

## INTERNATIONAL DECISIONS

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*European Court of Human Rights—migrants—refugees—international refugee law—detention—immigration—torture—human rights—cruel and degrading treatment*

KHLAIFIA AND OTHERS V. ITALY. App. No. 16483/12. At <http://www.echr.coe.int/echr>. European Court of Human Rights (Grand Chamber), December 15, 2016.

In *Khlaifia and Others v. Italy*, the Grand Chamber of the European Court of Human Rights (Grand Chamber or Court) released a landmark opinion with broad implications for how states must respect the individual rights of migrants.<sup>1</sup> In the judgment, issued on December 15, 2016, the Court held that Italy's treatment of migrants after the Arab Spring violated the requirement of the European Convention on Human Rights (ECHR) that migrants receive procedural guarantees that enable them to challenge their detention and expulsion. The Court also held that Italy's treatment of migrants in detention centers did not violate the ECHR's prohibition on cruel and inhuman treatment, in part due to the emergency circumstances involved. The Court further held that Italy's return of migrants to Tunisia did not violate the prohibition on collective expulsion in Article 4 of Protocol 4 of the ECHR. Enforcement of the judgment would require many European states to provide a clear basis in domestic law for the detention of migrants and asylum-seekers. Given the global diffusion of state practices involving migrants, and other states' desires to restrict migration, this case has broad implications for delineating the obligations of states to migrants and the rights of migrants within receiving countries.

In September 2011, the Italian coast guard interdicted Mr. Saber Ben Mohamed Ben Ali Khlaifia and the other applicants, all of whom are Tunisian, and brought them to the island of Lampedusa. There, the applicants were placed in a reception and aid center (*Centro di Soccorso e Prima Accoglienza*, or CSPA) along with many other Tunisian migrants who were fleeing the events of the Arab Spring. CSPAs are more commonly known as migration "hotspots," which are distinct from Italy's Centers for Identification and Expulsion of Aliens (*Centro di Identificazione ed Espulsione*, or CIE). Hotspots are generally run by the European Union (EU), and their operations are not governed by Italian law. CIEs, by contrast, are run by Italy and authorized by Italian legislation.

According to Italy, officials filled in identification sheets for each individual migrant, although applicants disputed this. The migrants were held for three days in the allegedly overcrowded and unsanitary center, where they slept on the floor and ate their meals outside on

<sup>1</sup> *Khlaifia and Others v. Italy*, App. No. 16483/12 (Eur. Ct. H.R. Dec. 15, 2016). Judgments of the Court cited herein are available at its website, <http://hudoc.echr.coe.int>.

the ground. The CSPA was kept under constant police surveillance, making it impossible for the migrants to contact the outside world. After some migrants violently revolted and a fire partially destroyed the CSPA, the applicants were flown to Palermo, Italy. They were placed onto two crowded and allegedly unsanitary ships moored in the harbor. Applicants claimed that they were allowed outside for only a few minutes each day, had to wait hours to use the toilets, were insulted and mistreated by police, and again kept under permanent surveillance (para. 16).

After a week or less on the ships, two of the applicants were taken to Palermo airport on September 27. Mr. Khlaifia followed on September 29. Before being deported, they met with the Tunisian Consul, who “recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011” (para. 18). The text of this agreement was secret, unavailable to migrants or the public. Italy produced three “refusal-of-entry” orders, in Arabic, that they claim were issued regarding each applicant. Applicants, however, asserted that they were not issued documents of any sort during their time in Italy.

The matter attracted the attention of human rights groups. Several of them filed complaints that spurred criminal proceedings against officials in Palermo; these proceedings were ultimately dropped (para. 23). Two other migrants challenged their refusal-of-entry orders before the Agrigento Justice of the Peace, who annulled the orders on July 4 and October 30, 2011 (para. 31). On March 6, 2012, the Italian Senate’s Special Commission for Human Rights (Italian Senate Report) issued a report severely criticizing conditions in the Lampedusa CSPA (para. 35). Three days later, applicants applied to the European Court of Human Rights (ECtHR).

The applicants alleged that their detention and treatment violated ECHR Article 3’s prohibition on cruel, inhuman, and degrading treatment, Article 5’s requirement of procedural guarantees regarding detention, and the prohibition of collective expulsion in Article 4 of Protocol 4, alone and in conjunction with Article 13’s guarantee of an effective remedy for every right in the ECHR (para. 4). They argued that Italy had deprived them of liberty for ten days without offering any reasons, legal justification, or chance to contest their detention. Although Italy did not dispute that its police controlled the migrants’ accommodations and constrained them from leaving the detention areas, Italy argued these measures did not deprive the migrants of liberty because Italy was attempting to help them (para. 60). Italy asserted that it was acting under a secret agreement with Tunisia and relevant EU and Italian migration laws, which required Italy to identify and remove the migrants (para. 58). Italy argued that the Tunisians had adequate explanation for their detention because the migrants had been informed, in a language which they understood, that they had been temporarily admitted to Italy and could be deported imminently (para. 113). Moreover, the applicants had the right to challenge their removal as a remedy against their detention (para. 126).

On September 1, 2015, a chamber of the ECtHR held that Italy had violated Article 5 by not affording the migrants appropriate procedural rights, and that Italy had violated the prohibition on collective expulsion in Article 4 of Protocol 4.<sup>2</sup> However, it found that conditions in the detention centers did not violate Article 3. Finally, the Court found violations of Article 13, which guarantees a remedy for every right in the ECHR, because Italy did not grant the

<sup>2</sup> *Khlaifia and Others v. Italy*, App. No. 16483/12 (Eur. Ct. H.R. Sept. 1, 2015).

migrants effective remedies for the violations of their rights under Article 3 and Article 4 of Protocol 4. Italy then requested a referral of the case to the Grand Chamber. The Grand Chamber of the European Court of Human Rights upheld the Chamber's decision regarding the Article 5 and Article 3 claims but overturned the Chamber's decision regarding Article 4 of Protocol 4.

First, the Grand Chamber held that Italy's detention of the migrants violated Article 5 because migrants cannot be detained in emergency accommodations without a clear legal basis for doing so. Article 5, the Court reasoned, "is concerned with a person's physical liberty and its aim is to ensure that no one should be dispossessed of such liberty in an arbitrary fashion" (para. 64). To determine whether a person has been deprived of liberty, "the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects, and manner of implementation of the measure in question" (*id.*). While acknowledging that distinguishing between deprivation of liberty and restrictions on freedom of movement is difficult (*id.*), the Court held that Italy deprived the migrants of liberty (para. 65). The Court cited the Italian Senate Report to substantiate the migrants' claims that the migrants were effectively held in conditions of detention in the CSPA and on the boats. The restrictions on their freedom of movement and the surveillance that prohibited them from accessing the outside world, for example, made the confinement tantamount to detention. The Court also found that the total duration of their confinement—between nine and twelve days (paras. 65–70)—was significant. The Court further found that Italy's argument that the applicants were not in "detention," according to its own domestic laws, "cannot alter the nature of the constraining measures imposed upon [the applicants]" (para. 71). That Italy was trying to help the migrants also did not alter the application of Article 5, because "[e]ven measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty" (*id.*).

Next, the Court held that Article 5(1)(f) requires that the detention of migrants must have a clear basis in the domestic law of the receiving state. A deprivation of liberty is lawful only if it falls within the permissible grounds specified in Article 5(1)(a–f). Since Article 5(1)(f) justifies deprivation of liberty only if deportation or extradition proceedings are in process, the detention of the applicants was unlawful. The Court rejected Italy's argument that Article 5(1)(f) did not apply because the migrants were not being held pending deportation or extradition but had merely been allowed to temporarily enter Italy (para. 81).

The Court found Italy to be in further violation of Article 5. Italy had conceded that the applicants' detention was not conducted pursuant to its own domestic law. As noted above, Italian immigration law authorizes detention only within CIEs, which are judicially supervised, thereby allowing migrants to challenge their detention and the conditions in which they are confined (para. 75). The CSPA hotspot and the ships, by contrast, were not detention facilities, and migrants could not access judges there. The Court held that the secret agreement between Italy and Tunisia could not provide the basis for detention because the text was not public and was not accessible to the applicants. Without a legal basis for detention, Italy could not have informed the applicants of the reason for depriving them of liberty or how to challenge that deprivation, in violation of Article 5(2). Given that the Court found that the applicants were not informed of the reason for their detention, the migrants' right to appeal their detention did not have "effective substance" (para. 132). Thus, the Italian legal system did not offer the applicants an effective way to challenge the lawfulness of their

deportation, in violation of Article 5(4)'s guarantee of proceedings to review the lawfulness of their detention.

Turning to Article 3, the Court held that neither conditions in the Lampedusa detention center nor on the boats in Palermo harbor constituted inhuman and degrading treatment. Here, the Court considered the context of the detention as relevant in determining whether it constituted inhuman and degrading treatment. Italy had argued that the migrants were detained in an exceptional humanitarian emergency. The Grand Chamber noted the ECtHR's previous holdings that the absolute character of the prohibition on torture and cruel, inhuman, and degrading treatment meant that a mass influx did not absolve a state of its Article 3 obligations (paras. 184–85),<sup>3</sup> but it went on to say that “it would certainly be artificial to examine the facts of this case without considering the general context in which those facts arose” (para. 185). Given the circumstances, the Grand Chamber found that the migrants' treatment did not exceed the level of severity that Article 3 violations require. The duration of both confinements was relatively short, and applicants did not present any objective proof of their allegations of overcrowding and extreme unsanitary conditions in Palermo. Moreover, Italian domestic courts had issued a decision that directly countered the applicants' account of the conditions under which they were detained. Finally, the applicants were not asylum-seekers and did not have the “specific vulnerability inherent in that status” (para. 194). The applicants were young males without particular health issues, not children, asylum-seekers, or members of other classes traditionally considered to be vulnerable. Although they may have been physically and psychologically weakened by the sea crossing, the Court did not consider them “vulnerable.” Were they vulnerable, the Court implied that it may have reached a different holding.

The Court also found that Italy's deportation of the migrants did not qualify as collective expulsion in violation Article 4 of Protocol 4, noting again the extraordinary circumstances of the migration crisis. After reviewing *Hirsi Jamaa and Others v. Italy* and other cases in which the ECtHR had required individualized processing of asylum claims, the Court noted that Article 4 of Protocol 4 did not explicitly require individualized processing.<sup>4</sup> Instead, the provision requires that each person concerned has an effective possibility to individually submit arguments against deportation (para. 248). In this case, the Tunisian applicants had undergone two identification procedures during which they “had the opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned” (para. 247). At no time did they cite fears of persecution or other obstacles to their return to Tunisia (para. 251). Because no migrant challenged his expulsion, the situation did not qualify as a collective expulsion, even if it was simultaneous.

Even though the Court found no Article 3 violation, it held that Italy violated Article 13 in conjunction with Article 3 because the applicants had no remedy for their complaint about the conditions of their detention on the ships. Italy did not violate Article 13 in conjunction with Article 4 of Protocol 4, however, because the migrants had the opportunity to contest refusal-of-entry orders before the Agrigento Justice of the Peace. The Court further held that the fact that the applicants had no remedy that would have the effect of suspending

<sup>3</sup> *M.S.S. v. Belgium and Greece*, 2011-I Eur. Ct. H.R. 255 (2011); *Hirsi Jamaa and Others v. Italy*, 2012-II Eur. Ct. H.R. 97 (2012).

<sup>4</sup> *Hirsi Jamaa*, *supra* note 3.

enforcement of the removal-of-entry orders did not violate Article 13 taken with Article 4 of Protocol 4, given that none of the applicants had claimed that they would be ill-treated if returned to Tunisia.

Justice Serghides concurred with the decision in part, dissenting only regarding the Court's judgment on Article 4 of Protocol 4. By dispensing with the requirement of individual interviews to determine whether migrants have fears of persecution or torture in their countries of origin, Judge Serghides reasoned, the ECHR's safeguards become dependent on the discretion of police or immigration authorities. He also stated that the judgment disregarded the need to protect groups of aliens against arbitrariness or abuse of power, contrary to the intent of Article 4 of Protocol 4. The article was designed to protect aliens from being expelled on the basis of being part of a particular group, including an ethnic or national group. The decision, in his view, places the burden of proof on the alien, rather than the state, to show that the alien has the possibility of international or other legal protection. To Judge Serghides, this effectively makes the right against collective expulsion conditional on the possibility that an alien can assert protection. He argued that:

a State which expels aliens *en masse* [should be] presumed to be in violation of Article 4 of Protocol 4, unless it can prove, beyond reasonable doubt, that it followed due process regarding every alien in the group, through a procedure involving personal interviews.” (J. Serghides Partly Dissenting Opinion, para. 35)

Justice Serghides agreed with the applicants that this decision represents a step backward in human rights protections.

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For Italy and other states, the *Khlaifia* decision is a mixed result. On one hand, the decision may require states to change their laws regarding procedural rights for migrants, which can be a time-consuming and fraught political process. Even if state laws already include appropriate procedural guarantees for migrants, the decision sets up a conflict between state laws and EU policies. While *Khlaifia* was pending, the EU's use of migration hotspots in Italy, Greece, and elsewhere continued.<sup>5</sup> The EU had pushed Italy and Greece to develop their own hotspots, meaning designated facilities for identification and fingerprinting of arrivals and some asylum procedures. No EU legislation defines these hotspots or authorizes detention there, but EU agencies and staff are involved in running them.<sup>6</sup> As the Court noted, the UN Refugee Agency (United Nations High Commissioner for Refugees, or UNHCR) did note improvement in the conditions between the Chamber ruling and the Grand Chamber Ruling (para. 149). However, whether the procedural guarantees required by *Khlaifia* have been implemented remains unclear.

<sup>5</sup> See Amnesty International, *Italy: Beatings and Unlawful Expulsions Amid EU Push to Get Tough on Refugees and Migrants* (Nov. 3, 2016), at <https://www.amnesty.org/en/latest/news/2016/11/italy-beatings-and-unlawful-expulsions-amid-eu-push-to-get-tough-on-refugees-and-migrants>; European Council on Refugees and Exiles, *The Implementation of the Hotspot Approach in Italy and Greece: A Study* (2016), available at <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>.

<sup>6</sup> Darren Neville, Sarah Sy & Amalia Rigon, *On the Frontline: The Hotspot Approach to Managing Migration*, EUROPEAN PARLIAMENT, DIRECTORATE-GENERAL FOR INTERNAL POLICIES 29 (2016), available at [http://www.europa.eu/RegData/etudes/STUD/2016/556942/IPOL\\_STU%282016%29556942\\_EN.pdf](http://www.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU%282016%29556942_EN.pdf).

On the other hand, the judgment gives states more leeway to manage mass influxes of migrants. When states are overwhelmed by large migration flows, they may not have the resources to provide accommodations that meet their usual standards or be able to arrange such accommodations as quickly as they are needed. The Court's decision on Article 3 recognizes this, and effectively holds that, if migrants are not "vulnerable" and the period of detention is short, states can hold migrants in otherwise substandard conditions without fear of being held liable for human rights violations. Moreover, the judgment allows states to expel groups of migrants without conducting individualized asylum screenings, so long as migrants are notified that they can challenge their deportation.

The decision leaves unclear exactly what a meaningful opportunity for a migrant to challenge his deportation would look like. *Khlaifia* might be interpreted to mean that states do not have the burden of ensuring that migrants understand their procedural rights. For the Court, merely granting them refusal-of-entry orders translated into their language, but not their dialect, appears to be enough. As Justice Serghides noted, the decision shifts the burden of proof to individual asylum-seekers to assert their rights to non-refoulement or other international protection. The decision places no affirmative obligation on states to inform migrants of those rights.

From a human rights perspective, the *Khlaifia* decision is also a mixed result. The ruling expands the scope of Article 5 of the ECHR by explicitly requiring states to base detention of migrants on transparent and specific domestic laws. Under the ruling, migrants and other noncitizens now must have access to the legal basis for their detention and an effective opportunity to challenge the conditions of their confinement and the legality of their detention. These state laws must clearly spell out the substantive requirements and procedural guarantees for migrant detainees. The Court also held that Article 5's prohibition on the deprivation of liberty cannot be eroded, even in the extreme context of a migration crisis.

However, the Court's decision can be seen as eroding the rights previously established in ECtHR jurisprudence on Articles 3 and 4. In past jurisprudence, the ECtHR has explicitly refused to allow for a flexible interpretation of ECHR rights in an emergency context, even when terrorism concerns were at an extreme high following the attacks of September 11, 2001.<sup>7</sup> In *Saadi v. Italy*, for example, the ECtHR held that Article 3 provides a blanket prohibition against torture, even when an individual presents national security concerns, and even in the context of heightened fears of terrorism following the attacks of September 11, 2001. These cases dealt with an alien's potential deportation to a place where he might be tortured, and not cruel or inhuman treatment. However, the ECtHR's adamant declaration of the inviolability of Article 3 in these cases suggested its unwillingness to erode Article 3 rights, no matter the context.

In *Khlaifia*, the Court departed significantly from its prior jurisprudence by holding that context should be considered when interpreting the meaning of Article 3 rights. The Court admitted that it was influenced by the reality of the post-Arab Spring influx of migrants to Europe, and the difficult circumstances that Italy faced as a result. Its willingness to consider this context, however, erodes the absolute character of the prohibitions within Article 3. Without changing its overall reasoning, the Court could have easily declared that Italy

<sup>7</sup> *Saadi v. Italy*, 2008-II Eur. Ct. H.R. 207 (2008); *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1996) (previously affirming the inviolability of Article 3).

was liable for violating Article 3 in this particular case, citing specific actions the state could have taken to avoid this. The effect of such an alternate holding might have constituted a slap on the wrist for Italy, but it would have better preserved Article 3 rights.

The holding that the treatment of Tunisian migrants did not meet the definition of collective expulsion is even more troubling. Even beyond the concerns stated in Justice Serghides's dissent, the ruling seems to reduce the prohibition against collective expulsion to the theoretical requirement that a migrant can challenge his expulsion, regardless of whether he is aware of or meaningfully afforded the opportunity to do so. The Court's ruling is ambiguous as to what procedural guarantees are actually required, and what information the migrant must be given about his rights. Without an affirmative requirement of individual screenings or interviews, collective expulsion may be difficult to prevent. If the *Khlaifia* ruling is extended, it could erode procedural guarantees for migrants in other circumstances, and potentially open the door for still more erosion of ECHR rights in emergency situations.

*Khlaifia* has now been sent to the Committee of Ministers of the European Council in Strasbourg, which will require Italy to show how it has implemented the ruling. As mass migration to Europe continues, it remains to be seen whether *Khlaifia* will affect state behavior, cause better procedural guarantees for migrants, and whether it will open the door for the continued erosion of rights guaranteed by the ECHR.

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*Constitutional Court of Chile—abortion—conscientious objectors—international and comparative sources in constitutional interpretation*

STC 3729/2017. Upon Unconstitutionality Actions 3729, 3751; Against Legislative Bill Bulletin No. 9895-11. Rol de la causa 3729(3751)-17-CPT. At [https://www.tribunal-constitucional.cl/descargar\\_sentencia.php?id=3515](https://www.tribunal-constitucional.cl/descargar_sentencia.php?id=3515).

Constitutional Court of Chile, August 28, 2017.

While many women have profited from the relatively recent rights-revolution in Latin America,<sup>1</sup> their pregnant sisters have apparently had to sit in the back of the bus or stay off altogether. Even modest progress on abortion entitlements has come at a high price and slow pace,<sup>2</sup> perhaps due to the opposition of an alliance of long-established and up-and-coming religious groups. On a positive note, however, the struggle for emancipation on this front seems to be moving forward. In Chile, the Constitutional Court's (or

\* Views expressed here are those of the author, and do not reflect those of Marine Corps University, the U.S. Department of Defense, or any other U.S. government agency.

<sup>1</sup> See generally ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 593–656 (3d ed. 2017).

<sup>2</sup> See generally *id.* at 231–60.