

## **ECtHR - Khlaifia and Others v. Italy (GC), no. 16483/12, 15 December 2016**

**Country of Applicant:**

Tunisia

**Date of Decision:**

15-12-2016

**Citation:**

Khlaifia and Others v. Italy [GC] (no. 16483/12)

**Court Name:**

European Court of Human Rights (Grand Chamber)

**Keywords:**[Effective access to procedures](#) [1][Effective remedy \(right to\)](#) [2][Detention](#) [3][Individual assessment](#) [4][Inhuman or degrading treatment or punishment](#) [5][Procedural guarantees](#) [6]**Relevant Legislative Provisions:**Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7] > [Article 3](#) [8]

Council of Europe Instruments &gt; ECHR (Fourth Protocol)

Council of Europe Instruments &gt; ECHR (Fourth Protocol) &gt; Art 4

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7] > [Article 5](#) [9] > Art 5.1 > Art 5.1 (f)Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7] > [Article 5](#) [9] > Art 5.2Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7] > [Article 5](#) [9] > Art 5.4Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [7] > [Article 13](#) [10]**Headnote:**

The applicants' detention under Article 5 (1) was arbitrary and did not ensure the principle of legal certainty; lack of information was contrary to Article 5 (2) and impaired their ability to challenge the detention decisions in violation of 5 (4). The conditions at the reception centre and the boats did not amount to a violation of Article 3, as the applicants' stay was very short and there were not sufficient indications.

There was no violation of Article 4 Protocol 4, as the applicants have had a genuine and effective possibility during the entire procedure to raise concerns regarding obstacles to their return to Tunisia; there was similarly no violation of Article 4 Protocol 4 in conjunction with Article 13, since the applicants' complain would solely relate on the collective nature of their expulsion and not to any real risk of treatment contrary to Article 2 & 3 in Tunisia.

### **Facts:**

This case relates to three nationals of Tunisia who left, along with others, on makeshift boats aiming to reach Italy during the 'Arab Spring'. After being intercepted by the Italian coastguard, they were transferred to the a first reception centre (CSPA) in Lampedusa, which they alleged was overcrowded with unacceptable sanitation, inadequate space to sleep, constant police surveillance and no contact with the outside world. The applicants were transferred to a sports complex following an uprising by detainees during which the reception centre was partially destroyed by fire. They managed to escape to the village of Lampedusa, where they participated in demonstrations along with around 1,800 others. They were stopped by police and taken back to the CSPA before being flown to Palermo on 22 September.

In Palermo, they were placed on ships moored at the dock, but confined to overcrowded areas in the restaurant halls, with limited access to the toilets and no information from the authorities, where they allege they were insulted and mistreated by police officers. After 5-7 days they were taken to Palermo airport in order to be repatriated. They were identified by the Tunisian consul and deported to Tunisia based on a bilateral agreement between the two States. The applicants allege that they were not served with any documents at any time during their stay in Italy.

In the course of these proceedings the Italian government produced a repatriation decree against each applicant in Italian with Arabic translations, in essentially identical terms. The decrees were not signed but stated in handwritten notes that the person concerned had refused to sign and receive a copy. Following a complaint by anti-racist organisations, a criminal investigation took place into the unlawful arrest of migrants on board the ships and abuse of powers but the judge for preliminary investigations shelved the case in April 2012 without charges being brought.

The applicants complained before the ECtHR that they were unlawfully deprived of their liberty in violation of Article 5, both at the CSPA and on board the ships, and that the conditions of their detention amounted to inhuman and degrading treatment contrary to Article 3 ECHR. Finally, they submitted that they had been subject to a collective expulsion, in violation of Article 4, Protocol 4 ECHR. In its September 2015 ruling, the ECtHR (Second Section) found that the three nationals of Tunisia had been unlawfully detained upon arrival in Italy, first in a reception centre and then on board ships, where they were not provided information and had no opportunity to challenge their detention. In addition, the conditions in the reception centre amounted to inhuman and degrading treatment. Finally, the Court found that the applicants had been subject to collective expulsion, as despite being identified individually and being issued with separate repatriation decrees, their individual circumstances had not been genuinely considered prior to their return to Tunisia.

The case was referred to the Grand Chamber on 1 February 2016.

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## **Decision & Reasoning:**

### Article 5 (1)

The Court first analysed the guarantees found in Article 5 (1) and emphasised that the provision's requirement that any deprivation of liberty is 'in accordance with a procedure prescribed by law' does not simply refer to the existence of domestic legislation but also to its quality and compatibility with the rule of law. In terms of applicability of 5 (1) f, the Court agreed with the judgment under referral that, since their deprivation of liberty was connected to procedures relating to their unlawful entry, this limb of Article 5 is applicable.

In examining the legal basis of the applicants' detention, the Court noted that stays in the CSPA were restricted to the time needed to establish identity and legality of presence and did not have the same guarantees that Italian law provided for detention in a Centre for Identification and Expulsion (CIE), namely, an administrative decision subject to judicial review. The applicants had not received formal decisions of detention and the Court did not find any legal basis for their deprivation of liberty. Even if their detention was pursuant to the bilateral agreement between Italy and Tunisia, this did not provide an adequate legal basis under the exhaustive grounds set out in Article 5 and was not publicly accessible. The Court also observed the findings of the PACE Ad Hoc Sub-Committee and the Italian Senate's Special Commission, which referred to practices of *-de facto* detainees of unclarified legal status. Concurring with the Chamber judgment, the Court found that the applicants' detention failed to protect them against arbitrariness or meet the principle of legal certainty leading to a violation of article 5(1) ECHR.

### Article 5 (2) & (4)

On this point, the Court followed a line similar to that of the Chamber and stated that the mere lack of legal basis rendered the Italian authorities incapable of informing the applicants of the legal reasons or possibility of legal challenges against their detention. Although the applicants were probably aware of their status as irregular migrants and potential measures of removal, this information alone cannot satisfy the need for information in line with Article 5 (2). The Court last noted that, even if the orders relating to the refusal of entry included information on the legal basis for the detention, these were not quickly notified to the applicants and could not, in any case, satisfy the requirement of promptness. Additionally, the Court referred to [relevant case law](#) [11] and clarified that, where detainees have not been informed of the reasons for their detention, their right to challenge the detention decisions was not effective.

### Article 3

The Court first reiterated the absolute character of the prohibition of inhuman and degrading treatment and noted that such a treatment has to reach a certain level of severity in the light of, *inter alia*, the specific circumstances of the case, the individual's vulnerability and the context in which it is inflicted. Regarding the conditions of detention, the judges observed that the duration of detention and the lack of space in an institution are key factors in assessing compliance with Article 3, along with considerations of hygiene, outdoor activities, ventilation, light and privacy.

After examining comparable case law regarding the principles that govern the application of Article 3, the Court turned to the instant case sharing its concern with the Chamber in respect of the humanitarian emergency situation on the island of Lampedusa. Therefore, the judges did not agree with the applicants' argument that the situation at the time of the events was not

exceptional and noted that to do otherwise would place an excessive burden on the national authorities. Although constraints due to a humanitarian crisis cannot, in themselves, be used to justify Article 3 treatment, the Court analysed the conditions in the reception centre and the two ships separately and taking into account the extreme difficulties the Italian authorities were facing.

Regarding the conditions at the reception centre, the Court noted that the applicants' stay was only for a short period of 3-4 days. Where the duration of the deprivation of liberty is very short, the Court has found a violation of Article 3 in cases of extremely negative conditions but the present case does not reach the threshold required by Article 3. Additionally, the Court stated that it cannot ignore the reports by the PACE Ad Hoc Sub-Committee and by Amnesty International documenting the unsuitability of the Lampedusa centre for stays of more than a few days. However, it concluded that, in the instant case, it cannot rule on whether the authorities complied with their obligation to transfer the applicants in a more suitable centre as a violent incident erupted two days after the last two applicants arrived and it could not presume the authorities' action had that incident not occurred. Consequently, the Court departed from the Chamber judgment and did not find a violation of Article 3 for the conditions in the reception centre.

With regard to the conditions on board the ships, the Court concurred with the Chamber judgment and held that the allegations of the applicants were partly contradicted by the findings of the judge of preliminary investigations, in reliance on statements by a Member of Parliament who had boarded the ships and spoke to some migrants. Although the lack of information or explanation by the authorities on their detention may have caused the applicants' feelings of anxiety or agitation, this was not sufficient to meet the minimum level of severity required by Article 3. Hence there was no violation on account of detention conditions on board the ships.

#### Article 4 of Protocol 4

The Court first addressed the notion of 'collective expulsions' and reiterated its conclusions in previous case law that a removal measure must be made on the basis of reasonable and objective examination of the individual circumstances. However, the fact that several aliens may be subject to similar decisions does not in itself suffice to conclude that there is a collective expulsion if each person had an opportunity to put arguments against their expulsion.

In the present case, the Court resorted to the definition of expulsion by the International Law Commission to reiterate the current and generic meaning of expulsion as a measure that entails the removal of the applicant from the territory. Having established that the measure under review was one of expulsion, the Court went on to consider its collective nature. Although the applicant had stated that their identification did not involve an assessment of their personal circumstances, the Court found that the reported existence of several healthcare professionals, interpreters and cultural mediators at the centre testified to a reasonable assumption that they facilitated communication between the migrants and the Italian authorities. Similarly, the applicants had, in any case, the opportunity to raise their concerns regarding a return to Tunisia at any stage of the identification procedure or their stay at the centre or the boats. On this point, the Court emphasised that Article 4, Protocol 4, does not guarantee the right to an individual interview under any circumstances and it may be satisfied where the migrant has a genuine and effective possibility to raise arguments in respect of their expulsion, which will be examined appropriately.

The Court took note of the Chamber's finding that the refusal-of-entry orders were very similarly drafted and a large number of Tunisian migrants had been expelled at that time. However, the standardised form of such orders could be explained by the fact that the applicants had no valid travel documents and they had not addressed other obstacles to their removal, making the use of simple-form orders reasonable. Lastly, the almost simultaneous removal of the three applicants is

not sufficient to establish a collective nature within the meaning of Article 4 of Protocol 4, as it may be the result of consecutive individual refusal-of-entry orders. The Court also observed that the applicants' representatives had not indicated any grounds that would affect the status of the applicants in Italy and would impede the removal. The lack of such grounds casts doubts on the usefulness of an individual interview in this case. The Court disagreed with the Chamber's conclusions and found that there was no violation of Article 4 Protocol 4.

#### Article 13 in conjunction with Article 3 and Article 4 Protocol 4

The Court found that there was no effective remedy for the applicants to complain about the conditions in the reception centre and the boats, as the only remedy available to them was the one relating to their refusal-of-entry orders. On the point of Article 4 of Protocol 4, the Court saw no reason to depart from the Chamber's reasoning that the remedy against the refusal-of-entry order would not also cover any complaints they wanted to make regarding the personal situation of the migrants. In examining whether the lack of suspensive effect of that remedy is relevant to the examination of Article 13 in conjunction with Article 4 Protocol 4, the Court recognised the importance of suspensive but noted that this should be assessed by taking the overall situation into account. In this respect, it found that lack of suspensive effect in a remedy does not violate Article 13, where allegations are only made with regard to the collective nature of the expulsion and not in relation to a real risk of violation of Article 2 and Article 3 in the destination country.

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#### **Outcome:**

Violation of Article 5 (1), (2) and (4) - unanimous

Violation of Article 3 taken in conjunction with Article 13 - unanimous

No violation of Article 3 (reception centre and boats) - unanimous

No violation of Article 4 of Protocol 4 (on its own and in conjunction with Article 13) - majority sixteen to one

The respondent state to pay each applicant, within three months, EUR 2,5000 in respect of non-pecuniary damage. The respondent state to also pay to the applicants jointly EUR 15,000 in respect of costs and expenses.

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#### **Observations/Comments:**

##### Opinions

- **Judge Serghides** delivered a **partly dissenting opinion** on the reasons he did not concur with the finding that there was no violation of Article 4 Protocol 4 on its own and in conjunction with Article 13.

According to his opinion, the simplified procedure for readmission provided under bilateral agreements between Tunisia and Italy violates Article 4 Protocol 4 to the extent that they do not require mandatory personal interviews. The latter becomes even more striking as the agreement was not made public and the applicants could not have known why there were no personal interviews in their cases. Moreover, Italy had never had any reservations or declarations in respect of Article 4 Protocol 4 and with regard to collective expulsions of Tunisian nationals, which makes it impossible for Italy to handle such cases on the basis of readmission agreements and not that of Article 4 Protocol 4. The latter is better understood in the light of the serious nature of collective expulsion as breaches of international law,

according to Professor James Crawford.

The judge went on to analyse the nature of personal interviews as an absolute procedural right under Article 4 Protocol 4, which ultimately gives effect to this provision. An interpretation that does not focus on the obligation of personal interviews means that the Court is departing from clearly established case law on the states' obligation to prevent collective expulsions by examining cases individually. Furthermore, such an approach shifts the burden of proof from the state to the alien and inserts an exception on the prohibition of collective expulsions by precluding the application of these guarantees to any alien who had a genuine and effective possibility to present a claim justifying their stay in the territory. Lastly, it could be hard to imagine that a reasonable and objective examination of the migrants' situations can take place without any personal interview.

The lack of specific evidence on behalf of the Government is also analysed in this opinion, as the judge believes that the Court cannot rely on vague arguments, general information and irrelevant assumptions to rule on whether there had been an individual examination of the applicants' cases. Regarding the interpretation of the word 'collective', Judge Serghides leaned towards a qualitative approach taking into account the principle of human dignity, which underpins the provision of Article 4 Protocol 4, and concluded that the latter cannot be limited only to situations of massive numbers of expelled migrants. Additionally, the judge remarked that Article 4 Protocol 4 applies to all aliens, irrespective of lawful or unlawful status of entry or stay, and further added that all circumstances surrounding the expulsion must be considered, in addition to the existence of a personal interview. Lastly, the judge referred to the mandatory nature of Article 13 taken in conjunction with Article 4 of Protocol 4, which does not allow for exceptions as it is the only safeguard against arbitrariness in this context.

- **Judge Raimondi** issued a **concurring opinion** with his remarks regarding the Grand Chamber's departure from the Chamber judgment, where he had been part of the majority that found violations of Article 3 (reception centre), Article 4 of Protocol 4 (on its own and in conjunction with Article 13).

On Article 3 (conditions at the reception centre), the judge noted that the applicant's young age and good health, as well as the extreme difficulties the Italian authorities were facing in the overall crisis context, were sufficient to reconsider the Chamber's view and conclude that there was no violation of Article 3. This conclusion would also be in line with the Court's findings in [Aarabi v. Greece \(39766/09\)](#) [12] regarding the detention pending removal of a Lebanese migrant on Chios. Regarding Article 4 Protocol 4, the judge noted the reasonableness of the analysis provided by the Grand Chamber, including the emphasis on the applicants' possibility during the entire procedure to inform the authorities of any reason that would preclude their return. Nothing suggested that the Italian authorities would not have considered the applicants' concerns regarding their removal, as the possibility to make an asylum application remained a paramount safeguard during the procedures. He further emphasised on the Grand Chamber's finding that Article 4 Protocol 4 does not give rise to a right to an individual interview in all circumstances and can be satisfied where each migrant has an effective possibility to submit arguments that will be examined appropriately. Lastly, on the violation of Article 3 in conjunction with Article 4 Protocol 4, the judge noted that the Chamber had interpreted the Court's judgment in [De Souza Ribeiro v. France \(22689/07\)](#) [13] beyond what was required and emphasised the Grand Chamber's reading that the need for suspensive effect for remedies against expulsions concerns situation in which the applicants seek to raise Article 2 and 3 concerns and not just an allegation of the collective nature of the expulsion.

- **Judge Dedov** issued a **partly dissenting opinion** noting the reasons that he voted against the award of non-pecuniary damages to the applicants. He disagreed with the Grand Chamber's finding that there was no legal certainty in the way detention was imposed, as the applicants had never referred to legal certainty in their arguments and they had put themselves in an unlawful situation by entering Italy unauthorised. Furthermore, the situation of a mass influx of migrants could make the obligation to limit detention times would impose an excessive burden on the authorities.

\* ECRE and the AIRE Centre submitted written interventions to the Grand Chamber on the 17 May 2016. You can read the submission [here](#)[14].

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**Authentic Language:**

English

**State Party:**

Italy

**National / Other Legislative Provisions:**

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**Links:**

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