Collective Expulsion and the Khlaifia Case: Two Steps Forward, One Step Back

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When the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Khlaifia and Others v. Italy* yesterday, many may have felt considerable disappointment. I for one did. What had started as a next step in the development of the case-law on the prohibition of collective expulsion (Art. 4 Prot. 4 ECHR) in September 2015, has now taken a somewhat opposite turn.

The Grand Chamber judgment follows a judgment of the Second Section of the ECtHR which had caused some heated debate, in particular regarding the Court's finding that there had been a violation of Art. 4 of Protocol No. 4. The majority of Judges then stated that "a mere introduction of an identification procedure is not sufficient in itself to rule out the existence of a collective expulsion". Furthermore, the fact that the Italian authorities did not inquire about the specific situation of each applicant nor produce evidence of any individual interviews had contributed to the Court's assessment that the expulsion was of a collective nature. However, two markedly dissenting opinions on this question were raised. As argued by the two dissenting Judges Sajó and Vucinic, the Court's definition of the concept of collective expulsion had been too wide and was as such not in line with the reasoning in the four preceding cases in which the Court had found a violation of Art. 4 Protocol No. 4. In their opinion, an expulsion collective in nature must either relate to a group of individuals who share some identity characteristics, for instance ethnic origin or religion, or involve a group of individuals who had not been individually identified by the competent authorities.

The *Khlaifia* case concerns three Tunisian nationals who attempted to cross the Mediterranean Sea by boat, were intercepted by the Italian coastguard and escorted to the Lampedusa shore in September 2011. In accordance with a bilateral agreement concluded in early April 2011 – in response to the dramatically rising numbers of persons fleeing violence in the wake of the Arab Spring – the Italian authorities had applied a fast-track procedure. The agreement which had never been made public allowed the Italian authorities to return Tunisian nationals to Tunisia upon arrival in Italy after establishing their identity through the Tunisian consulate.

Aiming for the Italian coast, the three applicants had been intercepted by the Italian coastguard and taken to a reception facility on the island of Lampedusa where they underwent a first identification procedure. As a consequence of the large number of arrivals on the island, which had exceeded 50,000 by then, the three applicants experienced overcrowding, a lack of privacy and inadequate hygienic conditions in the reception centre. Furthermore, the applicants indicated that they were neither given the possibility to leave the facility nor to contact a lawyer.

After the outbreak of a violent revolt and a demonstration – the applicants participated in the latter – the three were flown to Palermo where they embarked two vessels moored in the harbour. The three applicants were kept on these vessels for some days and thereafter taken to the Tunisian consulate which re-confirmed their identities. Subsequently, all three were returned to Tunisia. Neither of them had applied for asylum with the Italian authorities.

While the Grand Chamber found that there had been a violation of Art. 5 § 1 ECHR (the right to liberty and security), Art. 5 § 2 ECHR (right to be informed promptly of the reasons for deprivation of liberty) and Art. 5 § 4 ECHR (right to a speedy decision on the lawfulness of detention) as well as violation of Article 13 ECHR (right to an effective remedy) taken together with Art. 3 ECHR (prohibition of inhuman or degrading treatment), it did not follow the Chamber's assessment in relation to violations of Art. 3 ECHR and Art. 4 Protocol No. 4 to the Convention (prohibition of collective expulsion of aliens). Both deviations entail notable implications for the protection of the rights of migrants at Europe's borders.

Had the Grand Chamber confirmed the Chamber's assessment, it would have been the fifth time the Court has found a violation of the collective expulsion prohibition, after *Čonka v. Belgium*, no. 51564/99 (2002), *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09 (2012), *Georgia v. Russia (I)* [GC], no. 13255/07 (2014) and *Sharifi and Others v. Italy and Greece*, no. 16643/09 (2014).

Instead, the Court firstly states that Art. 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances but may be served "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". Secondly, it establishes that in this case the expulsion was not collective in nature in spite of the simultaneous return of all three applicants, but merely a consequence of the issuance of their individual refusal-of-entry-orders. Hence, the case facts fundamentally differ from the situations in *Čonka*, *Hirsi Jamaa and Others*, *Georgia v. Russia (I)* and *Sharifi and Others*.

However, Judge Serghides raises some strong arguments in his partly dissenting opinion how the Court might have opened the flood gates to decreasing the level of protection guaranteed by the Convention and its Additional Protocol No. 4. In particular, he argues that the Court's interpretation of the prohibition of collective expulsion departs from previously established case-law. This had determined that Art. 4 of Protocol No. 4 was aimed at preventing states from expelling aliens in a collective fashion without examining the individual circumstances of each one through a personal interview. Judge Serghides further claims that "this interpretation disregards the mandatory nature of the procedural obligation of the authorities to conduct personal interviews in all cases engaging Article 4 of Protocol No. 4" meaning that the authorities were given a choice to determine when to abstain from procedural obligations. Hence, the Convention's safeguards were tied to the discretion of the competent authorities at whom a complaint might be directed. This, in turn, would undermine the supervisory role of the Court.

Chamber and Grand Chamber alike pointed out that they had taken into account the severity of the situation caused by the large influx of refugee in 2011 which had led Italy to declare a state of humanitarian emergency for the island of Lampedusa. The Court took note of the lack of resources, accommodation and competent officials to deal with the number of migrants. However, in view of these difficulties, different conclusions were reached.

In that sense, what remains of the second *Khlaifia* judgment is the disquieting feeling that the Court might have actually neglected the opportunity to inhibit an easier, maybe even more non-transparent, conclusion and implementation of readmission agreements at national and European level; instead of ensuring that the level of protection enshrined in the Convention must not decrease in times of crises and during states of emergency. On the other hand, confirming its case-law on the right to liberty and security, the Court set out clear limits for the detention of migrants and hence strengthened their rights with regard to the deprivation of liberty.

Unfortunately, the Court abstained from addressing the argument of the Italian government that the agreement with Tunisia should be viewed analogue to a readmission agreement as provided for under the Return Directive. An assessment of this aspect could have revealed further and more concrete implications for policy-making and reform at the European level.

Nevertheless, the ruling is in fact an important compass for the after all pressing European crisis relating to migration and asylum policy and thus bears strong implications for the reform and making of an effective Common European Asylum System compliant with international human rights standards. While a narrower concept of collective expulsion may enable especially the EU member states at the borders of the Schengen area to more efficiently and extensively protect their territory and prevent unlawful migrants from entering or staying, it raises the risk of human rights violations through simplified expulsion measures. Hence, the Court also had to take into account and balance the requirements of an effective migration control vis-à-vis the states' obligations under the ECHR.

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