

## Italy - Tribunal of Crotona, 12 December 2012, n. 1410

**Country of Decision:**

Italy

**Country of Applicant:**

Unknown

**Date of Decision:**

12-12-2012

**Citation:**

No. R.G. 809/2012

**Court Name:**

Tribunal of Crotona, Criminal Section, Judge Edoardo D'Ambrosio

**Keywords:**

Detention

Return

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**Relevant Legislative Provisions:**Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [2]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 5](#) [3]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [4] > [Recital \(16\)](#) [5]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [4] > [Article 15](#) [6]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [4] > [Article 16](#) [7]

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**Headnote:**

In a situation of unlawful detention ? unlawful because it did not comply with national and European norms on the detention of illegally staying citizens ? as well as inhuman and degrading conditions in the Identification and Expulsion Centre, the revolt by the four Defendants should be considered as proportionate and the alleged conduct should be treated as legitimate defence.

### **Facts:**

Administrative detention measures were issued against three individuals on grounds that they lacked identity documents.

After validation of the administrative measures of detention by the judge, the three individuals were taken to the identification and expulsion centre 'Sant'Anna' in Isola di Capo Rizzuto on separate dates.

The conditions in the centre were unhygienic and insalubrious, with the three individuals being forced to sleep on dirty mattresses, wash in unsanitary facilities and forced to eat limited food on the floor.

On the morning of 9 October 2012, an ordinary search was carried out by the law enforcement authorities in the Centre in order to find and seize objects that might have been used as a means to escape the centre. Many individuals within the centre verbally protested against this act.

In the afternoon of the same day, the three individuals climbed to the roof of the residential facility from the balconies of the third floor and started a protest. Indeed, they began to continuously throw pieces of plaster, bricks and similar materials at the Centre guards and the judicial police. The protest created a situation in which the guards were in danger and resulted in difficulties and disruptions to the assistance services for the other guests of the Centre. In addition, some objects were thrown against a Police car which was damaged, and against a street lamp which was destroyed.

Some directors of the central police station attempted to mediate with the protesters, but this had no effect since the three individuals understood that they would be arrested in any case.

After 6 days of protests and starvation, the three individuals surrendered and were arrested on grounds of aiding and abetting (art. 110 of the Italian criminal code) 'damaging' (art. 635(2)c.c.), with the aggravating circumstances of having committed the offence against public assets (art. 635(7) c.c.); and were also accused of the offence of aiding and abetting of the 'obstruction of a public official' (art. 337 c.c.), with the aggravating circumstances of having committed the offence with more persons gathered (art. 339 c.c.).

The competent Tribunal validated the arrest and ordered a pre-trial detention.

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### **Decision & Reasoning:**

The Tribunal firstly held that the detention measures were unlawful on grounds of a breach of the obligation to provide reasons with regard to the respect of the proportionality principle when choosing the measure necessary to ensure the expulsion of the foreigner from the national territory

#### 1) Principle of proportionality

By virtue of such principle, detention in the centre for identification and expulsion has to be

ordered only when other measures are deemed to be inadequate. This principle is foreseen in art. 15(1) of the Returns Directive 2008/115/EC; and art. 7(3) of the Directive foresees the obligation of regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place as possible less coercive measures than detention in a centre.

Firstly, The Tribunal highlighted that this interpretation had been corroborated by the CJEU in the judgment of *El Dridi* C-61/2011 para. 39. Secondly, the Tribunal observed that this principle has to be respected in Italy regardless of the fact that the national applicable law, namely the Consolidated Law on Immigration, neither envisages such a principle nor provides for less coercive measures. Indeed, the Tribunal firstly recalled that the CJEU has affirmed that arts. 15 and 16 of the Returns Directive are unconditional and sufficiently precise so as not to require further specific norms to allow Member States to apply them (*El Dridi*); and secondly that EU law provisions characterised by such precision and absoluteness and establishing individual rights that can be invoked against the State (so called self-executing dispositions) are directly applicable by national judges even if they are not properly transposed by the Member States within the required time, and even if contrary to national legislation, which consequently has to be set aside (judgements no. C-286/85 (1987) and no. 157/2002 (2004)). Moreover, the Tribunal noted that this principle of supremacy of EU law has also been embraced by the Italian Constitutional Court, which has, in addition, maintained that the CJEU case-law is a source of EU law as well, and is directly applicable by national Courts (judgements n. 113 (1985), and n. 389 (2009)).

## 2) The obligation to justify the administrative measure

The Tribunal held that, according to the obligation to justify their administrative choices foreseen by Italian law, read in conjunction with the principle of proportionality, law enforcement authorities had to provide reasons why, in the specific case, it was impossible to apply a less coercive measure than detention with the aim of ensuring the eventual removal of the individual. Nevertheless, the Tribunal observed that none of the three administrative detention measures contained specific reasons why less coercive measures were not applicable. Indeed, the aforementioned written measures did not substantiate the reasons as to why alternative measures were not possible or provided only abstract reasons that failed to take into consideration the individuals' specific and concrete circumstances.

For these reasons, the above mentioned measures were declared unlawful by the Tribunal, with consequent immediate release of the three foreign citizens by virtue of art. 15(2) of the Returns directive.

In the subsequent part of the judgment, the Tribunal stated that the conditions in which the indicted had been forced to live violated their right to human dignity.

### 1) National law applicable

As to national law, the Tribunal noted that the right to human dignity is protected by art. 2 of the Italian Constitution, which recognises and guarantees inviolable human rights, and by art. 14(2) of the Consolidated Law on Immigration (the Legislative Decree n. 286 (1998)), according to which the foreigner is detained in the centre in a way which ensures the necessary assistance and full respect of human dignity.

### 2) Applicable International law

As to international law, the Tribunal observed the applicability of art 3 of the ECHR. Furthermore, the Tribunal recalled that national norms, included those cited above, have to be interpreted in

conformity with the applicable international legislation, in particular the ECHR. In this respect, the Tribunal referred to the judgement n. 311, 16-26.11.2009 rendered by the Italian Constitutional Court, where the latter firstly stated that a violation of the ECHR is an indirect breach of art. 117 of the Italian Constitution; And secondly held that national judges have to interpret national norms in conformity with international norms if possible.

That said, the Tribunal noted that the aforementioned national norms could be interpreted in light of the ECtHR case-law on art. 3 in order to establish whether the conditions of detention in the Centre had violated the human dignity of the three individuals. In this respect, the Tribunal recalled the judgments *Tabesh v. Greece* n. 8256/07 (26 November 2009), and *M.S.S. v. Greece and Belgium* n. 30696/09 (22 January 2011), in which the Court found a violation of art. 3 ECHR in cases where the applicants ? detained in the first case in an identification and expulsion centre, and in the second case in a centre for Asylum seekers ? were malnourished, obliged to sleep on the ground, kept in overcrowded rooms and with limited access to toilets.

In light of the interpretation given to art. 3 ECHR by the Court, particularly in the aforementioned cases, and in light of the factual conditions in which the indicted were kept, the Tribunal held the state of the *Sant'Anna* Centre was not suitable for its function, namely hosting human beings and therefore the individuals had suffered a violation of their human dignity.

In this respect, the Tribunal also underlined that the standard quality of housing to be used as a yard stick does not correspond to the average quality of housing of an irregular foreign citizen (more often in precarious), but to the average quality of housing of a human being as such, therefore an average person, irrespective of his condition, nationality of ethnicity.

Finally, the Tribunal stated that the behaviour of the indicted was a legitimate act of self-defence from an unlawful attack to their dignity.

In this respect, the Tribunal firstly recalled that the prerequisites of legitimate self-defence are an unlawful attack to one's right and a legitimate reaction by virtue of art. 55 of the Italian Criminal Code as interpreted by the Court of Cassation *inter alia* in the judgements n.32282 rendered on 04-07-2006.

#### 1) The requirement of an unlawful attack

The Tribunal considered that the conditions of the Centre met the requirement of an *unlawful attack* , since (as above reported) it constituted a violation of human dignity.

#### 2) The requirement of a legitimate reaction

As to the prerequisite of a *legitimate reaction*, according to the interpretation of the Court of Cassation, it refers to the necessity of defending oneself, to the inevitability of the danger, and to a proportionality between the attack and the defensive reaction.

The first two requirements were considered as evidently met by the Tribunal given the circumstances wherein the facts of aggression and reaction happened.

As to the proportionality between the attack and the reaction, the Tribunal recalled judgment n. 45407 rendered on 10/11/2004 by the Italian Court of Cassation, whereby the latter stated that there is certainly no proportionality when the harmed interest (life or physical integrity) is considerably more relevant than the defended interest (as property) according to the hierarchy of values set by the Italian Constitution. From such *ratio decidendi*, the tribunal inferred, through an argument *a contrario*, that in the case under analysis the conflict easily tipped in favour of the

defended interests (human dignity and personal liberty) against the interests of the public administration, namely prestige and efficiency and of the public property which had been offended by the indicted.

The tribunal then recalled another *ratio decidendi* of the Cassation case-law (judgment n. 32282, 04/07/2006), according to which the proportionality requirement implies that the reaction could not be replaced by another one of less intensity according to an *ex tunc* evaluation carried out taking into due account the circumstances of the specific case. In this respect, the Tribunal observed that the protest was undertaken by the indicted in the only possible effective way: obstructing the regular activities of the Centre. Indeed, the Tribunal firstly remarked that a verbal or written request to the competent authorities would be redundant since the detention in a Centre for Identification and Expulsion, despite unlawful in the case under analysis, is generally foreseen by the law and functionaries as obligatory. In addition, the Tribunal noted that it was not possible to argue against the legitimacy of the detention measure before the judge of validation since:

- the indicted had not been assisted by an interpreter who enabled them to understand the technicalities of the proceedings;
- the Court-appointed attorneys who defend foreign citizens in the judicial review hearing are notoriously appointed the same day of the hearing or immediately before, and therefore have no possibility to adequately prepare for the case.

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#### **Outcome:**

By virtue of art. 530(1) of the Italian Code of Criminal Procedure, the Tribunal acquitted the indicted for the offences of damaging public property and the obstruction of a public official. Indeed, the conduct committed by the indicted was not unlawful given the justification of legitimate defence.

By virtue of art. 300(1) of the Italian Code of Criminal Procedure, the Tribunal ordered the immediate liberation of the indicted.

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#### **Attachment(s):**



[Crotone Tribunal, 12.12.2012, n. 1410.pdf](#)[8]

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#### **National / Other Legislative Provisions:**

[Italy - Legislative Decree No. 286/1998 - Art 13](#) [9]

[Italy - Legislative Decree No. 286/1998 - Art 14](#) [10]

[Italy - Law 241/1990 - Art. 3](#) [11]

[Italy - Decree of the President of the Republic No. 394/1990 - Art. 20](#) [12]

[Italy - Law No. 129/2011](#) [13]

[Italy - Constitution - Art 2](#) [14]

[Italy - Criminal Code - Art. 52](#) [15]

[Italy - Criminal Code - Art. 110](#) [16]

[Italy - Criminal Code - Art. 116](#) [17]

[Italy - Criminal Code - Art. 330](#) [18]

[Italy - Criminal Code - Art. 337](#) [19]

[Italy - Criminal Code - Art. 339](#) [20]

[Italy - Criminal Code - Art. 625](#) [21]

[Italy - Criminal Code - Art. 635](#) [22]

[Italy - Criminal Procedure Code - Art. 244](#) [23]

[Italy - Criminal Procedure Code - Art. 438](#) [24]

[Italy - Criminal Procedure Code - Art. 275](#) [25]

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#### **Links:**

[1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[2] [https://www.asylumlawdatabase.eu/node/195#toc\\_12](https://www.asylumlawdatabase.eu/node/195#toc_12)

[3] [https://www.asylumlawdatabase.eu/node/195#toc\\_22](https://www.asylumlawdatabase.eu/node/195#toc_22)

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[5] [https://www.asylumlawdatabase.eu/node/1306#toc\\_24](https://www.asylumlawdatabase.eu/node/1306#toc_24)

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[8]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Crotone%20Tribunal%2C%2012.12.2012%2>

[9] <https://www.asylumlawdatabase.eu/en/taxonomy/term/4227>

[10] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7871>

[11] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-law-2411990-art-3>

[12] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-decree-president-republic-no-3941990-art-20>

[13] <https://www.asylumlawdatabase.eu/en/taxonomy/term/8040>

[14] <https://www.asylumlawdatabase.eu/en/taxonomy/term/8035>

[15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-52>

[16] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-110>

[17] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-116>

[18] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-330>

[19] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-337>

[20] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-339>

[21] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-625>

[22] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-code-art-635>

[23] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-procedure-code-art-244>

[24] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-procedure-code-art-438>

[25] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/italy-criminal-procedure-code-art-275>