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EUROPEAN COURT OF HUMAN RIGHTS
Council of Europe
Strasbourg, France
Third Party Intervention
L'Altro diritto ODV
J.A. and Others v. Italy (application no. 21329/18)
and 7 other applications

With letter dated 17 September 2020, L'Altro diritto ODV asked to the President of the Section, under Rule 44 § 3 of the Rules of Court, to make written submissions to the Court in the following 8 cases:
1) ***J.A. and Others v. Italy*** (Application no. 21329/18)
2) ***H.B. v. Italy and 3 other applications*** (Application no. 33803/18)
3) ***H.A. v. Italy*** (Application no. 26049/18)
4) ***Angelo APETOFIA v. Italy and Joseph NKONTCHOUA TCHOUMBOU v. Italy*** (Applications nos. 60154/19 and 60161/19)
5) ***S.B. and Others v. Italy*** (Application no. 12344/18)
6) ***A.B. v. Italy*** (Application no. 13755/18)
7) ***M.R. v. Italy*** (Application no. 13302/18)
8) ***M.A. v. Italy*** (Application no. 13110/18)

Please find enclosed the Third-Party Intervention of L'Altro diritto, in the mentioned cases.

Date: 04/11/2020

Sofia Ciuffoletti, Ph,D
President of L'altro diritto ODV

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1. Asylum seekers' grounds for detention. The blurred boundaries between detention and reception in practice

According to Recital 15 of the recast Reception Conditions Directive, "the detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention, he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority".

Since the entry into force of the recast Reception Conditions Directive (Directive 2013/33/EU) and Dublin III Regulation (Regulation (EU) No 604/2013), asylum seekers' detention has been provided by specific provisions of EU asylum law, detailing permissible grounds, procedural safeguards and conditions of detention[1].

In particular, pursuant to Article 8(3)(c) of the recast Reception Conditions Directive it is possible to detain a potential asylum applicant in order to decide on his/her right to enter the territory.

However, in its resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014)[2], the European Parliament stressed "the importance of democratic control of all forms of deprivation of liberty pursuant to the laws on immigration and asylum" and called "for closer monitoring of migrant reception and detention centres".

Within the Italian legal framework, it must be considered that even after the new set of provisions which transposed the recast Reception Conditions Directive (with Legislative Decree n. 142/2015), there were no specified grounds for detention of asylum seekers aside of the cases which regarded: the exclusion clauses laid down in Article 1F of the 1951 Convention; pending of an expulsion order or suspicion of terrorism; danger for public order and security; or risk of absconding. In all these specific cases, detention was provided under national law and needed previous validation by the judicial authority.

Article 6(1) of Legislative Decree n. 142/2015, which transposes the Directive 2013/33/EU, established that *asylum seekers shall not be detained for the sole reason of the examination of their application* and, under Article 6(3) an exhaustive number of grounds for detention was provided.

However, Italian Immigration Law n. 286/1998 and Legislative Decree n. 142/2015 do not provide legal grounds for detention of third-country nationals for the sole purpose of identification and under Article 13 of the Italian Constitution, detention can be considered as lawful only if provided by law (riserva di legge) and previous a judicial order (riserva

[1] Articles 8-11 recast Reception Conditions Directive; Article 28 Dublin III Regulation.
[2] Motion for a European Parliament Resolution on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)).

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giurisdizionale): art. 13 para. 2 "*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"* and para. 3 "*In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be 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*".

However, the distinction between detention centres (CPR) and reception centres has been defined by blurred boundaries and, as a result, asylum seekers' detention for identification purposes (even within reception centres) has become a common practice, thereby deliberately circumventing the obligation to ensure asylum seekers with access to key procedural safeguards.

Even if no national provision established legal grounds for detention of asylum seekers other than in the specific cases above mentioned, a *de facto* detention for identification purposes has always been enhanced in Italian first-aid reception centres.

During our work as an NGO offering free legal counselling for migrants and asylum seekers, we received numerous reports by migrants themselves and reception centres on the practice of long periods of detention of migrants illegally arrived in Italy. Indeed, migrants were usually detained for the duration of the identification procedure and often arrived in the second-line reception centres without having been able to file their asylum application to the authorities.

2. Case of Khlaifia and Others v. Italy – Grand Chamber: nothing has changed.

The circumstance of asylum seekers' detention has already been addressed by the Court in the case of Khlaifia and Others v. Italy.

The Grand Chamber, in that case, considered that Italy breached Article 5(1) of the Convention as the provisions applying to the detention of irregular migrants were lacking in precision, Article 5(2) as the applicants had not been duly informed of the reasons for deprivation of their liberty and Article 5(4) as there was no remedy in the Italian legal system whereby the applicants could obtain a judicial decision on the lawfulness of their deprivation of liberty.

The situation has not changed since then.

The Court, at the time, considered that the only national provision establishing grounds for detention was Article 14 of Legislative Decree 286/1998, which however applies "only where removal by escorting the person to the border or a refusal-of-entry measure cannot be implemented immediately, because it is necessary to provide assistance to the alien, to conduct additional identity checks, or to wait for travel documents or the availability of a carrier" (99).

The Court also considered Article 10 of Legislative Decree 286/1998 which "provides for the refusal of entry and removal of, among other categories of alien, those allowed to remain temporarily in Italy on public assistance grounds"; but confirmed that in this

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provision there isn't "any reference therein to detention or other measures entailing deprivation of liberty" (100).

Furthermore, the Court observed that its finding on how the applicants' detention was devoid of legal basis in Italian law was even confirmed by the report of the Senate's Special Commission: "The Special Commission noted that stays at the Lampedusa centre, which in principle should have been limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his or her presence in Italy, sometimes extended to over twenty days 'without there being any formal decision as to the legal status of the person being held'" (104).

For these reasons, the Court took "the view that persons placed in a CSPA, which is formally regarded as a reception facility and not a detention centre, could not have the benefit of the safeguards applicable to placement in a CIE, which for its part had to be validated by an administrative decision subject to review by the Justice of the Peace. […] Consequently, the applicants were not only deprived of their liberty without a clear and accessible legal basis, but they were also unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down, for example, in Article 13 of the Italian Constitution (…). Under that provision, any restriction of personal liberty has to be based on a reasoned decision of judicial authority, and any provisional measures taken by a police authority, in exceptional cases of necessity and urgency, must be validated by the judicial authority within forty-eight hours. Since the applicants' detention had not been validated by any decision, whether judicial or administrative, they were deprived of those important safeguards" (105).

Finding a violation of Article 13 of the Italian Constitution, both under the safeguard of an accessible legal basis and of the previous decision of judicial authority, sufficed for the Court to ascertain the breach of art. 5.4. and "to conclude that 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" (133).

Our written submissions in the present case, bearing the findings of the Court in the case of Khlaifia v. Italy, are intended to show that nothing has changed substantially in the national regulatory field in recent years.

It must also be considered that while the applicants of the Khlaifia ruling had received a refusal order to enter the Italian territory and therefore could potentially fell under the provision of art. 14 T.U.I., Italy has detained many people for purely identification purposes or even just while waiting to find appropriate accommodation to their status as asylum seekers, for which detention is not even conceivable.

The problem of ~~a~~ systemic use of unlawful detention by Italian authorities was underlined by the applicants even in the Khlaifia case, where: "The applicants argued that, in spite of repeated criticisms from various national and international institutions, the procedure for managing the arrival of migrants as described in their application was still applied by the Italian authorities, with the result that there was a systemic and structural violation of the fundamental right to liberty of migrants and the courts had allowed it to continue. The applicants pointed out in this connection that from the autumn

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of 2015 onwards, the Lampedusa CSPA had been identified as one of the facilities where the so-called "hotspot" approach could be implemented, as recommended by the European Union, whereby migrants would be identified and asylum-seekers separated from economic migrants. In 2016 the Italian authorities had continued to run this facility as a secure centre where migrants were detained without any legal basis" (80).

3. Detention for asylum seekers' identification purposes

According to Eurostat data, throughout 2014-2015 almost 180,000 migrants out of the 320,000 that landed in Italy – most of whom had not been identified – crossed the country to apply for international protection in the other Member States.

The European Commission's European Agenda on Migration then created the "hotspot" approach, which is generally described as providing "operational solutions for emergency situations", through a single place to swiftly process asylum applications, enforce return decisions and prosecute smuggling organisations through a platform of cooperation among the European Asylum Support Office (EASO), Frontex, Europol and Eurojust.

Even though there is no precise definition of the "hotspot" approach, it is clear that it has become a fundamental feature of the relocation procedures conducted from Italy and Greece until September 2017, in the framework of Council Decisions 2015/1523 and 2015/1601 of 14 and 22 September 2015 respectively.

In Italy, this strategy has been implemented in 2017 by Article 10 ter of Legislative Decree n. 286/1998, which provided for the establishment of "crisis points" within the first-reception facilities where asylum seekers must be "sent" and "received".

However, no specific definition of the "Hotspots" is provided by law and new reception facilities were not required, so that previous existing first-line reception centres became more and more similar to already existing detention centres.

Indeed, Article 10 ter of Law n. 286/1998, introduced by Law Decree n. 13/2017, does not allow "detention" for identification procedures, but rather provides that when a decision needs to be taken on their right to enter the territory of the state concerned, third-country nationals shall be "led" (*condotti*) in the so-called Hotspots or in the first reception centres as defined by Article 9 of the Legislative Decree 142/2015.

The same provision introduced the possibility of detention for thirty days, but only in cases of reiterated refusal to collaborate in the identification procedures and with the respect of the procedures established for detention in cases of expulsion: the deprivation of liberty, in the case of asylum seekers, should be confirmed by a Court, and in case of "economic" migrants by Justice of Peace Tribunal with the respective safeguards and remedies.

Hotspots, vaguely defined by law as first-reception centres for asylum seekers, have become detention centres without specific procedural grounds being provided by law.

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Indeed, the only provisions on the detention of migrants inside Hotspots can be found in the Standard Operating Procedures ('SOP')[3], issued by the Ministry of Interior, which however cannot be considered having the same value as the law: according to it, deprivation of liberty has to be as short as possible, but migrants cannot be released until full identification "pursuant to current legislation" takes place. Such legislation does not, in fact, allow for any such form of detention.

As it was already found in the Khlaifia case, there is an official recognition by the Italian Parliament of the practice of "*trattenimento*". The title of the Parliamentary Commission itself "*Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei centri di accoglienza, nei centri di accoglienza per richiedenti asilo e nei centri di identificazione ed espulsione*" is already indicative of the three types of detention the Commission is interested in. Of them, the only legitimate detention, since it complies with art. 13 of the Italian Constitution, is that in the centres of identification and expulsion regulated by art. 14 of the T.U.I. (Legislative Decree n. 286/1998).

As regards the other two kinds of detention, the issue of legitimacy was clear to the Parliament and it was addressed by the Head of the Department of Civil Liberties and Immigration of the Ministry of the Interior, Mario Morcone, on 3 December 2015, when he declared that the problem of a long period of detention of asylum seekers in first-reception centres was not addressed by Legislative Decree 142/2015 and still remains unsolved.

So even after the 2017 Reform, detention for identification purposes that extends beyond the 48 hours' time limit, as provided by Article 13 of the Italian Constitution, continues to be used without being prescribed by law and with not guarantees of judicial validation.

This situation has become unbearable because in the meantime, since 2015, detention no longer concerned only applicants who refused to be identified for fear of the effects of the Dublin Regulation, but had become a mass phenomenon: almost all asylum seekers have been detained at "crisis points" for much longer than 48 hours.

Indeed, Legislative Decree n. 142/2015 qualifies as an asylum seeker who "expressed their will to ask for such protection" (that means, even before having formalised the request) and clarifies that the reception allocation refers to "applicants for international protection on the national territory, including borders and transit zones, as well as territorial waters, and members of their families included in the asylum application form" (Art. 1, para. 1).

The transfer of asylum seekers in the local reception centres, which means in practice, often, the exit from a condition of unlawful detention in the first-reception facilities, is subsequent to the formalisation of the asylum application as provided by paragraph 1 of art. 15 of Leg. Decree n. 142/2015.

[3]https://docs.google.com/viewer?url=http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf

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The lack of immediate formalisation of the asylum request has also, over the years, made possible a large number of «deferred refoulement decrees» (*Decreti di respingimento differito)* by the Italian authorities, allowing many foreigners to be considered as economic migrants and not asylum seekers on the basis of what they've answered in the form "foglio notizie" (information sheet), which is a kind of multiple-choice form in which migrants tick the «right answer» to the question «Why are you in Italy?». There are five options: «job search; family reunification; fleeing for poverty; fleeing for other reasons; request political asylum», but no information is given to migrants in order to understand what they are signing and which will be the consequences of their answer.

4. The 2018 Reform. The first legal provision on asylum seekers' detention for identification purposes… but lacking procedural safeguards and remedies

In 2018, Art. 6 of the Reception Decree was amended by Article 3 of Decree Law n. 113/2018 and L. n. 132/2018. The new provision of Art. 6 (3 bis), for the first time, provides that asylum seekers can be detained in Hotspots or other first-reception centres for the time strictly necessary to exhaust the identification procedure, in general and not just in case of refusal to collaborate.

At first, this provision could have even been considered as a big step forward in the lawful definition of asylum seekers' detention for identification purposes: at least this procedure was now officially provided by law. However, no reference to the procedural rules provided by other similar measures, specifically Art. 6 (5), was given; thus, leaving "identification purposes" a ground for detention provided by law, but lacking procedural safeguards and effective remedies to raise complaints. Detention for months without any judicial check is a clear breach of the Constitution: thirty days are fifteen times the limit fixed by art. 13.

The interesting fact is that while the law does not clarify the procedure relating to the validation of this form of detention, the Ministry of Interior in a Circular of 27 December 2018[4] generally referred to validation by the judicial authority needed in these cases.

When the Ministry of Interior specifically clarified that "detention for identification purposes can be carried only for the time strictly necessary, and in any case no further than 30 days, previous a validation by the judicial authority", it seemed like it was trying to fill the gap of the new Art. 6 (3 bis).

However, for the fulfilment of the identification obligations by the authorities, the Italian legislation allows officers or public security agents at most to accompany foreigners for the identification (art. 4 and art. 6 para. 4 of Legislative Decree n. 286/1998) and, until the 2018 Reform, the identification of asylum seekers could be carried out only in open places and not in "closed" ones, that is, it had to take place at first-aid and reception

[4] https://www2.immigrazione.regione.toscana.it/?q=norma&urn=urn:nir:ministero.interno:circolare:2018-12-27;22146

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centres (art. 8, paragraph 2 Leg. Decree n. 142/2015) or at government reception centres (art. 9 Leg. Decree n. 142/2015) or at the Questura (art. 11, paragraph 4 Leg. Decree n. 142/2015) outside of the cases of detention of asylum seekers provided by law.

In practice, before and after the 2018 Reform, there has been a structural recourse to the detention of migrants, for weeks and months (far longer than the 48 hours provided in exceptional cases by the Italian Constitution), on account of their illegal entry into the State during the period considered necessary to provide them with the asylum application forms. As a result, while waiting for the identification procedures to be concluded, asylum seekers are "detained" in reception centres on unlawful grounds.

With regard to this kind of reception/detention system, this Court has already considered, in the Khlaifia and others v. Italy case, as it was mentioned before, that the classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures imposed on them (see, *mutatis mutandis*, *Abdolkhani and Karimnia*, §§ 126-27) and therefore that forced placement of migrants inside a reception centre, under police surveillance and a prohibition to leave, amounts to deprivation of liberty.

The blurred line between the reception/detention nature of Hotspots have been definitively removed, but without safeguards for the right to liberty of asylum seekers.

About the communications of the Italian authorities in response to the Committee during the supervision of execution procedure of the Khlaifia case about the possibility to use exceptional remedies (i.e. complaints to the National Ombudsman or urgent proceedings under Article 700 of the Code of Civil Procedure), we notice that the Italian Constitutional Court, in the decision n. 222/2004, established that any validation judgment must be conducted in an adversarial manner before its enforcement (in that case as regards the border accompanying measure), thus considering as insufficient the guarantees of the urgent remedy provided by Art. 700 of the Code of Civil Procedure and the role of Ombudsman, which cannot be considered as a legal review instrument of unlawful detention, but only as an instrument of control of the conditions of detention. In any case, it has also to be considered how access to lawyers from inside the hotspots centres is quite impossible and due to language obstacles and lack of legal assistance, could not be considered as effective remedies. These remedies have been useful for migrants who were not able to file an asylum application at the local Questura[5], but not for migrants "detained" in facilities as secure and isolated as hotspots.

Therefore, these kinds of detention for identification purposes continue to be in violation of art. 13 of the Italian Constitution and consequently of art. 5.1 and 5.4 of the ECHR. In particular, the lack of effective remedy, before and after the amendments of Legislative Decree n. 142/2015, makes it impossible for migrants to raise the objection of unconstitutionality, although the entire world of lawyers and associations dealing with immigration law underlines the illegality of detention for identification purposes.

[5] https://www.dirittoimmigrazionecittadinanza.it/allegati/fascicolo-n-2-2019/umanitaria-6/410-8-trib-napoli-2-5-2019/file

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The new provision of Art. 6 (3 bis) lacks all these guarantees and therefore added even more ambiguity on the figure of Hotspots centres. An ambiguity that is effectively represented by how people live in the Lampedusa centre, where asylum seekers can be said to be "detained through the front door", but "with freedom of movement through the back door", because there is literally a breach in the iron net from which migrants come out with the silent approval of public authorities.

Salomé Archain, (researcher of the NGO – teaching assistant of the legal clinic on the rights of international protection applicants/ asylum seekers of the University of Florence)

Emilio Santoro, Professor (president of the Scientific Board of the NGO)