

De jure and de facto administrative detention of migrants in Italy: observations and challenges

DE FACTO AND DE JURE ADMINISTRATIVE DETENTION: ICRs AND HOTSPOTS.

The administrative detention in Italy between 2015 and 2018 involved about 17,000 (seventeen thousand) people (table 1 "Persons detained in the Italian Immigration Removal Centres from 2015 to 2018"). It deals with migrants without a regular residence permit intended for repatriation and held in the Italian Immigration Removal Centres (from now on IRC) or asylum seekers detained on the grounds of the legislative provisions relevant to the international protection. These are closed structures variously renamed over time, but envisaged by an act issued in 1998. The currently functioning IRCs are six for a total capacity of around 600 places. On these sites, the monitoring activity of the Guarantor is carried out both by virtue of its national mandate and of that deriving from the OPCAT as appointed National Preventive Mechanism. The Guarantor has published two reports on the general conditions in the administrative detention centres in Italy, one in June 2017 and one last September both published on the National Guarantor's website. The deprivation of liberty in the administrative detention centers is a *de jure* deprivation as it is subject to a primary legislation, which entails a series of guarantees including judicial review on the validation of detention and on its extensions.

Together with the *de jure* administrative detention such as that of the IRCs, several situations of *de facto* deprivation of liberty started to be executed in the so-called *hotspot*. The National Guarantor's published a first report on *hotspots* in Italy in June 2017.

The *hotspots* - unlike the Immigration Removal Centres - did not have a real normative basis and, in fact, they were not even considered places of detention, but only first aid and identification spots (up to the coming into force, in Italy, of the current so called "Security Decree" – which I will speak about later on). Nonetheless, persons actually arrived to the hotspots were many more in number than those held in the IRCs.

Between 2015 and 2017, around 120.000 (one hundred twenty thousand) migrants entered the hotspots in Italy (Table 2, "Number of migrants entering the hotspots in Italy from 2015 to 2018").

The *hotspots* do not refer to a definite legal framework. In the National Guarantor's report, they were defined: as "legal limbos" being regulated only by the SOPs, not

really a source of primary law. Yet the deprivation of liberty - even after the completion of the identification procedure - has been easily practiced, even for several consecutive days. In this regard, the National Guarantor in its first round of visits to the structures - carried out in January 2017 - verified that in some facilities, once identified, migrants were allowed to leave the structure, while in others “free-in-outs” were not possible. Hence, the National Guarantor’s request to let all migrants, once identified, leave the place at will and return to the facility under fixed procedures.

At present, the number of places in these facilities look like not to be in need of any increasing, while the Italian government's projects drafted in an act by the previous legislature, had plans to strengthen the IRC network, to foster forced returns.

Moreover, in these days a decree is being converted into law: it is destined to radically change the administrative detention framework in Italy with the effect of broadening the range of detention hypotheses, but also the variety of places where detention is possible.

OTHER PLACES, THE “DICIOTTI CASE”

Yet, before examining in depth the above mentioned decree and its consequences and giving some hints on the real material and environmental conditions, observed during the Guarantor’s monitoring visits to the immigration detention facilities, I would like to point out that some *de facto* detentions are not only related to *hotspots* but also to other places of deprivation of liberty such as, for example, vessels.

Last Summer, the National Guarantor took actions in some occurring *de facto* deprivation of liberty referred to the detention of migrants on board Italian ships; the case, probably the most striking, which had a wide international echo, is that of the boat *Diciotti*, a vessel of the Italian coastguard.

As known, in mid-August, the Italian coastguard vessel rescued around 190 (one hundred ninety) migrants from a boat sailing from Libya. On board, there were families, women, children and unaccompanied minors, adrift and in danger of shipwreck around the border of Malta’s search and rescue area. After about 48 hours being stuck in the Lampedusa bay, without obtaining permission to reach the shore, the *Diciotti* sailed to Catania where it arrived on August 20. The vessel was then permitted to dock but the migrants could not get off the boat. Consequently, all migrants remained aboard with no interruption from August 16 to August 25, with no possibility to disembark, and under no detention grounds. Only two exceptions: those

in serious medical conditions and the unaccompanied minors. On August 22, the continued forced stay aboard determined the visit of the Prosecutor of the Republic in Agrigento and the day after also the National Guarantor went on board.

The Guarantor following the visit, with consequent information to the Public Prosecutor in Agrigento and Catania, noted:

- A situation of *de facto* deprivation of liberty in violation of article 5 ECHR and article 13 of the Italian Constitution, which provides that the deprivation of liberty within 48 hours must be validated by a judge.
- The inadequacy of the material conditions aboard for the permanence of such a high number of migrants. In particular, the migrants had not had access to the indoor spaces, intended exclusively for the vessel's crew. They had their meals on the ground and slept on cartons and blankets. On the bridge, a sheet was mounted to provide a minimum of shelter from weather conditions. The 150 migrants had only two toilets available for use: two re-adapted chemical toilets with direct discharge to the sea, and not a sink. A pump on the bridge also used for washing clothes provided the running water for personal cleaning. These conditions, regardless of the efforts made by the Captain and the crew (that the Guarantor was able to appreciate even during the visit), fall within an overall framework that might be judged as amounting to that situation of inhuman and degrading treatment according to article 3 of the ECHR .
- According to the board medical report of August 20, there were 74. All migrants were given antihistamines, taming symptoms but not treating the infection. They appeared severely weakened, as a result of malnutrition and dehydration.

Following the case, the Public Prosecutor in Catania started an investigation, initially against persons unknown and subsequently against the Minister of the Interior and his Chief of Staff, for abduction and other crimes related to the case. If subsequently the accusation against the Head of Cabinet of the Minister of the Interior was dismissed, the investigation continued against the Minister of the Interior. The Catania prosecutor's office, to whom the file had been entrusted for the investigation, has recently asked for a filing because the behavior of the Minister of the Interior was "justified by the political choice to ask the European distribution of migrants in a case where, according to the international SAR convention, Malta should have indicated the safe harbor".

This is an event that constitutes in any case a *vulnus* in the Italian legal framework also in consideration of precedents such as the ones of the Khlaifia case. Moreover,

the forced presence of the migrants on board was used as a political pressure tool, without worries about the humanitarian, individual and collective, consequences.

OBSERVATIONS ON IRCs

Reference was made to the material conditions of the *de facto* and *de jure* administrative detention. In its recent report on visits to IRCs in Brindisi, Potenza, Bari and Turin – conducted between February and March 2018 - the National Guarantor highlighted:

- At the structural level, some emerging factors of serious critical aspects represented by the absence of premises and environments for common activities, by the places structure and the lack of some furniture, which heavily affected the quality of life within the facilities and determined the risk of situations of degradation even in the exercise of the most elementary fundamental rights, not compliant with the Regulation of the Centres issued by the Ministry of the Interior in 2014.
- In relation to the detainees' juridical positions, it is necessary to encourage as much as possible the separation between those who come from the criminal environment and those who are only in a position of administrative irregularity or who are asylum seekers. The heterogeneous [heterogenous] situation of the hosted subjects should therefore be addressed by providing separated "sections", within the structure, that may take into account such significant differences.
- It is necessary to create a *registre of critical events* in all the Italian administrative detention centers, to be kept up to date on a daily basis, as well as the need to create registers in which any case of injury detected on guests or operators is systematically reported.
- Furthermore, it is necessary that in all the repatriation centers, comprehensive information is provided to the persons hosted about the rules governing life within the Center, in an understandable and accessible way, through the dissemination of documents, translated into the different languages spoken by the detainees. Just as it is urgently necessary to proceed with a complaint procedure before an independent Authority, concerning the material conditions of accommodation in the centers, the relative rules and the exercise of their own legitimate interests.
- Finally, that the acquisition of the intention to access the international protection procedure by the Police officers been always promptly ensured, and that in any case the migrant asking for protection is immediately given back written receipt proving the declaration he manifested has been registered.

The general opinion that can be drawn after a visit to one or more administrative detention centers in Italy, comparing the material and quality conditions of life with the ones observed in prisons, is that the latter, paradoxically, offer greater conditions of livability and respect for rights.

Nevertheless, a progressive enlargement of the use of administrative detention is ongoing.

CHALLENGES: THE “ NEW SECURITY DECREE”

In this framework, the law-decree 13 of February 2017 converted into law in April of the same year, has foreseen a program of escalating openings of new IRCs, one for region and with certain features: structures of limited capacity, close to villages and to communication routes, suitable to guarantee full respect for the dignity of the people housed. Anyway, all the information about new openings are not compliant with the abovementioned law: they do refer to former local prisons (in some cases), or former administrative detention centers - meanwhile abandoned, far from inhabited centers or communication ways.

In this regard, the National Guarantor recently launched a process of internal debate that will lead, within early 2019, to the publication of national guidelines on administrative detention, on the model of the European rules currently being drawn up within the Council of Europe. In this context, it is essentially a matter of reaffirming the principle that a clear line of demarcation between administrative detention and criminal detention is to be drawn.

Indeed, law-decree 113 of 4 October 2018, the so called “Security Decree”, converted in these days, is the legislative measure that more than others is destined to have a decisive influence on the panorama of administrative detention in Italy. It is a legislative provision, therefore, that makes administrative detention an instrument of government of the migratory phenomena with worrying consequences on the general system of protection of the rights of migrants, whether they are applicants for international protection or not.

In fact, it is broadening range of places of detention, and variety of hypotheses for which administrative detention is possible. It establishes a wider time-span for administrative detention within which it is possible to enforce an administrative detention order.

In particular,

- the Decree deletes the residence permit for humanitarian reasons, notwithstanding that about 25% of all applications for international protection are processed through the granting of a residence permit for humanitarian reasons. Therefore, its suppression will automatically produce – in the case of immigrants who arrived in Italy after 4 October – a situation of almost automatic irregularities and the very probable inclusion in an administrative detention facility and subject to expulsion.
- the Decree establishes that stay in the Immigration Removal Centres is extended from 90 days to 180 days for the so called "economic migrants".
- As regards asylum seekers, the Decree provides for the possibility of detention for identification purposes (to ascertain identity or citizenship) in dedicated premises within the hotspots and government first reception centres for the time strictly necessary and in any case not more than 30 days.
- Establishes that if it has not been possible to determine the migrant's identity, the detention (for identification purposes) can then be carried out in the IRC up to a maximum of 180 days, thus amounting to 210 days of detention.

A scenario opens up in which this condition of non-identification constantly affects asylum seekers and opens up extremely wide-ranging discretionary actions carried out by the public administration and border police. This is in contrast with the principle that the asylum seeker cannot be detained simply because they have applied for asylum.

Furthermore, the possibility of detaining asylum seekers in different places of detention other than the IRCs or prisons, is in contrast with the provisions contained in the "Reception" Directive, where it is expected that the detention of asylum seekers is normally conducted in those detention facilities.

Back to the economic migrants, the rule once again widens the list of places in which to carry out the foreign nationals' temporary and forced stay for the purposes of expulsion. Or else, if there is no availability in the IRC, the Judicial Authority may authorize the temporary stay of the migrant in other "suitable" facilities in the availability of the law enforcement agencies for a maximum of four days.

If the necessity is still manifest, the Judicial Authority may authorize the temporary stay of the alien, at most for further two days, in "suitable" premises of the Border Police Office, up to the execution of the removal and, in any case, for no longer than 48 hours after the hearing. Overall, the subject can be held for six days for expulsion purposes (48 h + 48 h + 48 h).

Therefore, an indefinite framework of detention places is opening. It is based on a generic notion of suitability, not previously determined, whose verification is entrusted essentially to the public administration and only abstractly to the judicial screening. A provision that contrasts with what emerges from a combination of article 13 of the Italian Constitution and article 16 of the "Return" Directive which states that detention shall normally be enforced in specific places or exceptionally in prisons. Furthermore, there is no updated official mapping of these places that the Guarantor can use for the implementation of a program of visits.

Many are the doubts expressed by the Guarantor about the "Security Decree". Just think of the extension of the detention time limits in the IRCs for up to 180 days, whose effectiveness for the purpose of repatriation is denied by the statistical evidence that the possibility of being repatriated is independent of the time variable.

Detention therefore works as a deterrent to migration flows and as a perspective of potential suffering based on the individual's deprivation of liberty. As stated by the National Guarantor Mauro Palma in a recent meeting on the theme of trafficking in human being "From Beccaria's teachings, when a person is considered by other people as a means to obtain something else, it is there that the breaking element between the rule of law and human relations occurs. Torture and human trafficking (and administrative detention enforced for different purposes and not in the perspective of repatriation, I would rather add) have that in common".

Thank you for your attention.