Are immigrants detained at Reception Centres at a greater risk than those being held in Detention Centres?

The recent ECHR Judgment Khlaifia and others v. Italy (Khlaifia II)

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Some weeks ago, the Grand Chamber of the European Court of Human Rights released a most awaited Judgement Khlaifia and others v. Italy of 15th December 2016 on the conditions of detained immigrants at Reception centres. A previous Judgment ruled out by the ECtHR's Second Chamber (*Khlaifia I*) banned certain detention practices against irregular immigrants that had been commonly applied by South and East European States since the 2014 refugee crisis. The initial judgement held Italy responsible for the violation of several rights protected by the ECHR with a potential to shake up State's arrival detention orders and policies.

The case of Mr. *Khlaifia* and the two co-applicants is, sadly, a quite common story. The applicants left their country (Tunisia) on rudimentary vessels towards Italy, were intercepted by Italian coastguards, escorted to Lampedusa and transferred to an Early Reception and Aid Centre (ERAC), where they were kept detained for identification purposes. Being held involuntary in the Centre and in very poor conditions, the interns revolted, broke out of the centre and took to the streets of Lampedusa. Afterwards, they were detained by police and brought back to the centre, just to be shipped quickly afterwards to Palermo, where they were held on custody in two different ships. Detention lasted between 9 and 20 days.

The *Khlaifia* case raises concern about five cross-cutting issues.

First issue, the need of a **legal basis and ordinary detention safeguards against confinement in reception centres** (or ships) of aliens entering illegally. By unanimity, the Grand Chamber found that holding immigrants or asylum seekers in Centres and/or ships for a significant period of time, even if the aim of the custody is to assist applicants and ensure their safety, in conditions similar to detention and deprivation of freedom, prolonged confinement, inability to communicate with the outside world, and lack of freedom of movement, called into application art. 5.1.f CEDH. The Court found that such *de facto* detention in a reception centre was surrounded of lower safeguards against arbitrary detention than those provided for people confined in a Detention Centre (for example, *Habeas Corpus, see* Para 105). In this situation, the Court noted by unanimity a violation also of the right to be promptly informed of the reasons for detention protected by art. 5.2 ECHR, this was so due to the particularly belated notification of the refusal-of-entry orders, and the fact that in those

documents was absent any reference to the applicant's detention or to the legal and factual reasons for such measure.

Similarly, the Court reminded Italy that **detention requires the States to provide for a judicial review with a speedily decision of compliance with procedural and substantive conditions of detention**. Lacking detention a legal basis and a formal communication of its legal and factual reasons, it naturally follows that such a remedy did not exist in substance in this case. Even in the event of admitting that an appeal before the Judge of Peace was available it lacked effectivity because the detainee would be already back in Tunisia by the time his/her claim would be reviewed.

It is noteworthy, though that for the Grand Chamber highlights to find a State liable for the infringement of art. 3 ECHR on degrading or ill-treatment, a minimum level of severity is to be found, such assessment should take into account a number of factors (purpose, context, vulnerability, cumulative effects of detention conditions, etc..). In the present case despite the overcrowding, poor hygiene, and lack of contact with the outside world, the Court also weighted other factors relating to the conditions of the Centre (basic but decent), the conditions of the applicants (not asylum seekers, not vulnerable people) as well as the short length of their stay, and remarkably, the the particularly exceptional circumstances of immigration to Lampedusa during 2011-2012 and the violent revolt at the reception centre, that stroke the balance in favour of the State. Therefore, it concluded by unanimity the absence of violation of art. 3 ECHR. The Court accepted though the challenge against the lack of an effective appeal against ill-treatment (art. 13 ECHR in connection with art. 3 ECHR) rather cryptically, mainly due to the specific lack of remedies available to challenge potential ill-treatments at reception centres and/or the ships.

Finally, and again against the opinion of the issuing Second Chamber in *Khlaifia I*, the Grand Chamber concluded that Italy did not infringed upon the **prohibition of collective expulsion** enshrined in art. 4 Protocol 4 ECHR. The Grand Chamber concluded that the applicants underwent identification on two occasions, their nationality was established and were afforded a genuine and effective possibility of submitting arguments against their, thus accepting that the prohibition was also applicable to refusal-of-entry orders expulsion. However, the Court applied a less strict check to the refusal-of-entry orders, admitting their nature justified a limited fact-checking. The Grand Chamber also dismissed the challenge against the lack of an effective appeal against expulsion (art. 13 ECHR) the appeal available being not suspensive, the argument was that here the applicants did not risk their live or integrity if returned to Tunisia. This last argument is most troubling because it raises the standards, hopefully only to refusal of entry cases, usually applied to art. 13 ECHR cases.