Third-Party Intervention in the ECHR's case S.B. and Others v. Italy. Application no. 12344/18

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1. 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[1]. The submissions are meant to assist the Court by providing objective and independent information on the proceeding No. 12344/18, S.B. and Others v. Italy, concerning the detention conditions of a family of three Tunisian nationals (a father and two children) in the hotspot of Lampedusa, with a focus on the situation of vulnerable groups, their right to family life and the procedural guarantees related to their status under the ECHR. In collecting and presenting the following information, the Clinics adhere to the highest

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methodological standards relevant to independent clinical legal research, providing the Court 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 detention under Article 5 § 1 ECHR

Article 5 § 1 of the ECHR provides the individual's right to 'liberty' and 'security'. Sub-paras (a) to (f) of this provision enumerate the conditions which can lawfully justify a deprivation of liberty. Subparagraph (f) specifically allows an individual's detention to prevent his/her unauthorized entry into the country or with a view to deportation or extradition, specifying the conditions of the deprivation of liberty of irregular migrants.

In order to minimize the risks of arbitrary detention, Art. 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"[2].

In establishing that any deprivation of liberty must take place "in accordance with a procedure prescribed by law", Art. 5 §1 primarily requires any arrest or detention to have a legal basis in national law, but also relates to 'the quality of the law': "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"[3].

For this purpose, it is necessary to determine whether the situation of migrants held in the hotspot of Lampedusa can be qualified as detention and to what extent the detention has a legal basis in Italian law.

[2] 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.
[3] ECtHR, Lokpo and Touré v. Hungary, 20 September 2011, § 18.

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[4], has raised questions and criticism as regards the lack of a clear legal framework establishing new procedures and priorities at EU level to be carried out by member States[5]. The necessity of setting out minimum standards for the human rights protection of migrants held in the hotspots has been broadly discussed in European public debates[6]: the core issue raised under Art. 5 § 1 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.

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 on 17 May 2016, both drafted by the Ministry of the Interior as administrative instruments, devoid of any normative value[7].

[4] European Commission, COM (2015) 240 fin (Doc.1).

[5]About the absence of a stand-alone legal instrument, see Directorate General for International Policies, Policy Department for Citizen's Rights and Constitutional Affairs (2016) *On the frontline: the hotspot approach to managing migration*, p. 30 (Doc. 2).

[6] 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. 3); Amnesty International (2016) *Hotspot Italy. How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights* (Doc. 4); Dutch Council for Refugees (2016) ECRE, CIR, GCR, ProAsyl, *The implementation of the hotspots in Italy and Greece. A Study*, 2016 (Doc. 5); FRA (2019) *Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the'hotspots'setup in Greece and Italy* (Docs. 6-7).

[7] 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 (2016) *Relazione sul sistema di identificazione e di prima accoglienza nell'ambito dei centri «hotspot»*, p. 13 ff. (Doc. 8), and *Relazione di Minoranza* (2016) Doc. XXII-bis, N. 8-bis, (Doc. 9). See also Article 2, § 10, Regulation (EU) 2016/1624 (Doc. 10), 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".

Looking at the Italian legislative framework relevant to the case, Italian hotspots are not legally conceived as detention centres but as crisis spots (*punti di crisi*)[8] that can be established within first line reception facilities for rescue and first-aid facilities.[9] 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 and fingerprint and, finally, channel the people into the proper procedure. Nevertheless, different authorities and institutions have referred to the situation of people held in Italian hotspots (with particular reference to the hotspot of Lampedusa) as a *de facto* deprivation of liberty[10].

The ECtHR 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: these centres have now been replaced by hotspots which have similar functions), and that the legislative ambiguity has given rise to numerous situations of *de facto* deprivation of liberty in breach of Article 5 ECHR. The Court concluded that the applicants' detention was devoid of legal basis in Italian law, while the agreements entered into at different times between Italy and Tunisia could not have constituted a clear, accessible and foreseeable legal basis for the applicants' detention under Art. 5 § 1.

With specific reference to the legal basis, Article 13 of the Italian Constitution states that no one can be detained or otherwise subjected to any restriction of personal liberty, except by a reasoned order of a judicial authority and only in such cases and in such manner as provided by law. Under this provision, in exceptional circumstances of necessity and urgency, the administrative authority is entitled to adopt measures entailing deprivation of

[8] The 'crisis spots' are mentioned by Article 10-*ter* of Legislative decree No. 286/1998 (Consolidated Immigration Act or *testo unico sull'immigrazione*, TUI). This article was introduced by Article 17 of Law-Decree No. 13/2017, converted into law by Law No. 46/2017.

[9] The reception facilities are established by a Ministero dell'Interno decree and regulated by Article 9 of legislative decree No. 142/2015 (the so called *decreto accoglienza*).

[10] National Guarantor (2018) *Relazione al Parlamento*, p. 231-232 (Doc. 11); 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. 12); Amnesty International (2016), cit..

liberty; however, such measures have to be referred within forty-eight hours to a judicial authority and must be validated in the following forty-eight hours.

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 mentioned in Article 6 of Legislative Decree n. 142/2015 and Articles 10-*ter* of Legislative Decree No. 286/1998.

Specifically, art. 6 of Legislative Decree No.142/2015, as effective in March 2018 (it has since then been modified)[11], 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.

Art. 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 art. 13 of the Italian Constitution and art. 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 which lay down a procedure supervised by the Judicial Authority. Such detention takes place in centres designated by article 14, namely the Closed Removal Centres (CPRs)[12]. These 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 the holding of people in different conditions in absence of any specific procedural guarantees defined by law.

[11] The last modifications were made by Law-Decree No. 113/2018 (4 October 2018), converted into law by Law No. 132/2018 (1 December 2018) and by Law-Decree No. 130/2020 (not yet converted into law), not applicable at the present case.

[12] That is the conclusion that results from the first sentence of § 1 of Article 10-*ter* of 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".

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"[13].

Further, the existence of specific situations of vulnerability or special reception needs is 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. 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. The case of minors is illustrative of the importance of the vulnerability assessment under Article 5 § 1 and Article 3 ECHR (see also *infra* § 3), as emerges from the UN Special Rapporteur on the Human Rights of Migrants' recent 'Report on ending immigration detention of children and seeking adequate reception and care for them' (20 July 2020)[14].

In cases of migrants vulnerable because of their age, violations of Article 5 § 1 may occurwhen the "best interests of the child" had not been duly considered[15].

[13] This is an unofficial translation of National Guarantor (2018), cit.

[14] See also Nowak (2019) *The United Nations Global Study. Children Deprived of Liberty* (Doc. 13).

[15] ECtHR, Moustahi v France, 25 June 2020; H.A. and Others v. Greece, 28 February 2019. Moreover, according to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint General Comments No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, §10, (Doc. 14).

2.1. 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". Following 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"[16].

As reported by the National Guarantor, the relevant situation in 2018 was the same as the ECtHR pointed out in the Khlaifia judgment: "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"; "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"[17]. 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".

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"[18]. The ambiguous Italian practice of *de facto* detentions of migrants within the hotspot of Lampedusa – lacking legal grounds in domestic law and specific measures explicitly recording the deprivation of liberty – clearly impacts on the failure to comply with information obligations and leads to a violation of the ECHR. The ultimate scope of these elementary guarantees for detained migrants is instrumental to the further safeguard of art. 5 § 4 ECHR: the possibility to apply to a court to review the lawfulness of the detention depends on the previous adequate information received about the reasons of the deprivation of liberty[19].

[16] ECtHR, Khlaifia and Others v. Italy, 15 December 2016, § 115.
[17] National Guarantor (2018), cit, p. 234.
[18] ECtHR, Khlaifia and Others v. Italy, cit., § 118.
[19] ECtHR, Conka v. Belgium, 5 February 2002 § 50.

2.2. The procedural guarantees under Article 5 § 4 ECHR

Article 5 § 4 provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". To be effective, the remedy should be sufficiently 'certain' not only in theory but also in practice, to ensure the 'lawfulness' of the detention[20]. 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[21].

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, this Court 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[22]. Furthermore, the Court found that missing any administrative detention order it is not possible to examine the lawfulness of the applicant's presence in the administrative-detention centre[23].

In 2016, Khlaifia and Others v. Italy declared the arbitrariness of the detention of foreign citizens in first aid and reception centres in the absence of a legal basis, of any judicial validation and 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. In fact, according to the Report of the National Guarantor:

> Once the identification process is concluded, migrants are not allowed to leave the Lampedusa Hotspot. This entails a deprivation of personal freedom

[20] ECtHR, Khlaifia and Others v. Italy, GC, § 93.
[21] ECtHR, Khlaifia and Others v. Italy, GC, §131.
[22] ECtHR, H.A. and Others v. Greece, § 158.
[23] ECtHR, Popov v. France,§ 124.

> without any legal basis and review by a judicial authority, making the hotspot as a "limbo of legal protection", in which people are de facto detained[24].

As furtherly reported in his 2018 Report to the Parliament, still the Italian legal system did not provide the applicants with a remedy whereby they could obtain a judicial decision on the lawfulness of their deprivation of liberty, as the Court pointed out in Khlaifia[25].

With specific regard to the situation of migrant children, they are often reported as *de facto* deprived of their liberty within hotspots, without having access to legal and other appropriate assistance, in contrast with international minimum standards of protection of vulnerable migrants. Illegal practices may reach such severity thresholds as to be considered comparable to inhumane and/or degrading treatments[26]. Indeed, in case, the ECHR should be interpreted systematically with other binding international instruments, such as the Convention on the Rights of the Child[27], whose Article 37 requires, *inter alia*, States to ensure

> every child deprived of his or her liberty … the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action (d).

3. The vulnerability approach: the detention conditions of minors in the hotspot of Lampedusa under Article 3 ECHR

The failure to consider specific (and in case intersectional) vulnerabilities of migrants and asylum seekers may determine multiple violations of conventional rights, especially

[24] National Guarantor (2017) *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia (2016/2017): primo anno di attività*, p. 36 (Doc. 15).
[25] National Guarantor (2018), cit. p. 234 (Doc. 11).
[26] Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione per migranti (2016), *Relazione di minoranza* (Doc. 9).
[27] Convention on the Rights of the Child, New York, 20 November 1989, *UN Treaty Series* 15777, p. 3 (Doc 16).

where arbitrary detentions under Article 5 § 1, f) go hands in hands with current or potential effects incompatible with Article 3 and/or Article 8 ECHR[28].

Article 3 ECHR absolutely prohibits torture or inhuman or degrading treatment or punishment. In the ECtHR case-law this provision grounds States' positive obligations to protect groups and individuals in vulnerable situations, such as migrant children and their families.

According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

> the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children[29].

Irrespective of the domestic legislations on the matter, deprivations of liberty of children based on their immigration status may integrate violations of international law and of EU Law: accordingly, the Resolution 2020 (2014) of the Council of Europe Parliamentary Assembly, calls member States "to introduce the prohibition of the detention of children for immigration reasons into this legislation, if it has not yet been done, and ensure its full implementation in practice"; "to refrain from placing unaccompanied or separated children in administrative detention"[30]. In this context, the ECHR's basic guarantees typically related (even if not expressly devoted to) to migrant children (Arts. 3, 5, 8) need to be read together with EU legal standards (EU Charter on Fundamental Rights, Arts. 6, 7, 14, 18, 19, 24, 35)

[28] ECtHR, M.S.S. v. Belgium and Greece, cit. On the reception conditions in the Hotspot of Lampedusa see also Consorzio Opere di Misericordia, Associazione Croce Rossa Italiana (2018) *Relazione sullo stato dei locali al Cspa di Lampedusa* (Doc. 17).

[29] UN Human Rights Council, Juan E. Méndez, (2013) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, 80 (Doc. 18).

[30] Council of Europe (2014) *The alternatives to immigration detention of children*, Parliamentary Assembly Resolution 2020§ 9 (Doc. 19). On ECtHR case-law, see spec. A.B. Others France, 12 July 2016.

and other international human rights treaties and monitoring bodies' practice, such as the CRC (Arts. 2, 3, 9 22, 37) as well as the Committee on the Rights of the Child.[31]

Besides, the detrimental effects of detention upon children are well documented and widely reported by scientific literature, civil society actors, independent experts, national and international human rights institutions, even in cases of short-term deprivation of liberty taking place in relatively human conditions[32]: the ECtHR case-law stresses the extreme vulnerability of children in detention, frequently at risk of suffering anxiety, depression and post-traumatic stress disorder, with possible damages to their cognitive and physical development. Nor should be underestimated the negative impacts of detention on children's education.

Hence, a thorough analysis based on necessity and proportionality is required for accommodating migrant children and families in accordance with the right to liberty, the availability of alternatives to detention, the best interest of the childand the prohibition of inhuman and degrading treatments.

The following situation has been reported with reference to the hotspot of Lampedusa[33]:

a) the capacity of the centre was overestimated. While initially the 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 centre was smaller and that could be reached by cramming people and using the spaces available to the maximum. Moreover, due to the fires occurred on 17 May 2016 and 9 March 2018 and the consequent damages to the pavillons, the capacity was further reduced to a maximum of 200 people.[34]Despite the physical limitations

[31] UN Comm. CRC, *General Comment No.* 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 (Doc. 20).

[32] FRA (2017) *European Legal and Policy Framework on Immigration Detention of Children* (Doc. 21); see also European Commission, *The protection of children in migration*, COM/2017/0211 final, 12 April 2014 (Doc. 22).

[33] National Guarantor (2018), cit., p. 232 (Doc. 11); National Guarantor (2017) *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia (2016/2017)*, p. 30.

[34] Commissione Parlamentare di inchiesta sul sistema di accoglienza, identificazione ed espulsione, *Relazione di Minoranza*, 2016, p. 38 (Doc. 9). 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* (2017) (Doc. 23), p. 15; National Guarantor, *Relazione al Parlamento 2018,* (Doc.11), p.128; about the fire in

and the crumbling state of the structure, there is some evidence that, after the accidents of 2018, migrants continued to live within the damaged pavillon due to the lack of available spaces in the hotspot[35];

b) there is no canteen and the food distributed is of very poor quality;

c) the turkish-style toilet services are indecorous and dirty; the number of the sanitary facilities is insufficient (10 toilets for an average of 300 people hosted) with extremely low levels of cleanness and hygiene;

d) the mattresses are nasty, badly laid out and with paper sheets, replaced only after weeks, when they are clearly and irreparably damaged;

e) hot water is provided only for one 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 by any door or other closure;

f) there are no laundry rooms, no courtyards or places to pray;

g) only one bottle of water is provided throughout the day and there are no machines or points of sale to buy drinks, food or other goods;

h) migrants do not have the possibility to leave the hotspot;

i) 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 situation, other critical issues concern medical assistance, information services and legal support provided to migrants within the hotspot.

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.

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the Lampedusa Hotspot, see Rai News, *Incendio doloso all'hotspot di Lampedusa: 150 migranti tunisini ospitati, nessun ferito*, 9 March 2018 (Doc. 24).

[35] F. Tonacci, *La vergogna dell'hotspot di Lampedusa. E il Viminale lo chiude "temporaneamente"*, *La Repubblica*, 13 March 2018 (Doc. 25).

In light of the numerical evidences, however, the Court might consider the hotspot's situation differently from tha tone assessed by the GC in the Khlaifia case[36]: it does not seem indeed that, at the time of the events related to S.B., the Italian authorities were facing a humanitarian and logistical migration emergency.

As a matter of fact, considering the interval 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[37]. 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[38].

Eventually, there are reasonable grounds to question whether the detention of migrants in the hotspot of Lampedusa, as minors and family groups, may reach the threshold of inhuman or degrading treatments for the purposes of Article 3 ECHR: this assessment could not disregard the cumulative evidence taken from available information about the living conditions in the hotspot at the beginning of 2018, the status and special vulnerabilities of the persons concerned and not least,the circumstance that even asylum requests remain, at times, unregistered.

4. The vulnerability approach: migrant children and the right to respect of family life under Article 8 ECHR

Children are protected against arbitrary detention both by the general human rights guarantees and by additional safeguards designed to protect their specific needs as vulnerable persons. Their special protection stems from the principle of the best interests of the child, the rights of the child to care and development and the right to respect for family life; it also requests to all actors involved in the promotion of children's rights effective means to prevent

[36] ECtHR, Khlaifia and Others v. Italy, §§178-201.

[37] See Ministry of Interior (2018) Report 28 February 2018 (Doc. 26).

[38] See Ministry of Interior (2018) Report 31 December 2018 (Doc. 27). See also Ministry of Interior (2018) *Relazione sulla Performance* (Doc. 28).

unnecessary detention of minors for migration or asylum purposes, regardless of whether they are with their families or alone.

As shown by the above-mentioned relevant information, in the hotspot of Lampedusa children – falling under the category of vulnerable migrants[39] – consistently experience deteriorating conditions due to the insufficient consideration of their needs and their fundamental rights protected at domestic, international and supranational level.

Even though international law and EU law do not expressly prohibit immigration detention of children, a widespread consensus in international legal practice considers it incompatible with the human rights *acquis* provided by the CRC and other international mechanisms of protection.

More, according to the ECtHR case-law on Article 8 ECHR, the respect for private and family life includes also the legal parent-child relationship[40]. This means that detained families shall be provided with separate accommodation guaranteeing adequate privacy[41].

Under EU law, both the 'Reception Conditions' Directive (2013/33/EU) and the 'Return' Directive (2008/115/EC) mention children in their lists of vulnerable persons, including provisions devoted to the particular situations of the migrant child in detention (asylum-related detention and return-related detention respectively)[42].

Under the Directive 2013/33, Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development[43]: in this context, also detained minors shall have the possibility to engage in leisure activities[44], to access educational services[45], to socialise with their peers. Further, at national level, under the

[39] Legislative Decree No. 142/2015, Article 17 (§ 1) enlists minors among those applicants who require specific arrangements, together with disabled people and single parents with minors.
[40] ECtHR, Mennesson v. France, § 96.
[41] Article 11, § 4, Directive 33/2013; ECtHR, Szafrański v. Poland, §§ 39-41.
[42] See Article 2, h) of the Directive 2013/33/UE (Reception Conditions Directive), defining detention as "confinement of an applicant by [an EU] Member State within a particular place, where the applicant is deprived of his or her freedom of movement" (Doc. 29).
[43] Article 23, § 1, Directive 2013/33.
[44] Article 23, §3, Directive 2013/33
[45] Article 14, § 1, Directive 2013/33.

Legislative Decree No. 142/2015, the best interests of the child[46] shall be regarded as a priority, so that minors and applicants for international protection with special needs should avail of special programs of reception, specific assistance and psychological support[47].

Thus far, international human rights law and EU Law preventing unlawful and arbitrary detention consider States' obligations to respect and protect migrants' *family unity* as the object of a fundamental human right[48] and claim that minor children applying for international protection shall have their request to be lodged with their parents[49].

This principle has been incorporated in Italian law and does not provide any exceptions[50]. Also, the Convention on the Rights of the Child requests States to take appropriate measures to ensure the child's best interests (art. 3 CRC) "both keeping the family together, as far as possible"[51] as a primary consideration[52]. Although, as frequently acknowledged, these provisions are not generally respected[53]. Once separation occurs, a violation of the right to respect for the family life can also be found when the reunification is not facilitated[54] or when the reunification process is not adequately transparent or processed with undue delays[55].

[46]Article 18 of the Legislative Decree No.142/2015.

[47]Article 17, § 3, Directive 2013/33.

[48] UNHCR, Summary Conclusions, *Family Unity*, 2001, § 4 (Doc. 30).

[49]Article 23, § 5, Directive 2013/33. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) states that "If members of the same family are detained under aliens legislation, every effort should be made to avoid splitting up the family" Germany: 2005 visit, § 56; 19th General Report on the CPT's activities, § 87 (Doc. 31).

[50]Article 18, § 3, Legislative Decree No. 286/1998.

[51] ECtHR, Popov v. France, §§ 140-141.

[52] See Article 9 CRC requiring States Parties to ensure that a child is not "separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child". See also Article 2 CRC, stating that children should not be discriminated against on the basis of the status or activities of their parents.

[53] ECtHR, Popov v. France, §147, where it is stated that the State's duties "cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life". However, the right to the unity of family is rarely guaranteed, see National Guarantor, *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia (2016/2017: primo anno di attività*), p. 30 (Doc. 15).

[54] ECtHR, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, § 83.

[55] ECtHR, Tanda-Muzinga v. France, § 82; A.B. and Others v. France, §§ 155-156; R.K. and Others v. France, §§ 114 and 117.

As well, Article 28, § 3, of Legislative Decree No. 286/1998 states that in every administrative or jurisdictional procedure aimed at implementing this right, when minors are involved, their best interest should be considered 'with priority'. Also in the framework of the procedure of *fermo*, i.e. on the basis of clues rather than evidence, beside the soundness of the flight risk (Art. 384, Italian Code of Criminal Procedure) the priority of minors' best interests should be carefully taken into account.

Moreover, under Italian law, in the case of dependent children under six years of age, there is a prohibition of pre-trial detention for the parent. This prohibition, though, is relative, as it can be overcome in the case of exceptionally important precautionary requirements (Article 275, § 4, of the Italian Code of Criminal Procedure). *Stricto iure*, this rule applies in case of children younger than six, but situations where children have only one parent should also be considered. In addition, it should be noted that the legitimacy of such a rule must be questioned, since it lacks a necessary appreciation of the child's particular conditions, to be considered even if the child is older than six. In fact, this rule limits pre-trial detention, in order to protect the integrity of the child's evolutionary and educational process, which does not necessarily – nor immediately – end after the age of six. Although the Italian Constitutional Court and the Court of Cassazione have declared Art. 275 § 4 legitimate and not subject to extensive interpretation, it should be noted that the absolute limit of six years seems to be in conflict with international human rights treaty law, too. Beyond Article 8 ECHR, the rules set out by Articles 3 (Best interests of the child) and 9 (Separation from parents) CRC, and by Article 24 EU FRC (The rights of the child) should lead to the following conclusion: although the provision of a fixed age threshold could be deemed as reasonable, this cannot make the interests of children older than six completely irrelevant, especially if they are in a condition of special vulnerability.

The migration status also implies that the integration of the children in the new country could be made much more difficult by any interruption of the parent-child relationship. Again, a careful assessment is deemed necessary to balance, on a case-by-case basis, security and liberty considerations with the best interests of migrant children and the respect of their (private and) family life.

5. The right to domestic effective remedies under Article 13 (in conjunction with Article 3 and Article 8) ECHR

As clearly showed by the monitoring process on the implementation of Khlaifia and Others, the issue of the lack of an effective remedy concerning the conditions of migrant detention in Italian hotspots remains *de jure* and *de facto* highly controversial[56]. The Italian procedural law framework appears still fragmented and inconsistent with State's obligations to provide for domestic effective remedies (Article 13 ECHR) in cases of alleged violation of migrants' rights in hotspots under Article 3 and Article 8 ECHR, as well as under Art. 47 of Charter of Fundamental Rights of the EU[57].

In Khlaifia the Grand Chamber found, *inter alia*, a violation of Article 13 in combination with Article 3 of the Convention as the Government had not indicated any remedies by which the applicants, Tunisian nationals, could have complained about the conditions in which they were held in the CSPA or on the ships.

The inconsistency and inadequacy of procedural guarantees related to the conditions of migrants' detentions has been widely reported as a systemic deficiency of the Italian legal systems, also following, *mutatis mutandis*, the Torreggiani rationale[58].

Indeed, several factual and legal issues apparently endorse the ECtHR's previous conclusions on the violation of Italy's obligations to provide migrants with effective internal remedies to claim mistreatments and living conditions inside hotspots.

First, and besides references to the criminal justice system, no specific remedies were available at the time relevant for the present case, with reference to the National Guarantor's competences for migrants complaining about their conditions in hotspots facilities[59].

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[56] OHCHR (2017) *In Search of Dignity. Report on the human rights of migrants at Europe's borders* (Doc. 32).

[57] The general principle of effective judicial protection is codified in Article 47 EU Charter and Article 19 (1) TEU.

On the relevance of Article. 47 of the Charter as EU primary law see European Law Institute (2017) *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards* (Doc. 33).

[58] ECtHR, Torreggiani v. Italy, 8 January 2013.

[59] National Guarantor, (2018) *Opinion*, 15 October 2018, p. 14 (Doc. 34). The National Guarantor has reported to the Parliament the persistent absence of a remedy allowing migrants to complain about the conditions of their detention in hotspots and recommended the urgency to establish such a remedy. It should be added that the Law-

Second, contrary to what has been generically stated by national authorities[60], the Italian legal system does not specifically include effective procedures of remedy and redress to the benefit of migrants illegally mistreated at hotspots.

The state of the art as regards the lack of adequate and effective remedies to complain about the conditions of detention in hotspots and to obtain appropriate redress, is clearly showed by the other information produced pursuant to Rule 9.2 of the Rules of the Committee of Ministers, during the supervision of the execution of the judgment[61].

Apparently, precautionary and restorative remedies are not available in practice within the Italian legal order nor easy to use, proving to be inadequate and ineffective in light of the nature of violations (arts 3, 8) related to art. 13 and the particular circumstances of the case.

Conversely, pending the supervisory procedure on Khlaifia, the Italian Government basically submitted that the migrants concerned can effectively recur to the remedy provided for by Article 700 of the Code of Civil Procedure.

However, the remedy provided by the urgent proceedings under Article 700 of the Cod. Civil Proc. could be considered as ineffective *in concreto*. In fact, lawyers may end up to refer to this proceeding as the only procedure that provides some sort of precautionary

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Decree No.130/2020, Article 3 § 4, has recently introduced a complain procedure only for migrants hosted in the centres mentioned under Article 14. This new provision however cannot be applied to the present case.

[60] See DH-DD (2019)671, *Communication des authorités (04/06/2019) relative à l'affaire KLHAIFIA et autres c. Italie* (Doc. 35); Presidenza del Consiglio dei Ministri, Dipartimento affari giuridici e legislativi, Relazione al Parlamento per l'anno 2018, *L'esecuzione delle pronunce della Corte europea dei diritti dell'uomo nei confronti dello Stato italiano* (Doc. 36), pp. 145-146.

[61] See, among others, the position of the NGO CILD, "Italian Coalition for Civil Liberties and Rights" addressing the Government's allegations that the Italian legal framework does in fact provide foreign individuals held in hotspots with effective judicial remedies to complain about the detention conditions and obtain redress if appropriate. The document denounces the partiality and the incompleteness of the information included in the response submitted by the Italian Government in June 2019 as follows: "In fact, the remedy provided for by Article 700 of the Code of Civil Procedure is a general one and mainly aims to safeguard property and non-property rights during precautionary proceedings, and not to put an end to the detention of individuals whose personal liberty is being limited, in violation of Article 3 ECHR. Since the detention in the hotspots constitutes a restriction of personal liberty (…) the relevant judicial remedy should not be a general one. Instead, an *ad hoc* remedy is needed in such cases, similar to the remedy provided for detainees seeking to complain about the detention conditions in prison", Council of Europe, Committee of Ministers, Secretariat, *Communication from an NGO (Italian Coalition for Civil Liberties and Rights) (11/02/2020) in the case of KHLAIFIA AND OTHERS v. Italy (Application No. 16483/12)*, DH-DD (2020)189, 28.2.2020 (Doc. 37).

protection, without any recourse to further specific claims to guarantee migrant deprived of their liberty grounds of the material conditions of their detention. The inadequacy and ineffectiveness of the Italian overall remedial system seems further confirmed by the scarcity of relevant judicial practice on this issue and by the Government's inability to produce illustrative case law[62].

According to the ECtHR relevant case-law, the migrants concerned should receive sufficient information concerning their situations to be able to access the appropriate remedies, to substantiate their complaints and to effectively avail of interpreters and legal assistance[63]. As a matter of fact, accessibility of any judicial remedy is generally hampered by insufficient information on the possibility to bring cases before judicial domestic authorities.

Ultimately, the Italian system tends to reveal a systemic deficiency of "effective remedies", both in law and in practice, to protect and redress under Article 13 victims of mistreatments and unlawful living condition in hotspots contrary to Art. 3 and Art. 8 of the ECHR.

In the light of what has been said so far, the findings of a violation of Article 13 ECHR would be autonomous and not covered by the concurrent claim under Article 5 §4. As regard the review of lawfulness of detention, the ECtHR case-law considers Article 5 § 4 of the ECHR as *lex specialis* in relation to the more general guarantee of Article 13 ECHR, so that in case the Court finds a violation of the former, the violation of the latter is considered absorbed and not further separately examined[64].

Therefore, an independent scrutiny of Article 13 standards on migrants' access to domestic remedies in cases of alleged violations of Article 3 and Article 8 ECHR would be conclusive to further develop ECtHR case-law on procedural safeguards: *ubi ius ibi remedium*.

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[62] In its Communication, the Italian Government stated as follows: "Nous n'avons pas repéré des décisions ex Article 700 CPC en matière de conditions de rétention dans les hotspots; ça n'implique pas qu'il n'est pas un remède effectif par rapport à cette type de situation mais plutôt que les avocats ne l'ont pas utilisé ou que les conditions des hotspots ne présentent pas de problèmes" (Doc. 35).

[63] ECtHR, M.S.S. v. Belgium and Greece GC, 2011, §§ 301-304 and 319.

[64] ECtHR, Chahal v. the United Kingdom, 15 November 1996, § 126; A. B. and Others v. France, 12 July 2016, § 158.

Pisa-Catania, 4 November 2020

The Rector of the Scuola Superiore Sant'Anna

The Rector of the University of Catania