APPEAL TO THE INSTITUTIONS ABOUT THE SERIOUS AND IMMINENT RISK OF WIDESPREAD VIOLATIONS OF THE FUNDAMENTAL RIGHTS OF REFUGEES AND MIGRANTS PRESENT IN LAMPEDUSA

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The signatory associations and protection bodies express their very strong concern regarding some choices made by the Italian government in relation to the overall management of the arrival of foreign citizens in Lampedusa.

Contrary to what has been happening since February 2006, in fact, it turns out that the interior minister has suspended any transfers of foreign citizens from the Lampedusa first aid and reception centre (Centro di primo soccorso e accoglienza, CSPA) towards other structures found in the national territory. The same interior minister has also provided, via his own decree dated 14 January 2008, to proceed immediately, as an emergency, to the transfer of the Territorial Commission for the recognition of the right to asylum of Trapani (which is territorially competent) to the island, so that all the asylum applications submitted in Lampedusa may be examined promptly by the Commission of Trapani itself, while keeping the applicants in the first aid and reception centre.

To sum up the situation, a substantial part of the foreign citizens who have arrived in Lampedusa since late December are currently held in the CSPA (on 21 January 2008 they were over 1800), located in a structure that has been active since 1 August 2007, with 381 places available, a capacity that may be increased, when necessary, to 804.

We highlight the problems detailed below.

1. Alarming conditions

As has been said, the current situation sees over 1800 people present in a centre whose maximum capacity is 804 places. It is glaringly obvious that this entails serious problems of overcrowding, worrying hygienic-sanitary conditions and an alarming promiscuity between men, women and children.

2. The legal nature of the centre in Lampedusa and the risk of arbitrary detentions

The choice to stop any transfers and to concentrate all the migrants in the CSPA of

Lampedusa effects a complete reversal as regards the functioning and the very nature of the CSPA, which, instead, would be to carry out a first aid and reception service for the people who have been rescued at sea, before transferring them almost immediately to other reception centres found in several Italian localities. The logic for this reasonable decision enacted over the last few years until this sudden change in praxis is drawn from both logistic and health service needs (to avoid improper situations of concentration of people in the restricted space that is available on the island from arising) and from the need to define the foreigners' legal position and to adopt the measures concerning them in different structures, whose legal nature and functions may be clearly defined by the norms that are in force.

In fact, it is well known that the legal framework that is in force and regulates rescue, assistance and early reception interventions for foreigners appears to have shortcomings and gaps, and is liable to be interpreted in different ways and be applied with discretion. In particular, the rights of foreign recipients of assistance measures in so-called early reception centres, which are still exclusively disciplined by Law 563/95 (referred to as the Apulia Law), are not defined. Several reports have highlighted how, often, foreigners are effectively held in the current early reception centres for considerably long periods that may vary from a few days to weeks or months, without the legal framework establishing the rights of foreigners who are there in a clear or binding manner, and without that situation of *de facto* limitation of personal freedom being subjected to any form of judicial scrutiny. It must be stressed that this situation, which does not comply with Italian legislation in the field of measures limiting freedom and could also be considered a violation of art. 5 point 1 of the European Convention on Human Rights (ECHR), has recently been the subject of great concern expressed by the Group on arbitrary detention established within the UN Human Rights Council that has also recalled the Italian government's failure to redress a situation that has been highlighted for some time[1].

The use of the Lampedusa CSPA as a structure that only had first aid and transit functions has not provided an adequate response to the legislative shortcomings highlighted above. However, within the prospect outlined above, it must be stressed that the deployment of this centre, as of 2006, as a place essentially concerned with rescue work seemed a sign of the consciousness of the Italian authorities with regards to the need to guarantee the respect of foreign citizens' fundamental rights, while placing the processing of the different administrative procedures elsewhere in the national territory. To now enact the opposite choice of making the centre in Lampedusa a place for holding people, gives rise to very serious concern as regards possible violations of the norms of internal and international law about the legitimacy and non-arbitrariness of the detention.

Hence, one must wonder under what basis the migrants who have arrived in Lampedusa may remain in the centre once the mere requirements of first aid and for the organisation of transfers have been exhausted. Moreover, it is essential to ascertain what procedures have been applied and their resultant legitimacy, insofar as the possible adoption and execution of expulsion or refusal of entry measures are concerned.

Finally, we stress that the legal framework that is in force in the field of the execution of expulsion and refusal of entry measures regulates the use of structures that have this purpose within which the foreigner may be held, and establishing the binding circumstances in which this

[1] The UN experts, however, highlighted "significant human rights concerns with regard to the centres in which migrants and asylum seekers are kept", in particular with regard to the legal basis for the detention of those deprived of their freedom. The Working Group noted that in 2006 the Ministry of Interior had established a commission to study the matter, commonly referred to as the "De Mistura Commission" after the UN official appointed to head it. Its findings and recommendations remain to a large extent to be implemented.

holding may occur[2] as well as envisaging a validation of the measure by the judicial authority. It seems evident that the aforementioned procedures cannot possibly be applied in a centre for first aid and reception such as the one in Lampedusa.

3. The effectiveness of access to jurisdiction

Specific attention must be paid to the possibility of the application of so-called "deferred refusal of entry" envisaged by art. 10 third point of legislative decree D.Lgs 286/98. Like the order for expulsion with accompaniment to the border, it constitutes a measure that limits personal freedom falling within the scope of the implementation of art. 13 of the Constitution and, as such, it cannot be withdrawn from the control of the judicial authority[3]. In this matter, we observe that the reserve of jurisdiction provided for by art. 13 of the Constitution does not envisage any sort of exception and, hence, it must be deemed applicable even in so-called emergency situations.

It must also be noted that the possibility of a judicial appeal against "deferred" refusal of entry ordered by the *Questore* [the head of police in a given city or town] is a rather theoretical possibility that substantially lacks any effectiveness. The formal measure issued by the Questore must be impugned before the Tribunale Amministrativo Regionale (regional administrative court, TAR, in the specific case of Lampedusa, the one in Palermo), and this turns out to be even more difficult, if not entirely impossible, when the forced removal measures are issued by administrative authorities in places, like Lampedusa itself, that are rather distant from the places where the forced removal measures could be impugned (it suffices to consider how difficult it is to undersign a power of attorney for one's habitual lawyer and the absence of court-appointed legal representatives, apart from the lack of a competent judicial office detachment operating on the island).

From the moment of their entry into Italy, the people who have entered or are residing irregularly –also including the migrants who have arrived irregularly in Lampedusa, regardless of their age–, must have an adequate possibility to submit an appeal before a judicial authority against a repatriation measure. We recall what is provided for by art. 6 of the ECHR and by art. 47 of the European Union's Charter of Fundamental Rights, which guarantee the right to an effective remedy and to a fair trial, apart from, naturally, the principle of judicial control of detention, understood as any limitation of personal freedom, in accordance with art. 5 of the ECHR.

Thus, several factors concur to outline a situation that may effectively occur in Lampedusa, that is, that of a kind of extra-territorial area where, for the purpose of countering irregular immigration, it may be possible to provisionally "suspend" the application of the most important guarantees deriving from internal and international law. Even on its own, the total geographical isolation of the island of Lampedusa, the small size of its territory and the absence of competent judicial offices effectively makes access to jurisdiction by foreign citizens impossible even in the most positive of circumstances, in cases where they may be allowed to leave the early reception centre.

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[2] When it is not possible to execute the expulsion by escorting the foreigner to the border or refusing them entry immediately because they must receive assistance, additional checks must be carried out to establish their identity or nationality, or they must obtain travel documents, or due to the lack of available carriers or other suitable means of transport, the *questore* (head of police in a given city or town) provides for the foreigner to be held for the time that is strictly necessary in the closest centre for temporary stay and assistance (centro di permanenza temporanea e assistenza, CPTA, re-named CIE –centre for identification and expulsion- following the changes introduced by Law no. 186/2008, converted into law, with modifications, by law decree no. 151 of 2 October 2008) among those identified or established through a decree issued by the interior ministry, in concertation with the ministers for social solidarity, of the treasury, of the budget and economic planning (legislative decree D.Lgs 286/98, art. 14 point 1).

[3] See, Constitutional Court - sentence no. 222 of 2004.

It must be recalled that the European Court of Human Rights itself has condemned the countries that had set up "transit areas" in airports that were specifically meant for the removal of migrants[4]. In fact, according to the Court, the indisputable right for countries to control the entry and residence of foreigners into their territory must be exercised in compliance with the Convention and, thus, without violating any of the principles asserted by the ECHR itself.

4. The uncertainty of identification procedures

The adoption in the centre of Lampedusa of refusal of entry and expulsion measures to be executed immediately also raises relevant questions concerning procedures to identify migrants and the certainty of the attribution of respective identities and nationalities.[5] In fact, we deem that the Italian authorities should supply further indications about what the procedures that are already being adopted or that they seek to adopt in Lampedusa are to identify migrants with certainty, something that often takes place within a few hours, considering the general lack of identity documents among the migrants.

5. The situation of unaccompanied foreign minors

On a number of occasions, positively, the Italian government has provided assurances about its intention to scrupulously respect the prohibition against expelling unaccompanied foreign minors established by art. 19 point 2 of legislative decree D.Lgs 286/98, and to enact the necessary procedures in order to ascertain their age through non-invasive diagnostic tests. In the presence of unaccompanied minors, their *immediate* transfer out of Lampedusa towards appropriate reception structures (SPRAR communities/centres for minors) not only in Sicily but throughout the national territory, should be carried out. Their stay in the CSPA should be limited to the time that is strictly necessary to transfer them to such structures.

Considering that there is a high number of foreigners arriving in Lampedusa who declare that they are minors and also that the most frequent age group among the minors who arrive is the one ranging between 15 and 18 years of age, the reliability of the diagnostic tests that are carried out takes on a value that is particularly important. In spite of the fact that the arrival of minors on the island of Lampedusa has been taking place for years, it has always been the case that only the radiological examination of the wrist is carried out at the local general health centre and the medical report does not contain any details about the existence of a range of error. The momentum with which this procedure has been continuing for a long time[6] is highly surprising because, as is well known on the basis of international scientific literature, the checking of age through a radiological scan of the wrist involves a considerable range that should be specified. Hence, it is necessary for the margin of error to always be detailed in the medical certificate; it should always be assumed that one is under-age when, even after the test to ascertain it, doubts remain as to the minor's age (any time when the mentioned range of possible values includes an age that is under eighteen). We recall what is laid out by art. 19 of legislative decree D.lgs 25/08, which sets some guarantees regarding the situation of unaccompanied foreign minors who submit asylum applications. In its second point, this article provides that «*if the checks do not allow their age to be established exactly, the provisions contained in this article are applied*», meaning that the subject must be considered a minor. This fundamental principle, even if it is envisaged in the regulations concerning procedure in the field of asylum applications, cannot be deemed not to be

[4] On this matter, it is interesting to recall the sentence of the European Court of Human Rights, in the Amur/France case of 1996.

[5] See, for example, the operation for the identification and repatriation of 35 presumed Egyptian citizens that took place between 30 and 31 December 2008.

[6] Also on this issue, there were specific recommendations, also in reference to the case of Lampedusa, dealt with in the report by the so-called De Mistura Commission.

applicable to the more general situation in which the age of an unaccompanied foreign minor must be ascertained, as indicated in the circular order issued by the interior ministry, Prot. 17272/7 of 9 July 2007 with regards to the identification of unaccompanied foreign minors[7]. For the reasons detailed above, in Lampedusa, the mentioned norms are completely eluded and there is a rather concrete risk that an unspecified number of minors may be treated as being over-age also as regards removal measures, that is, they may be expelled without any guarantees.

Those (presumed) minors who, following only the radiological exam, have been deemed to be over-age, are immediately sent to an identification and expulsion centre (generally the CIE in Caltanissetta) in order to proceed to the expulsion or even to be directly repatriated to their country of origin or the one from which they came. It is not known whether in the implementation of identification procedures enacted involving them there is, where possible, the involvement of the consular authorities and within what time-frame this happens. Moreover, neither is it known what effective possibilities of appealing against such measures have been recognised to presumed minors who are later declared adults following the radiological exam.

6. The prohibition of collective expulsions

We believe that, due to the serious problems highlighted above, there is currently a serious risk in Lampedusa of measures for collective repatriation being adopted by the authorities. Art. 4 of Additional Protocol no. 4 to the European Convention on Human Rights forbids the collective expulsion of foreigners, which, on the basis of the case law of the European Court of Human Rights, take place on any occasion when the individual circumstance of a person subjected to forced removal measures is not taken into account, all the more so in cases in which their certain identification is not carried out.

Art. 19 of the European Charter of Fundamental Rights expressly forbids collective expulsions, and, in consistent case law, the European Court of Human Rights has expressed itself likewise. Hence, not only must the expulsion be ratified by the judicial authority on the basis of elements that strictly pertain to the individual, but the context in which such an expulsion is enacted must also be taken into account. The prohibition of collective expulsion detailed in art. 4 of the 4th Additional Protocol of the ECHR includes "*those expulsions adopted in relation to a group of foreigners without a reasonable and objective examination being carried out for each of them as to the reasons and defence each of them submits to the competent authority*".

The Court has also deemed that a series of individual measures adopted against people of the same nationality who were in the same situation of irregular residence were collective expulsions.[8]

We recall that in 2005, a Resolution by the European Parliament condemned the collective expulsions from Lampedusa to Libya. In 2004 and 2005, Italy never answered the request made by

[7] "The lower age must be presumed when the verification exam indicates a margin of error. Finally, it is added that insofar as the results of the verifications in question are not available, provisions concerning the protection of minors must nonetheless be applied to the immigrant".

[8] For example, see the Conka/Belgio case, whose sentence was issued on 5 May 2002. The Court expressed itself with great clarity on this matter: *"The Court reiterates its case-law whereby 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 on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4". …. " in those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective".*

the European Court of Human Rights, which sought to receive a copy of the orders of forced removal from Lampedusa that have been issued repeatedly since October 2004.

7. The safeguard of the right to asylum

At a first glance, the choice to transitorily transfer the operativity of the Territorial Commission for the recognition of the right of asylum of Trapani to Lampedusa, may appear not to be different from analogous operative transfers of territorial commissions, which have also taken place recently. However, the nature and seriousness of this choice appears to be different, considering the overall context in which it is enacted.

In fact, the current situation gives rise to very serious concern, both with regards to the reception measures and to the jurisdictional safeguard against negative decisions adopted by the Territorial Commission of Trapani.

Firstly, due attention must be drawn to the fact that the holding of asylum seekers in the centre for first aid and reception of Lampedusa following the formal submission of an asylum application while awaiting for it to undergo administrative examination, evidently contravenes the legislation that is in force in the field of the reception of asylum seekers, regulated by legislative decree D.Lgs 140/05 and by the recent legislative decree D.Lgs 25/08. The reception of asylum seekers, beyond the cases in which they are sent into the network of the Protection system for asylum seekers and refugees, detailed in art. 1 sexies of art. 1 of Law 39/90 as modified by Law 189/02, may occur, in the binding cases detailed by art. 20 point 2 letters a, b and c of legislative decree D.Lgs 25/08, only within CARAs (centri di accoglienza per richiedenti asilo, reception centres for asylum seekers) or, in the cases regulated by art. 21 of the mentioned legislative decree D.Lgs 25/08, in the CIEs (centri di identificazione ed espulsione, centrs for identification and expulsion). Hence, it is not possible to use the CSPA of Lampedusa as a reception centre for asylum seekers because it does not fulfil the requirements envisaged by the law and no guarantee is provided about the fact that the provision of necessary support, counselling and guidance services would be ensured for asylum seekers, even as an emergency or temporarily, with particular attention paid to situations involving the most vulnerability.

Attention must also be drawn towards the subjective circumstances of people who have just arrived after a trip that is often very traumatic, and are subjected to a procedure whose outcome may determine their future and personal safety, straight away; and this happens in the same physical environment in which they have received first aid. Moreover, people arriving in this situation cannot benefit from any assistance service, even psychological, in relation to the traumatic experiences that they have undergone. This particularly affects those who are most vulnerable. Furthermore, the combination of these circumstances produces stress that does not allow the interested party to face an interview with the commission in a relaxed manner.

Instead, in relation to jurisdictional safeguard, it is a priority to recall that art. 39 of Directive 2005/85/EC, in its point 1, establishes that "*The asylum seeker has a right to an effective means of impugnation before a judge..*", while art. 13 of the ECHR decrees that "*every person whose rights and liberty recognised by this convention have been violated, has right to an effective appeal before a national authority, even when the violation has been committed by people acting in the exercise of their official functions*". In the case of the right to asylum, the notion of effectiveness entails a prohibition against exposing applicants to the risk of persecution they have

complained about, or to the risk of suffering serious harm, until a decision on the matter has been adopted by a judicial authority[9].

The Italian legislation that is in force envisages (D.Lgs 25/08, art. 35) that within 15 days (or, in other cases, within 30 days) from the notification of the decision with which the Territorial Commission rejects the asylum request, the interested party, unless they want the procedure to expire, must file an appeal before the ordinary monocratic court of the provincial capital of the district of the court of appeal where the Territorial Committee has its offices. In the case of the examination of applications carried out directly in Lampedusa, the competency of the court of Palermo persists, in view of the fact that the Territorial Committee of Trapani is only operating in Lampedusa on a provisional basis.

On this matter, it appears very serious that there be a *de facto* impediment of access to jurisdiction to appeal against a refusal of refugee status or humanitarian protection. In relation to what is provided in art. 32 point 4 of legislative decree D.Lgs 25/08, which allows free access to jurisdiction, it seems unrealistic to imagine that dozens or hundreds of asylum seekers, entirely lacking in means, but free to circulate around the island of Lampedusa, may, in the very brief period that is available to them, materially initiate proceedings before the jurisdiction by contacting available lawyers, either privately or through protection bodies, to safeguard their own individual positions and submit the appeals in time for them to have any effect before the court in Palermo, a city that is several hundred kilometres away that can only be reached after a long trip in a ship followed by an overland journey. In fact, this situation clearly contravenes the mentioned legislation on the right to an effective judicial remedy.

8. Conclusions

Due to the serious situation that is developing on the island of Lampedusa and to the serious and concrete risk of widespread violations of the fundamental rights of migrants and especially asylum seekers, minors and the people who are most vulnerable, the undersigned associations ask the interior ministry and other competent authorities to do as much as is within their powers to:

- suspend the decisions that have been adopted, re-establishing the situation that envisages the use of the structure in Lampedusa with functions as a centre for early reception and first aid, and to proceed to the swift transfer of foreigners arriving in Lampedusa to other centres in the national territory, so as to examine their individual legal positions;

- avoid subjecting migrants and asylum seekers to any treatment that may be construed as arbitrary detention;

- guarantee access to an effective judicial remedy to migrants facing refusal of entry or expulsion;

- guarantee legal assistance to asylum seekers to submit their application and during the asylum procedure;

[9] The case law of the European Court of Human Rights in Strasbourg concerning the application of art. 3 appears to have been cleary directed, for some time, towards deeming that the notion of effectiveness envisaged by art. 13 must find full application where, in the procedure, it is possible to note the possible violation of art. 3 of the Convention itself, that is, if the appellant faces a serious risk of suffering torture or inhuman and degrading treatment, should he return to his country. Among the Court's past case law on this issue, the *Gebremedhin [Gaberamadhien] v. France affair (Request no 25389/05)* has assumed particular importance due to the clarity with which the Court expressed itself.

- guarantee access to an effective judicial remedy to applicants whose request for international protection is denied;

- avoid any identification procedure that, due to its summary or prompt nature, may lead to collective expulsions, or expulsions that are unlawful in any way;

- avoid the expulsion of individuals identified as being adults as a result of legal-medical methods that do not provide certain results, including x-ray wrist scans; postpone the decision as to their age to a later time and entrust it to differential diagnostic tests; guarantee that unaccompanied foreign minors are not held in Lampedusa beyond the time that is strictly necessary for their transfer, and that it be undertaken exclusively towards reception structures that have this purpose (SPRAR communities/centres for minors) that are present throughout the national territory;

- guarantee the certain identification of the migrant (including through co-operation with the consular authorities, where possible) before proceeding to refuse entry;

- allow access to the detention centre to the organisations that request it, so as to ensure monitoring of the situation by civil society.