migrants' right to legal assistance was undermined, because lawyers were only informed about the hearing shortly before the start of the hearing, so that they were unable to prepare the hearing with their client[103]. Research of the hearing transcripts by the Monitoring Centre on Judicial Control of Migrants' Removal showed that activity from lawyers was very limited[104].

9. Application to the present case

It should be concluded that it is impossible to challenge the detention measures in the Lampedusa and Taranto hotspots and the police station in Ventimiglia and during the bus transportation, because there is no legal ground for detention and migrants concerned are (thus) not informed of the reasons for the detention and the available legal remedies. In this respect, Article 5(4) ECHR has been violated.

[98] Monitoring Centre (2017) p 3.
[99] Monitoring Centre (2017) p 4. See also Ogada-Osir and Others (2014) p 11, where it is noted that 96% of the validation hearings resulted in a validation and 97,2% of the extension hearings resulted in an extension.
[100] Ogada-Osir and Others (2014) p 11.
[101] Monitoring Centre (2017) p 2. See also Ogada-Osir and Others (2014) p 11.
[102] Monitoring Centre (2017) p 4.
[103] Ogada-Osir and Others (2014) p 11.
[104] Monitoring Centre (2017) p 5.

A review of the detention measure in the CPRs is available before the *Guidice di Pace*. However, there are serious concerns about the effectiveness of this review, as a result of the reported low quality of the performance of judges and lawyers, the superficiality of the review, the lack of reasoning in the validation decisions taken by the *Guidici di Pace* and the very limited opportunities for migrants to participate in the proceedings. This may indicate that Article 5(4) ECHR has been violated in the applicant's case.

10. Conclusion

In light of the arguments submitted above, the intervener urges the Court to conclude that Italy has violated Articles 5(1), 5(2) and 5(4) of the Convention on the basis of a lack of a legal ground for the detention in the Lampedusa hotspot and the police station in Ventimiglia as well as during the bus transportation and the lack of information about the reasons for and a judicial review of this detention. Moreover, it urges the Court to take into account the provided information concerning the deficient detention conditions in the hotspot in Lampedusa and the procedural shortcomings of the review of detention in the CPR in the context of the applicant's complaints concerning Article 3 and 5(4) of the Convention respectively.