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Di hotspot e di respingimenti a Lampedusa. A prima lettura su J.A. e altri contro Italia (CEDU, 30 marzo 2023 ricorso 21329/18)

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La Corte europea dei diritti umani l'ha detto chiaramente il 30 marzo scorso decidendo sul ricorso J.A. contro Italia.

Ha detto che il trattenimento dei migranti nell'hotspot di Lampedusa può essere contrario alla Convenzione europea dei diritti umani.

E più specificamente, che le condizioni del centro di contrada Imbriacola sono tali da costituire violazione dell'articolo 3 perché possono integrare la fattispecie del trattamento disumano e degradante.

Inoltre, il fatto che il trattenimento equivalga a una detenzione senza adeguata base giuridica determina la violazione dell'articolo 5 della Convenzione, in quanto privazione arbitraria della libertà personale.

E ancora che un respingimento senza adeguata motivazione individuale costituisce espulsione collettiva e viola l'articolo 4 del Quarto Protocollo addizionale.

E così l'Italia aggiunge un'altra condanna della propria politica migratoria da parte della Corte europea dopo altre due perle: la decisione del 23 febbraio 2012 in causa *Hirsi Jamaa e altri contro Italia* (ricorso n. 27765/09) e quella del 15 dicembre 2016 nel caso *Khlaifia e altri contro Italia* (ricorso n. 16483/12).

Ma veniamo alla decisione. I fatti della causa sono così descritti ai paragrafi 5-11

> 5. The applicants left the Tunisian coast on 15 October 2017 aboard makeshift vessels in order to reach a larger boat carrying about a hundred people. After a few hours of sailing, following an emergency at sea, they were rescued by an Italian ship which took them to Lampedusa on 16 October 2017. They submitted that they underwent a medical check-up. Some of them received a flyer containing general information regarding unaccompanied minors and asylum procedures. The applicants stated that they had been unable to fully understand the content of the said documents. They then underwent identification procedures.
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> 6. The applicants remained in the Lampedusa hotspot for ten days, during which it was allegedly impossible for them to interact with the authorities. They stated that they had been unable to leave the

centre lawfully during that period and that they had done so a few times by going through an opening in the fence which surrounded the centre. The applicants described the material conditions at the centre as inhuman and degrading.

7. In the early morning of 26 October 2017 the applicants and some forty other individuals were woken up by the Italian authorities. They were told to undress, were searched and were then transferred by bus to Lampedusa Airport.

8. There, the applicants were asked to sign some documents of which they allegedly did not understand the content or receive a copy, and which they subsequently found out were refusal-of-entry orders issued by the Agrigento police headquarters (*questura*). The applicants' representatives submitted a request to the police headquarters to obtain a copy of those documents. Only the copies concerning the first two applicants were provided to them; the requests submitted with regard to the third and fourth applicants on 15 February 2018 and 26 March 2018 went unanswered. The refusal-of-entry orders issued in respect of the first two applicants were dated 26 October 2017.

9. The Government stated that the refusal-of-entry orders had been duly served on the applicants, who had signed a receipt and been provided with a copy of it. The Government also pointed out that the refusal-of-entry orders included the information that it was possible to challenge the decisions in question before the Agrigento District Court within thirty days of them being notified of them.

10. The applicants were then searched again, their wrists were secured with Velcro straps, and their mobile phones were taken away from them. They were transferred to Palermo by airplane, and the straps were removed during that flight and put back on again at Palermo Airport.

11. Once there, the applicants met a representative from the Tunisian consulate who recorded their identities and, on the same day, 26 October 2017, they were forcibly removed to Tunisia by airplane.

Respinta una eccezione di inammissibilità presentata dal Governo italiano, la Corte si applica all'esame delle condizioni in cui è avvenuto il

trattenimento nel centro di Lampedusa e, attraverso l'ampia documentazione disponibile, giunge ad affermare la violazione dell'articolo 3 della Convenzione

58. The general principles applicable to the treatment of people held in immigration detention are set out in detail in *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09, §§ 216-22, ECHR 2011), *Tarakhel v. Switzerland* ([GC], no. 29217/12, §§ 93-99, ECHR 2014 (extracts)) and *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 158-69, 15 December 2016; see also *E.K. v. Greece*, no. 73700/13, §§ 72-84, 14 January 2021).

59. The Court would first note that the applicants provided several pieces of evidence in support of their claims.

60. Although highlighting some positive aspects of the organisation at the facility, within a "hotspot approach" that has been developed starting from 2015 (see paragraphs 32 et seq.), the Government, for their part, did not dispute the abundant information submitted by the applicants with regard to the shortcomings of the material conditions of stay in the Lampedusa hotspot (i.e., the conditions of hygiene, the lack of space, and the features of accommodation – see paragraphs 52 and 53 above).

61. The Court also observes that multiple national and international sources have attested to the critical material conditions in the Lampedusa hotspot during the period of the material facts of the present case.

62. The 2016-17 report of the Guarantor and the 2017 report of the Senate of the Republic (see paragraphs 17 and 19 above) stated that the general conditions in the Lampedusa hotspot were run down and dirty and pointed out the lack of services and of space, with regard in particular to beds, as well as the general poor hygiene and inadequacy of the centre.

63. The centre's overcrowding was also referred to *inter alia* by the CPT in its report to the Italian government on its visit to Italy carried out in 2017. In general terms, living conditions in hotspots were also criticised by the UN Committee against Torture in its 2017 reports on Italy (see paragraphs 37-39 and 41 above).

64. In light of all of the above, the Court finds that the Government have failed to produce sufficient elements in support of their view that the individual conditions of stay of the applicants could be deemed to have been acceptable. Indeed, having regard to the elements listed above, submitted by the applicants, and supported by photographs and by several reports, the Court is satisfied that, at the time the applicants were placed there, the Lampedusa hotspot provided poor material conditions.

65. In this context, the Court also reiterates its well-established case-law to the effect that, having regard to the absolute character of Article 3, the difficulties deriving from the increased inflow of migrants and asylum-seekers, in particular for States which form the external borders of the European Union, does not exonerate member States of the Council of Europe from their obligations under this provision (see *M.S.S. v. Belgium and Greece*, cited above, § 223; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 122, ECHR 2012; *Khlaifia and Others*, cited above, § 184; and *J.R. and Others v. Greece*, no. 22696/16, § 137, 25 January 2018).

66. The Court notes that, in the present case, the applicants remained in the Lampedusa hotspot for ten days.

67. In the light of the above, the Court dismisses the Government's objection as to the applicants' alleged lack of victim status and concludes that the applicants were subjected to inhuman and degrading treatment during their stay in the Lampedusa hotspot in violation of Article 3 of the Convention.

Il secondo profilo che la Corte passa ad esaminare, seguendo le doglianze dei ricorrenti, è quello relativo alla possibilità di qualificare le condizioni del trattenimento come in violazione dell'articolo 5 della Convenzione.

A tali conclusioni la Corte giunge attraverso la dimostrazione che l'Italia non ha tenuto conto delle indicazioni fornite dall'Unione europea in materia

87. The European Commission's European Agenda on Migration of 13 May 2015 established some guidelines to be applied in EU

countries with regard to different aspects of migration and put in place the "hotspot approach". In its Roadmap of 28 September 2015, the Italian Ministry of the Interior thus identified four seaport areas in which hotspots were to be set up, including Lampedusa (Contrada Imbriacola).

88. The Roadmap clarified that the purpose of these hotspots was to carry out the registration and identification of migrants as a preliminary step to subsequently sorting and dispatching them by channelling asylum-seekers and those who needed to be relocated to competent national and regional hubs, or transferring irregular migrants who had not applied for international protection to Identification and Expulsion Centres in order for them to be expelled. Therefore, hotspots, namely existing reception facilities used to implement the "hotspot approach", were not intended, at least at the point in time relevant to the case in question, to serve as detention centres, but rather as identification and dispatching facilities.

89. The national legislation regarding "hotspots" appears to be Article 10-*ter* of Legislative Decree no. 286 of 25 July 1998, as amended by section 17 of Decree-Law no. 13 of 17 February 2017. In accordance with this provision, "crisis centres" or "hotspots" were set up within two facilities: those instituted pursuant to Decree-Law no. 451 of 1995, converted with modifications by Law no. 563 of 29 December 1995 (such as the Lampedusa Early Reception and Aid Centre (*Centro di Soccorso e Prima Accoglienza*)) and those instituted pursuant to Article 9 of Legislative Decree no. 142 of 2015.

90. The Court cannot but note that while Decree-Law no. 13 identified the two types of existing facilities that were apt to serve as hotspots, the Government have not shown that the Italian regulatory framework, including EU rules that may be applicable, provides clear instructions concerning the detention of migrants in these facilities.

91. In this respect the Court has found no reference in the domestic law cited by the Government (see paragraph 74 above) to substantive and procedural aspects of detention or other measures entailing deprivation of liberty that could be implemented in respect of the migrants concerned in hotspots. Nor have the Government submitted any legal source stating that the Lampedusa hotspot was to be

classified as a CIE (where migrants, under certain conditions, might be lawfully detained under domestic legislation – see paragraph 75 above).

Ma anche esaminando le informazioni fornite da rapporti indipendenti e attendibili sulla concreta gestione del centro

92. In addition, reports of independent observers, most of which based on on-site visits, as well as of national and international organisations, unanimously describe the Lampedusa hotspot as a closed area with bars, gates and metal fences that migrants are not allowed to leave, even once they have been identified, thus subjecting them to a deprivation of liberty which is not regulated by law or subjected to judicial scrutiny. The Court refers in particular to the 2016-17 report of the Guarantor on its visits to the Identification and Expulsion Centres and hotspots and to its 2018 report to the Italian Parliament (see paragraphs 17-18 above). It also refers to the Senate's report on the Identification and Expulsion Centres in Italy (see paragraph 19 above) and the reports of the European Parliamentary Research Service, the Special Representative of the Secretary General on migration and refugees of the Council of Europe, the CPT, and the UN Committee against Torture (see paragraphs 37-41 above).

Sulla base di queste argomentazioni, la Corte può così concludere

93. Under the Convention, the Court can accept that, at the moment of migrants' attempt to be admitted into the territory of a Contracting Party, a limitation of their freedom of movement in a hotspot may be justified – for a strictly necessary, limited period of time – for the purpose of identification, registration and interviewing with a view, once their status has been clarified, to their possible transfer to other facilities. In those circumstances, the detention, for instance, of asylum-seekers waiting for their request to be processed (under the first limb of Article 5 § 1 (f)) or the detention of irregular migrants in view of their removal (under the second limb of the same provision) is regulated by law (see paragraphs 27, 30, 31 and the relevant implementation measures above).

94. However, in the circumstances of the present case, the impossibility for the migrants to lawfully leave the closed area of the Lampedusa hotspot did not fall under any of the situations described above. The limitation on the applicants' freedom of movement clearly amounted to a deprivation of their personal liberty under Article 5 of the Convention, all the more so if one considers that the maximum duration of their stay in the crisis centre was not defined by any law or regulation and that, in addition, the material conditions of their stay have been deemed to be inhuman and degrading (see paragraph 67 above).

95. The Court considers that the nature and function of hotspots under the domestic law and the EU regulatory framework may have changed considerably over time (see, for example, paragraphs 33-35 above, where it appears that the aim of hotspots has become that of managing an existing or potential disproportionate migratory challenge, thus possibly not excluding deprivation of liberty, rather than the original aim of merely swiftly identifying, registering and fingerprinting incoming migrants – see, in particular, paragraph 32 above). Be that as it may, the Court notes that at the time of the facts, that is in 2017, the Italian regulatory framework did not allow for the use of the Lampedusa hotspot as a detention centre for aliens.

96. The organisation of the hotspots would thus have benefited from the intervention of the Italian legislature to clarify their nature as well as the substantive and procedural rights of the individuals staying therein.

97. In the light of the above considerations and bearing in mind that the applicants were placed at the Lampedusa hotspot by the Italian authorities and remained there for ten days without a clear and accessible legal basis and in the absence of a reasoned measure ordering their retention, before being removed to their country of origin, the Court finds that the applicants were arbitrarily deprived of their liberty, in breach of the first limb of Article 5 § 1 (f) of the Convention.

98. In view of the above finding in respect of the lack of a clear and accessible legal basis for detention, it fails to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or have provided them with sufficient

information or enabled them to challenge the grounds for their *de facto* detention before a court (see *Khlaifia and Others*, cited above, §§ 117 and 132 et seq.).

99. Therefore, the Court dismisses the Government's objection as to the applicants' alleged lack of victim status, concludes that Article 5 of the Convention is applicable and that there has been a violation of Article 5 §§ 1, 2 and 4 of the Convention.

Rimane poi da valutare un ultimo profilo, quello dell'assenza di garanzia adeguate nella procedura adottata nell'espulsione

106. The Court reiterates that collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken following, and on the basis of, a reasonable and objective examination of the particular case of each individual alien of the group (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, §§ 193-201, 13 February 2020, and the cases cited therein). Moreover, Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances and the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion and where those arguments are examined in an appropriate manner by the authorities of the respondent State (see *Khlaifia and Others*, cited above, § 248).

107. In the present case, the applicants stated that no interview was held with the authorities before they signed the refusal-of-entry orders, of which they received no copy. The Court notes that the Government did not contest the information submitted by the applicants in this respect.

108. The Court also acknowledges that the text of the orders concerning the first two applicants is standardised and does not disclose any examination of the applicants' personal situations. As for the third and fourth applicants, no copies of the decisions have been submitted to the Court, the relevant requests from the applicants to the

Agrigento police headquarters having gone unanswered. The Court also notes that the Government did not submit to the Court a copy of the documents related to the identification procedure in respect of the applicants.

109. The applicants were forcibly removed on the day the refusal-of-entry orders were served on them. Their wrists were bound with Velcro straps during the transfers to the airports and their mobile phones were taken away from them until their arrival in Tunisia.

110. In this context the Court refers to the 2016-17 report of the Guarantor (see paragraph 17 above) in which, following a visit to the Lampedusa hotspot, the Guarantor invited the Italian authorities to suspend the practice of the migrants signing the information sheet during their identification procedures.

111. In its 2018 report to the Italian Parliament (see paragraph 18 above), the Guarantor also observed that migrants were being unlawfully detained in the hotspots during the identification procedures, at the end of which deferred refusals of entry (*respingimenti differiti*) were forcibly enforced based on a decision of the public security authority.

112. In addition, in 2017 the Extraordinary Commission for the protection and promotion of human rights of the Senate of the Republic (see paragraph 19 above) reported that the information sheet used in the Lampedusa hotspot could not be qualified as a proper interview but as a simple questionnaire formulated in an extremely concise way and in any event difficult to understand for the aliens concerned.

113. It should also be noted that, taking into account the short lapse of time between the signature by the applicants of the refusal-of-entry orders and their removal and the facts that they allegedly did not understand the content of the orders and that two of the applicants were not provided with a copy of them, the Government have not sufficiently shown that, in the circumstances of the case, the applicants benefited from the possibility of appealing against those decisions.

114. The Court further notes that, in its judgment no. 275 of 8 November 2017, the Constitutional Court noted that deferred

> refusals of entry carried out through the use of force called for a legislative intervention since that measure had an impact on the individual's personal liberty within the meaning of Article 13 of the Constitution and was to be regulated pursuant to paragraph 3 of that provision.
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> 115. In these circumstances, the Court finds that the refusal-of-entry and removal orders issued in the applicants' case did not have proper regard to their individual situations (see *Shahzad v. Hungary*, no. 12625/17, §§ 60-68, 8 July 2021; *D.A. and Others v. Poland*, no. 51246/17, §§ 81-84, 8 July 2021; and *A.I. and Others v. Poland*, no. 39028/17, §§ 52-58, 30 June 2022).
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> 116. Those decisions thus constituted a collective expulsion of aliens within the meaning of Article 4 of Protocol No. 4 to the Convention and there has therefore also been a violation of that provision in the present case.

Insomma, la Corte conferma il suo punto di vista critico sulle politiche di respingimento poste in essere dall'Italia, anche se, va riconosciuto, non sono mancate decisioni che hanno constatato altrettante violazioni da parte di altri Stati parti della Convenzione (vedi supra par.65).

Comunque, resta il fatto che politiche di contenimento e respingimento come quelle in atto adesso in Europa sono e potranno continuare ad essere occasioni di violazioni della Convenzione.

Anche la Corte dunque si aggiunge a quanti affermano che bisogna cambiare sistema.