Third-Party Intervention in the ECHR's case M.R. v. Italy. Application no. 13302/18

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Introduction

The present written submissions are respectfully filed with the Court pursuant to the letter of 14 October 2020 granting the Human Rights Legal Clinic 'Coesione e Diritto' of the Law Department at the University of Catania and the Legal Clinic in Immigration and Asylum of the Dirpolis Institute at the Scuola Superiore Sant'Anna leave to intervene in the present proceedings in accordance with Article 36 § 2 of the ECHR and Rule 44 § 3 of the Rules of the Court. The present submissions are meant to assist the Court by providing objective and independent information on the proceeding No. 13302/18, M.R. v. Italy, regarding the lawfulness of the detention of a Tunisian national in the hotspot of Lampedusa under Article 5 ECHR, with a focus on the situation of vulnerable groups, such as persons with mental disorders, and the consistency of the detention condition with Article 3 ECHR. In collecting and presenting the following information, the Clinics adhere to the highest methodological standards relevant to independent clinical legal research, providing the Court

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with information available in the public domain at the time of the events relevant in this case. The quoted sources are available in the List of Accompanying Documents.

2. The lawfulness of the detention under Article 5 § 1 ECHR

Article 5 § 1 of the ECHR provides the individual's right to 'liberty' and 'security'. Pursuant to this provision, a deprivation of liberty must in all cases be carried out in accordance with a procedure prescribed by law and for the exclusive purposes enumerated therein. Furthermore, deprivations of liberty must be free from arbitrariness. The ECtHR has consistently held that the 'object and purpose' of Article 5 § 1 is "precisely to ensure that no one should be deprived of his liberty in an arbitrary fashion"[1], emphasizing the importance of these guarantees "for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities"[2]. In order to minimize the risks of arbitrary detention, Article 5 § 1 "provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty is amenable to independent judicial scrutiny and secures the accountability of the authorities for that measure". Consequently, "the unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5"[3]. The Court has also clearly held that, for the purpose of Article 5 § 1, "the 'lawfulness' of detention primarily requires any arrest or detention to have a legal basis in domestic law, but also relates to the quality of the law". This latter implies that "where a national law authorizes deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness"[4].

The ECHR, under sub-paras (a) to (f) of Article 5 § 1, specifically enumerates the cases which can lawfully justify a deprivation of liberty. This list is "exhaustive" and "must

[1] ECtHR, X v. the United Kingdom, 5 November 1981, § 43; McKay v. the United Kingdom, GC, 3 October 2006, § 30; S.,V. and A. v. Denmark, GC, 22 October 2018, § 73.
[2] ECtHR, Ladent v Poland, 18 March 2008, § 76; Medvedyev and Others v. France, GC, 29 March 2010, § 76.
[3] ECtHR, Çakici v. Turkey, 8 July 1999, § 104; Akdeniz v. Turkey, 31 May 2005, § 129; Bazorkina v. Russia, 27 July 2006; Musayeva and Others v Russia, 26 July 2007, § 110.
[4] ECtHR, Lokpo and Touré v. Hungary, 20 September 2011, § 18.

be interpreted strictly"[5]. The rationale of this provision is indeed to ensure that no one should be dispossessed of his or her liberty in an arbitrary way[6]. Subparagraph (f) specifically allows an individual's detention to prevent his/her unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition, thus justifying the deprivation of liberty of migrants. However, "such detention must be compatible with the overall purpose of Article 5"[7]. And regarding the detention of irregular migrants, the ECtHR stated that, even in the context of a migration crisis, *de facto* deprivation of liberty cannot be compatible with the aim of Article 5 of the Convention "to ensure that no one should be deprived of his or her liberty in an arbitrary fashion"[8].

Moreover, in its interpretation of Article 5 § 1, the ECtHR has frequently emphasized that measures involving deprivation of liberty inevitably generate suffering and humiliation[9].

In particular, in the application of Article 5 § 1, f), national authorities should first consider any potential or actual situation of vulnerability of individuals concerned, evaluating in case special reception needs[10]. Detention measures in such circumstances could be also considered as inhuman or degrading[11]. Therefore, when particular vulnerabilities are identified, special consideration must be given to less coercive measures or alternatives to detention, in compliance with the criteria of good-faith and non-arbitrariness of any deprivation of liberty. This is especially the case when it comes to people suffering from serious illnesses[12].

The existence of specific situations of vulnerability or special reception needs is therefore critical to determine whether or how to detain a person and whether, depending on specific circumstances, the deprivation of liberty is lawful under the ECHR standards. A preliminary examination and assessment of vulnerability situations is thus requested, in light

[5] ECtHR, Bouamar v. Belgium, 29 February 1988, § 43; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 12 October 2006, § 96.
[6] ECtHR, Saadi v. the United Kingdom, GC, 29 January 2008, §§ 64-66. In ECtHR, Muskhadzhiyeva and Others v Belgium, 19 October 2010.
[7] Saadi cit., § 66.
[8] ECtHR, Khlaifia and Others v. Italy, 15 December 2016, § 106.
[9] ECtHR, De Los Santos and De La Cruz v. Greece, 26 June 2015, § 42.
[10] ECtHR, M.S.S. v. Belgium and Greece, GC, 21 January 2011; Efremidze v. Greece, 21 June 2011; H.A. and Others v. Greece, 28 February 2019.
[11] ECtHR, Khubodin v. Russia, 26 October 2006, § 93.
[12] ECtHR, Yoh-Ekale Mwanje v. Belgium, 20 December 2011, § 124.

of specific circumstances, in order to verify whether detention or other restrictive measures may have detrimental effects on the dignity, well-being or health of individuals or groups concerned. Also, the lack of particular services within the detention facilities, necessary to cover specific needs of vulnerable subjects, may require the option of alternative measures to detention.

The case of persons with mental disorders is illustrative of the importance of vulnerability assessment under Article 5 § 1 ECHR[13]. Persons with mental disorders require additional attention, protection and the access to particular services. First, mental disorders could potentially be identified during the screening interview of an asylum claim. Accordingly, where there is an indication that an individual may suffer from mental illness, this should be considered prior to a decision to detain. That said, several important caveats can be drawn from the Court's own jurisprudence concerning persons of unsound mind (Article 5 §1, e), the appropriateness of the treatment provided for their mental condition, the level of assistance required for persons with mental health issues[14]. Eventually, the failure to consider specific (and in case intersectional) vulnerabilities of migrants and asylum seekers could determine multiple violations of conventional rights, say when in specific circumstances arbitrary detentions under Article 5 §1, f), go hands in hands with actual situations or potential effect incompatible with Article 3 and/or Article 8 ECHR[15].

2.1. The Italian 'hotspot approach' and its consistency with Article 5, § 1, ECHR

The so-called 'hotspot approach', launched by the European Commission in response to the migration crisis in 2015 with the adoption of the European Agenda on Migration[16], has raised questions and criticism as regards the lack of a clear legal framework establishing new

[13] See *Reception and Detention Conditions of Applicant for International Protection in light of the Charter of Fundamental Rights of the EU*, January 2015 (Doc. 1).
[14] ECtHR, Aerts c. Belgium, 30 July 1998, § 49; Rooman v. Belgium, 31 January 2019, §§ 208-209.
[15] ECtHR, M.S.S. v. Belgium and Greece, cit.
[16] European Commission, COM (2015) 240 fin (Doc. 2).

procedures and priorities at EU level to be carried out by member States[17]. The new strategy aimed at providing member States with operational support for the registration, identification and fingerprinting of migrants, avoiding irregular secondary movements as well as implementing returns policy and the relocation scheme. The necessity of setting out minimum standards for the human rights protection of migrants *de facto* held in the hotspots has been broadly discussed in European public debate[18]: the core issue raised under Article 5 § 1 of the ECHR is that of identifying adequate supranational and domestic legal grounds for the detention of people in hotspots, either pending the availability of suitable first reception accommodation or because their refusal to providing fingerprints during identification procedures[19].

As a result of the European Migration Agenda, the Italian Government issued two main documents framing the functions and management of hotspots: the 'Italian Roadmap' published on 28 September 2015 and the 'Standard Operating Procedures (SOPs) applicable to Italian Hotspots' adopted in 2016[20], both drafted by the Ministry of the Interior as policy instruments, devoid of any normative value[21].

[17] About the absence of a stand-alone legal instrument, see Directorate General for International Policies, Policy Department for Citizen's Rights and Constitutional Affairs, *On the frontline: the hotspot approach to managing migration*, 2016, p. 30 (Doc. 3).

[18] Following a UN Human Rights Office monitoring mission to Italy (2016) to assess the human rights situation of refugees and migrants, various aspects of Italy's migrant hotspot centres have been criticized, see OHCHR, *Italy's migrant hotspot*, 2016 (Doc. 4); see also Amnesty International, *Hotspot Italy. How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights,* 2016 (Doc. 5); Dutch Council for Refugees, ECRE, CIR, GCR, ProAsyl, *The implementation of the hotspots in Italy and Greece. A Study*, 2016 (Doc. 6); FRA, *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' setup in Greece and Italy*, 2019 (Doc. 7).

[19] See Article 2, § 10, Regulation (EU) 2016/1624 (Doc. 8), that introduces the definition of hotspot as "an area in which the host Member State, the Commission, relevant union agencies and participating Member State cooperate with the aim of managing an existing or potential disproportionate migratory challenge characterized by a significant increase in the number of migrants arriving at the external border".

[20] See Standard Operating Procedures (Doc. 11)

[21] See Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migranti e sulle risorse pubbliche impegnate, *Relazione sul sistema di identificazione e di prima accoglienza nell'ambito dei centri «hotspot»*, 2016, p. 13 ff. (Doc. 9), and *Relazione di Minoranza*, Doc. XXII-bis, N. 8-bis, 2016 (Doc. 10).

In this framework, the Italian hotspots are not legally conceived as detention centres but as 'crisis spots' (*punti di crisi*)[22] that can be established within first line reception facilities for rescue and first-aid facilities[23]. The national and international personnel deployed in the hotspots have the task to carry out medical screenings, give information about asylum and migrant related legislation, pre-identify, fingerprint and, finally, channel the people into the proper procedure[24]. Nevertheless, different authorities and institutions have referred to the situation of people held in these hotspots (with particular reference to the hotspot of Lampedusa) as a *de facto* deprivation of liberty[25]. In particular, as stated by the National Guarantor in 2018: "hotspots continue to be places with an uncertain legal nature, responding to different functions that continually change their character and discipline"[26].

While on the one hand they appear to be places with a humanitarian vocation for first aid and assistance, on the other hand they are places for carrying out police procedures of pre-identification and forced return operations. These procedures imply for the guests the prohibition to leave the centre until their conclusion and the coercion in the execution of deferred rejection measures.

With reference to the legal basis, Article 13 of the Italian Constitution states that personal liberty is inviolable, no one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be

[22] The 'crisis spots' are mentioned by Article 10-*ter* of Legislative Decree No. 286/1998. This Article was introduced by Article 17 of Law-Decree No. 13/2017, converted into Law No. 46/2017.

[23] The reception facilities are established by a Ministry of Interior decree and regulated by Article No. 9 of Legislative Decree No. 142/2015.

[24] See Standard Operating Procedures (Doc. 11).

[25] National Guarantor, *Relazione al Parlamento 2018*, p. 231-232 (Doc. 12); Council of Europe, *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) *from 7 to 13 June 2017* (Doc. 13); Amnesty International, *Hotspot Italy. How EU's flagship approach leads to violations of refugee and migrant rights*, 2016 (Doc. 5).

[26] This is an unofficial translation of National Guarantor, *Relazione al Parlamento 2018*, p. 231 (Doc. 12). The National Guarantor visited the hotspot of Lampedusa on 23 January 2018. See also *Report on the visits in the Identification and Expulsion Centers and in the hotspot in Italy (2016-2017)*, p. 6 (Doc. 14).

defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void.

The ECHR in 2016 (*Khlaifia and Others v. Italy*) stated that Italian laws do not provide a clear and accessible legal basis for holding people in Early Reception and Aid Centre (*Centro di Soccorso e Prima Accoglienza* – CSPA), and that the legislative ambiguity has given rise to numerous situations of *de facto* deprivation of liberty in breach of Article 5 of the Convention. CSPAs have now been replaced by hotspots which have similar functions. Since then the Italian system on migration has undergone some modifications, such as Legislative Decree n. 142/2015 and Law-Decree No. 13/2017, converted into Law No. 46/2017. In particular, new forms of administrative detention (*trattenimento*), in relation to migrants and asylum seekers, are provided by Article 6 of Legislative Decree No. 142/2015 and Article 10-*ter* of Legislative Decree No. 286/1998.

In particular, Article 6 of Legislative Decree No. 142/2015, as effective in March 2018 (it has since then been modified[27]), deals with the hypothesis of detention of asylum seekers in specific cases such as the ones envisaged in international conventions and cases of people who are potentially dangerous or who might run away. The article deals with detention in specifically dedicated facilities and does not offer general coverage to the deprivation of liberty of people in hotspots at their first arrival.

Article 10-*ter* of Legislative Decree No. 286/1998 firstly states that people at their arrival are taken to crisis spots for assistance and first aid purposes and to undergo identification procedures set out by the norm. There is no reference here to any procedure that can lead to deprivation of liberty or to judicial control over such deprivation, as required by both Article 13 of the Italian Constitution and Article 5 of ECHR. The Article then states that foreigners who repeatedly refuse to undergo the identification procedures can be detained, in accordance with paragraphs 2, 3 and 4 of Article 14 Legislative Decree No. 286/1998, which lay down a procedure supervised by the Judicial Authority. Such detention takes place in

[27] The last modifications were made by Law-Decree No. 113/2018 (4 October 2018), converted into law by Law No. 132/2018 (1December 2018) and by Law-Decree No. 130/2020 (not yet converted into law). Both amendments entered into force after the facts related to the present case.

centres designated by Article 14, namely the Closed Removal Centres (CPRs)[28]. These latter centres are different and serve a different purpose than hotspots, which are never mentioned in the provision.

As previously noted, hotspots are not considered as detention centres and their nature is still legally uncertain. This implies holding of people in different conditions in absence of any specific procedural guarantees defined by law. As stated by the National Guarantor in 2018:

> without a clear legal definition, and considering the great variety of activities that take place inside of them [...] hotspots present the risk of creating grey areas becoming from time to time open or closed facilities depending on the needs of Public Security Authorities and on the implemented procedures. The legal ambiguity of these places ends up affecting the personal liberty of the guests, who, besides, cannot benefit from judicial protection[29].

2.2. The right to be informed under Article 5 § 2 ECHR

Pursuant to Article 5 § 2 ECHR: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". As stated in Khlaifia and Others v. Italy*,* Article 5 § 2:

> is an integral part of the scheme of protection afforded by Article 5: 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 in accordance with paragraph 4[30].

[28] That's the conclusion that results from the first sentence of Article 10-*ter*§ 1of Legislative Decree No. 286/1998: "il rifiuto reiterato dello straniero di sottoporsi ai rilievi di cui ai commi 1 e 2 configura rischio di fuga ai fini del trattenimento nei centri di cui all'articolo 14".

[29] This is an unofficial translation of National Guarantor, *Relazione al Parlamento 2018*, p. 232 (Doc. 12).

[30] ECtHR, Khlaifia and Others v. Italy, cit., § 115.

The kind, timing and sufficiency of information to be provided varies according to the specific circumstances of the cases. In fact, it should be noticed that the lack of knowledge or the poor mastery of the language makes it difficult to adequately manage the hotspots internal procedures safeguarding migrants' rights as well as the proper understanding of the judicial paths. Indeed, all obstacles able to undermining the complementary rights to information and judicial review can be a source of physical and psychological discomfort and risk to exacerbate the levels of isolation of persons detained, also in terms of cultural and linguistic barriers.

The relevant situation in 2018 was the same as the ECtHR pointed out in the Khlaifia judgment. As reported by the National Guarantor: "besides the necessity of introducing a legal basis in the Italian legal framework, it must be provided the respect of additional guarantees such as the obligation to inform the person of the reasons of the detention"[31]. The lack of legal basis could expose Italy to infringe international law and not protect migrants from the danger to suffer arbitrary deprivation of liberty. In any case, as stated in Khlaifia, "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"[32]. And the ambiguous Italian practice of *de facto* detention of migrants within the hotspot of Lampedusa – lacking legal grounds in domestic law and specific measures explicitly recording the deprivation of liberty – impacts on the failure to comply with information obligations and could lead to a violation of the ECHR. The scope of these elementary guarantees for detained migrants is instrumental to the further safeguard of Article 5 § 4 of the ECHR: the possibility to apply to a Court to review the lawfulness of the detention is dependent on the previous adequate information received about the reasons of the deprivation of liberty[33].

[31]This is an unofficial translation of National Guarantor, *Relazione al Parlamento 2018,* p. 234 (Doc. 12).
[32] ECtHR, Khlaifia and Others v. Italy, cit., § 118.
[33] ECtHR, Conka v. Belgium, 5 February 2002 § 50.

2.3. The right to an effective remedy under Article 5 § 4 ECHR

Article 5 § 4 ECHR entitles detained persons to institute proceedings to have the lawfulness of detention reviewed by a Court. The remedy should be sufficiently 'certain' not only in theory but also in practice, to ensure the 'lawfulness' of the detention[34]. Moreover, States must ensure that the proceedings concerning detained persons are conducted "as quickly as possible" in order to verify the lawfulness of the detention and to order the release if the detention is unlawful[35].

Since the authorities do not recognize the migrants in the hotspots as detainees, the latter end up to be deprived of any procedural right connected with this official status, including also the right to a speedy review on the lawfulness of their detention. In *H.A. and Others v. Greece,* for instance*,* ECtHR underlined that even if migrants had had access to a review procedure, the absence of an official status of detention would have still raised significant practical obstacles regarding their possibility to claim before Courts[36].

Furthermore, the Court found that in case of missing any administrative detention order, it is not possible to examine the lawfulness of the applicant's presence in the administrative detention center[37].

In 2016 Khlaifia v. Italy, ECtHR sanctioned the arbitrariness of the detention of foreign citizens in first aid and reception centers in the absence of a legal basis, in the absence of judicial validation and in the absence of remedies for the verification of the legality of the detention. The legislative framework in force at the time of the case has not been changed as regards the remedy issue. As clarified in the 2018 Report to the Parliament of the National Guarantor, still the Italian legal system did not provide the migrants in hotspot with a remedy whereby they could obtain a judicial decision on the lawfulness of their deprivation of liberty[38].

[34] ECtHR, Khlaifia and Others v. Italy, cit., § 93.
[35] ECtHR, Khlaifia and Others v. Italy, cit., § 131.
[36] ECtHR, H.A. and Others v. Greece, cit.,§ 158.
[37] ECtHR, Popov v. France, 19 January 2012,§ 124.
[38] National Guarantor, *Relazione al Parlamento 2018,* p. 234(Doc. 12).

3. The detention conditions and the violation of Article 3 ECHR

Art 3 of the ECHR entails the prohibition of inhuman or degrading treatments, which is one of the most fundamental values of democratic societies. Article 3 ECHR has an absolute character and no reservation can be made to it. An ill-treatment constitutes a violation of Article 3 ECHR only when the latter attains a minimum level of severity, below which no violation can be found. The assessment is relative and depends on the circumstances of the case[39]. In order to make this evaluation, case law has identified some elements: the duration of the treatment; the age, sex and state of health of the victim; the purpose for which the treatment was carried out, in the knowledge that the lack of willingness to inflict it is not sufficient to exempt the State from liability; the context in which the disputed treatment was carried out; whether the victim is in a vulnerable position, which is normally the case for persons deprived of their liberty. Nevertheless, the level of suffering must exceed the normal level of suffering resulting from detention and the material conditions of detention must be compatible with human dignity.

Inside the place where they are detained, migrants must be provided with all the services and conditions that allow them to live with dignity. If these conditions are not met and these basic services are not guaranteed, that would potentially entail a violation of Article 3 ECHR. In particular, the ECtHR found that not allowing people to go out, to telephone, and not providing them with adequate sanitary facilities and clean sheets – along with the excessive duration of the detention – constitutes a breach of Article 3[40].

Furthermore, with regard to the material conditions, overcrowded rooms, deplorable hygienic and cleaning conditions, the absence of leisure and eating spaces, deteriorated bathroom fixtures, extremely dirty and restricted sleeping conditions were found to entail an inhuman or degrading treatment[41]. According to the Torreggiani case, each detention center must provide its occupants with a minimum space of 3 square meters and adequate hygiene,

[39] ECtHR, M.S.S. v. Greece and Belgium, cit., §219; ECtHR, Tarakhel v. Italy, 4 November 2014, §94;ECtHR, Khlaifia and Others v. Italy, cit.§§158-169.
[40] ECtHR, S.D. v. Greece, 11 June 2009, §49-54.
[41] ECtHR, Tabesh v. Greece, 26 November 2009, §§ 38-44; ECtHR, S.Z. v. Greece, 21 June 2018, §§ 33-42.

privacy, ventilation systems, illuminated spaces and access to running water, open spaces, heat sources[42].

If the person concerned is in a vulnerable condition, such as asylum seekers and people in custody, the detention must be compatible with their conditions and even a short detention in a place not suitable for their needs may not comply with Article 3 ECHR[43]. The ECtHR has recognized that mental disorder falls under the scope of the concept of vulnerability: victims suffering from a mental disorder are in fact more prone to experience feelings of distress, anguish and fear in the context of their detention[44]. Moreover, it is not enough for a detainee to be examined and a diagnosis made: it is essential that proper treatment for the problem diagnosed and suitable medical supervision are provided, even more so if the person is known to be a suicide risk[45]. States must indeed offer effective protection to vulnerable individuals and should take reasonable measures to prevent ill-treatment of which the authorities, being under an obligation to safeguard the dignity of the detainees, have or ought to have knowledge[46].

3.1. The detention condition of migrants in the hotspot of Lampedusa

Pursuant to the Legislative Decree No. 142/2015, the reception conditions shall take into consideration the specific situation of vulnerable people, such as children, unaccompanied minors and mentally ill people (Article 17). Migrants can be hosted in first aid reception centre only for the short time needed to first aid and reception needs, and to

[42] ECtHR, Torreggiani v. Italy, 8 January 2013, §§70-79; ECtHR, ZA and Others v. Russia, 21 November 2019, §186; ECtHR, Haghilo v. Cyprus, 26 March 2019, §§160-169; M.S.S. v. Greece and Belgium, cit., §§235-264.
[43] ECtHR, Rahimi v. Greece, 5 April 2011, §§63-86; ECtHR, M.S.S. v. Greece and Belgium cit., §251;ECtHR, Bouyid v. Belgium, 28 September 2015, §83 and §107; ECtHR, *Kudla v. Poland,* 26 October 2000, §94; ECtHR, Salman v. Turkey,27 June 2000, §99.
[44] ECtHR, Kudla v. Poland,cit. § 99; ECtHR, Dybeku v. Albania,18 September 2007, § 41 and § 48.
[45] ECtHR, Claes v. Belgium, 10 January 2013, § 95, ECtHR, Keenan v. The United Kingdom, 3 April 2001, § 116 and § 114.
[46] ECtHR, M.S. v. The United Kingdom, 27 August 1997, §§ 44-46; ECtHR, Khlaifia and Others v. Italy, cit. §§ 161-162.

identification operations (Article 9). In the reception centers the privacy of the occupants and other conditions, such as mental and physical health, shall be guaranteed and the personnel who works there shall be adequately prepared; the occupants have the possibility to go out from the center and to speak to UNHCR representatives (Article 10). In addition, asylum seekers in a vulnerable situation cannot be the detained in the close centre (Article 7 § 5 and Article 6). In addition to this normative framework, it should be also recalled the Convention on the Rights of Persons with Disabilities[47], ratified by Italy with the Law No. 18/2009, that adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.

As far as the duration of the detention in hotspots is concerned, National Guarantor has detected an established practice of detaining migrants for a long period of time which the available facilities are not suitable for[48]. The following situation has been reported with reference to the hotspot of Lampedusa[49]:

a) the capacity of the center was overestimated. While initially the Lampedusa hotspot was considered able to host 500 migrants, the maximum capacity envisaged was reduced to 381 people. Further assessments proved, indeed, that the actual capacity of the center was smaller and that could be reached by cramming people and using the spaces available to the maximum. Moreover, due to the fires set on 17 May 2016 and 9 March 2018 and their consequent damages to the pavilions, the capacity was further reduced to a maximum of 200 people[50]. Despite the physical limitations and the crumbling state of the structure, there is some evidence that, after the arson in 2018,

[47] The Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106) was adopted on 13 December 2006 (Doc. 15).

[48] National Guarantor, *Relazione al Parlamento 2018,* p. 232 (Doc. 12);

[49] *Ibidem*; National Guarantor, *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia (2016/2017)*, p. 30, 2017 (Doc. 14).

[50] Commissione Parlamentare di inchiesta sul sistema di accoglienza, identificazione ed espulsione*, Relazione di Minoranza*, 2016, p. 38, (Doc.10). See also Commissione Straordinaria per la tutela della promozione dei diritti umani, Senato della Repubblica, XVII Legislatura, *Rapporto sui Centri di Identificazione ed Espulsione in Italia*, p.15, 2017, (Doc. 16); National Guarantor, *Relazione al Parlamento 2018,* p.128 (Doc.12), where the capacity of the Lampedusa hotspot is estimated in 96 places. About the fire in the Lampedusa Hotspot, see Rai News, *Incendio doloso all'hotspot di Lampedusa: 150 migranti tunisini ospitati, nessun ferito*, 9 March 2018 (Doc. 17).

migrants continued to stay within the damaged pavilion due to the lack of available space in the hotspot;[51];

b) there is no canteen and the food, which guests must eat in the room or outdoors, is of very poor quality;
c) the dirty toilets are turkish style and the showers are without doors or curtains;
d) the number of the sanitary facilities is insufficient: there are, indeed, 10 toilets for an average of 300 people hosted. These facilities are characterized by an extremely poor level of maintenance and hygiene;
e) the mattresses are dirty, badly laid out and with paper sheets, replaced only after weeks, when they are clearly and irreparably damaged;
f) hot water is provided only for 1 hour a day. Since the running water is interrupted from 9 p.m. to 7 a.m., sewage accumulates daily inside the hygienic rooms, which are placed a few meters from the mattress room and not separated from it by any door or other closure;
g) there is no laundry room, no courtyard or place to pray;
h) only one bottle of water is provided throughout the day and there are no vending machines or points of sale to buy drinks or food or other goods;
i) migrants do not have the possibility to leave the hotspot;
j) the dormitories have beds next to each other that do not allow for support points and can accommodate up to 36 people, with no separation between men, women and children.

In addition to the aforementioned inhospitable material conditions, other critical issues concern medical assistance, information services and legal support provided to migrants within the Lampedusa hotspot. Indeed, the physical and psychological state of the people rescued at sea is not always considered in a prompt and adequate way, endangering the personal safety of the single migrant. As the self-killings happened in Chios in 2017 and in Moria in 2018, the dismal conditions that characterize the permanence in the reception

[51] F. Tonacci, *La vergogna dell'hotspot di Lampedusa. E il Viminale lo chiude "temporaneamente"*, Repubblica, 13 March 2018 (Doc. 18).

centers could represent a possible trigger for the most vulnerable people and lead them to self-harming behaviors and suicide tendencies.[52]

In light of the numerical evidences, the Court might consider the hotspot's situation differently from that one assessed by the GC in the Khlaifia case[53]: it does not seem that, in the first months of 2018, the Italian authorities were facing a humanitarian and logistical migration emergency. In particular, as a matter of fact, considering the period between 1 January and 28 February 2018, only 5247 migrants arrived to Italy compared to the 13439 of the same period of the previous year. This accounts for a 70.88% reduction in the number of arrivals, which is even more relevant noting that only 375 out of the 5247 migrants arrived in Lampedusa[54]. By the end of 2018, 5181 Tunisian nationals arrived in Italy and they account for the 22% of all migrants that arrived in Italy that year[55].

Ultimately, the overall situation of the Lampedusa hotspot raises serious concern for the similarity with the material conditions already 'condemned' by the ECtHR and once more for the applicability and relevance of Article 3 ECHR. There are reasonable grounds to question whether, at the beginning of 2018, the detention of migrants in the hotspot of Lampedusa for vulnerable groups, like person affected from mental disorders, may reach the threshold of inhuman or degrading treatments for the purposes of Article 3 ECHR: this assessment could not disregard the cumulative effects of both inappropriate conditions of the detention and inadequate medical care (such as the general lack of staff, the poor quality and lack of continuity in the treatment provided, the age of the buildings, the overcrowding and the structural lack of capacity in non-prison psychiatric facilities[56]), the status and special vulnerabilities of the persons concerned and, not least, the fact that even asylum requests remain, at times, unregistered.

[52] See FRA, *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* (Doc. 7).
[53] ECtHR, Khlaifia and Others v. Italy, §§178-201.
[54] See Ministry of Interior, report 28 February 2018 (Doc. 19).
[55] *Ibidem*. See also Ministry of Interior, *Relazione sulla Performance*, 2018, (Doc.21).
[56] ECtHR, Claes v. Belgium, cit., § 98. ECtHR, SławomirMusiał v. Poland, 20 January 2009, §§ 86, 89, 93, 95 and 97; ECtHR, Dybeku v. Albania, cit., § 41.

3.2. The unregistered asylum request and the violation of Article 3 ECHR

The expulsion of a foreigner may give rise to a violation of Article 3 ECHR when there are serious grounds for believing that they may be subjected to inhuman and degrading treatment in their country of origin, and therefore there is an obligation not to expel them[57]. If the migrant runs a real risk of being subjected to inhuman or degrading treatment in the receiving State, repatriation would be in contrast with the principle of non-refoulement and consequently would not be possible[58].

The right to access to the asylum procedure is the precondition of the application of the principle of non-refoulment, that must be ensured to asylum seekers. Therefore, the fact that the migrant's willingness to seek asylum remains unregistered exposes the asylum seeker to the danger of being expelled thus denying the right to remain in the Member State pending the examination of the application. This practice is contrary to the law. In fact, Article 6 of the Directive 2013/32/UE (so-called 'Asylum Procedures Directive')[59] provides a three working days term between the presentation of the asylum request and its registration, but its § 5 contains a clause that allows MS to extend this term to ten working days in case of a high number of landings on its territory. Article 26 § 2-*bis* of the Italian Legislative Decree No. 25/2008 applies these terms to the registration of the record necessary to formalise the request of international protection. Article 6 § 4 of the Asylum Procedures Directive states that the request is presented by means of a form or an official report. Referring to this provision, it is possible to find a serious shortcoming of the Italian legislation: it doesn't establish detailed rules concerning the request presentation, excepting for the obligation that it comes personally from the asylum seeker, according once again to Article 6. The gap left by the absence of legal provisions is then filled by usual practices, which most of the time prove to be inadequate.

[57] ECtHR, Chahal v. the United Kingdom,15 November 1996, §§73-74-80.
[58] ECtHR, Soering v. The United Kingdom, 7 July 1989; ECtHR, Chahal v. the United Kingdom, cit.
[59] See Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Doc. 22).

A chaotic situation is reported mainly due to the overlap between conflicting practices, that determines a state of uncertainty for asylum seekers in exercising their rights[60]. As a first step after the landing, migrants are subject to an interview by the local competent National Police office ('Questura') in order to compile an informative document that summarises essential information that will then be reported in the so-called factsheet ('foglio notizie'). The document has a scope of mere identification, that should fulfil a police function, but in practice (specifically in Lampedusa's hotspot) is conceived as the prime, decisive moment in which the applicant should express his will to request international protection. So, the step here described looks like a first filter, whose legitimacy can be questioned: subjects who don't express immediately their intention to request international protection could be qualified as irregular migrants and to be consequently refouled. Furthermore, the interview occurs at a time when migrants, just disembarked, are particularly vulnerable and there is a risk of no adequate information or support in a language understandable to them[61]. These conditions increase the risk that the interviewed person is not aware of the rights he/she is guaranteed under European and Italian legislation, as well as of the importance that his/her declarations could have for the prosecution of the procedure. This possible outcome may contrast with Article 12 of the Asylum Procedures Directive, which requires Member States to provide asylum seekers with adequate information about "their rights and obligations during the procedure" and Article 10 of Legislative Decree No. 25/2008 that implements the information rights established by the Asylum Procedures Directive into Italian national law.

The right to effectively access international protection is further jeopardised in relation to the following required step of the procedure. The Italian law prescribes that the only subject responsible for evaluating the requirements to obtain international protection are the so-called 'territorial commissions'. Nonetheless, an application in the form of a specific written record 'C3 model') must be filed by Border Police or the National Police itself in

[60] Commissione Parlamentare di inchiesta sul sistema di accoglienza, identificazione ed espulsione, *Relazione di minoranza*, 2016 (Doc. 10), Danish Refugee Council, *Fundamental rights and the EU hotspot approach*, 2017, p. 15 (Doc. 23).

[61] Commissione Parlamentare di inchiesta sul sistema di accoglienza, identificazione ed espulsione, relazione di minoranza, 2016, (Doc.10). About the 'foglio notizie' practice, see also Court of Cassazione, judgment No. 18189/2020 (Doc. 24) and No. 18322/2020 (Doc. 25).

order to be examined by territorial commissions[62]. This further step exposes the asylum seekers to the possible delays or obstacles in access to asylum procedure and there is no guarantee that the migrant, which effectively expressed his willingness to apply for international protection, is promptly heard by the National Police office in order to file the 'C3 model'.

The Italian legal system does not provide any specific instrument to address the case that, despite the migrants expressing their willingness to seek asylum, their applications are not registered by the National Police office. Some legal experts suggested that the asylum seekers activated Article 700 of the Italian Civil Procedure Code (CPC), which however is a precautionary measure with a more general scope, and which application to such cases is disputed. Moreover, even if Article 700 CPC could be used for such cases, the asylum seeker would need the assistance of a lawyer in order to activate this remedy. It is remarkable that in no other passage of the asylum seeking procedure such assistance is required, and access to the Lampedusa hotspot is particularly difficult for legal professional and NGOs. This raises further questions about the contrast between national law and Article 13 ECHR, which establishes the right to effective remedy before national courts, as well as Article 24 of the Italian Constitution. In the same spirit, it can be noted that ECtHR, in previous cases, stated that

> the remedy required by Article 13 must be effective in practice as well as in theory, in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that has already occurred (...). The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness[63].

[62] About the access to the asylum procedure and the necessity to avoid any selection of migrants based on the country of origin, see Commissione Parlamentare di inchiesta sul sistema di accoglienza, identificazione ed espulsione*, Relazione di minoranza*, 2016, p. 19 (Doc. 10); Amnesty International, *Hotspot Italy. How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights,* 2016 (Doc. 5).

[63] ECtHR, Yarashonen v. Turkey, 24 June 2014; ECtHR, Musaev v. Turkey, 21 October 2014; ECtHR, Khaldarov v. Turkey, 5 September 2017; ECtHR, Alimov v. Turkey, 6 December 2016.

In conclusion, the right to effectively access the asylum procedure, established by Article 6 Asylum Procedures Directive, could be compromised by the legislative gap in the Italian legal system and by the different practices developed by the National Police offices in order to fill it. This exposes the migrant to the danger of being expelled, because of the lack of the formal status of 'asylum seeker'. Moreover, the fact that the migrant's willingness to seek asylum remains unregistered might exclude the application of Legislative Decree No. 142/2015, which establishes the right to access all services provided by the national reception system. This exclusion from the system exposes once more to the risk of inhuman and degrading treatment.

Regarding the danger of being expelled, it should be also considered the status of the migrant and whether his/her expulsion may give rise to a violation of Article 3 ECHR when there are serious grounds for believing that he/she may be subjected to inhuman and degrading treatment in the country of origin, due to his/her vulnerability. Regarding health condition, when a migrant is affected by a mental illness, only in very exceptional cases humanitarian grounds may trigger the protection of Article 3 ECHR[64]. In fact, as the ECtHR pointed out, the exceptional cases have to be understood to refer to

> situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy[65].

In order to verify whether the case is exceptional or not, according to the interpretation given by the ECtHR, some of the elements which will be taken into account are: the presence or absence of healthcare; healthcare accessibility; the distance between the

[64] ECtHR, Paposhvili v. Belgium, 13 December 2016,§121.
[65] ECtHR, Paposhvili v. Belgium, cit., §183; ECtHR, Savran v. Denmark, 1 October 2019, §45.

person's home and the place where the cures are available;the existence of a social and family support network.[66]

When assessing if the care generally available in the receiving State is sufficient and appropriate to deal with the applicant's illness and to prevent the applicant from inhuman or degrading treatment, the returning State does not need to ascertain whether the care in the receiving State would be equivalent or not to the one that it provides; it will have to verify whether, due to their expulsion, the migrant will be exposed to a serious, rapid and irreversible decline in their health and to intense suffering.[67] In order to make this assessment, it is also necessary to take into account whether the migrant needs a constant follow-up for their illness and whether or not there are family ties in the receiving country. The need for constant follow-up and control in connection with outpatient therapy is all the more relevant when there is no family support.[68] When serious doubt persists as to whether the person is actually able to benefit from such treatment, the authorities of the returning State will have to obtain sufficient and individual assurances from the receiving State, as a prerequisite for refoulement,[69] that appropriate treatment will be available and accessible to the person concerned.[70]

Concerning the situation in Tunisia, it appears to be a shortage of mental health services across the country. The majority of General Practitioners are not trained to effectively deal with mental illness. Most people seeking mental health care, therefore, turn to the only standing and already overcrowded mental hospital in the country, Razi Hospital in Tunis, or to limited psychiatric units across the regional hospitals.In 2016, in order to address the high mental health treatment gap, the Tunisian Ministry of Health launched the implementation of the Mental Health Gap Action Programme (mhGAP) in the Greater Tunis Area, that was a first attempt to bridge the treatment gap in Tunisia by integrating accessible and evidence-

[66] ECtHR, N. v. the United Kingdom, 27 May 2008,§22-24 e §42-44; D. v. the United Kingdom, 2 May 1997, §50-54.
[67] ECtHR, Savran v. Denmark, cit.,§60; ECtHR, Paposhvili v. Belgium, cit., §192.
[68] ECtHR, Savran v. Denmark, cit., §63.
[69] ECtHR, Tarakhel v. Italy, cit.
[70] ECtHR, Savran v. Denmark, cit., §66.

based care for mental disorders into primary health care[71]. As WHO reported, non-specialists' involvement in mental health care is encouraged in the field of global mental health to address the treatment gap caused by mental illness, especially in low- and middle-income countries. Psychiatrists are however unevenly distributed across the country, creating disparities in care. More specifically, they are mainly located in and around the capital, or along the coastline, despite mental illness rates are being reported as highest in the interior of the country. The main perennial difficulty is, indeed, the access of rural and small towns areas to the healthcare system and to specialized medicine. In particular, the difference with Tunis capital region is great[72]. People with disabilities face high healthcare costs, barriers to education, labour market and social integration. They face serious obstacles in accessing school and many receive no education. Disability, alongside gender and lack of education, is a factor that negatively influences the access to the labour market. Despite the Ministry's commitment to further the transition from institutional to community-based mental health care, challenges to mental health care offered in primary care settings continue to abound.

There are not enough mental health nurses and psychosocial care providers to meet current needs; and while Primary Care Physicians (PCPs) see patients consulting for mental health problems in primary care, studies highlight their limited competencies in detecting, treating, and managing mental illness. Substance use disorders are heavily stigmatized in Tunisia; restrictions placed upon PCPs related to the prescription of psychotropic medications; and the continued allocation of most of the funding for mental health (and, therefore, resources) to specialized care[73].

Furthermore, it is significant to underline the support offered by the European Union in addressing disparities throughout Tunisian society: it is indeed in the EU's interest to have

[71] WHO, *Building general practitioner capacity in Tunisia by implementing the mhGAP* (Doc. 26).

[72] JASEHN, *Information paper on Main eHealth activities outside of the EU: Annex 10: Main Tunisia eHealth policies and activities*, p.6 (Doc.27). See also Trani J., Bakhshi P., Lopez D., Gall F., Brown D., *La situation socioéconomique des personnesen situation de handicap au Maroc et enTunisie: inégalités, coût et stigmatisation*, 2016 (Doc.28).

[73] Spagnolo J., Champagne F., Leduc N., Wahid Melki W., Nesrine Bram N., Imen Guesmi I., Michèle Rivard M., Saida Bannour S., Leila Bouabid L., Sana Ben Hadj Hassine Ganzoui S., Ben Mhenni Mongi B., Ali Riahi A., Zeineb Saoud Z., Elhem Zine E., Myra Piat M., Marc Laporta M., Fatma Charfi F. (2019) *A program to further integrate mental health into primary care: lessons learned from a pilot trial in Tunisia, Journal of Global Health Reports*, 3 (Doc. 29).

a stable Tunisia as its neighbour. In light of the many challenges that Tunisia faces, which are not just related to the health system, the help that the EU can provide, on the one hand, highlights the existence of a gap which needs to be fixed and, on the other hand, shows the need to develop an approach which takes into consideration the country's specific circumstances[74].

In conclusion, in light of this framework, the initial stage of the asylum procedure has practical drawbacks which could cause the asylum application not to be registered. This practice does not provide migrants with the adequate protection they would have if the application was indeed registered, exposing them to the risk of refoulement. The reported health situation in Tunisia may be considered in case of expulsion of vulnerable migrants affected from mental disorders.

Pisa-Catania, 4 November 2020

The Rector of the Scuola Superiore Sant'Anna The Rector of the University of Catania

[74] See European Commission (2016) *Joint Communication to the European Parliament and the Council: Strengthening EU support for Tunisia* (Doc. 30).