

**Refugee Status and Humanitarian Residence Permit
Criteria for distinction between Civil and Administrative Jurisdiction**

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LEGISLATIVE FRAME WORK ON ASYLUM

By Gianmario Palliggiano

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PART I

LEGISLATIVE FRAME WORK ON ASYLUM

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1. Asylum right and Italian Constitution

Art. 10 paragraph 3 of the Italian Constitution states: *“the alien, who, in his own country, is forbidden the effective exercise of democratic freedoms guaranteed by Italian Constitution, has the right of asylum in the territory of Italian Republic according to conditions stated by the law.”* There are evident differences between the meaning of asylum right adopted by Italian Constitution and refugee status according to International convention.

Asylum right, adopted by Italian Constitution, implies an objective absence of civil liberties in the Country of origin, although there were not a palpable risk for the person.

Refugee status claims instead well-founded fear of being victim of concrete persecution for reasons of his race, religion, nationality, political opinion or membership of a particular social group in the origin country, event doesn't demanded for the verification of the asylum right.

In a famous legal case around ninety year end (Ocalan v. Italian Government) Court of Rome (sentence October 1st, 1999) underlined that - according art. 10, paragraph 3, of Italian Constitution - asylum is a perfect civil right of the foreigner in the case of verification of obstacle in his origin country to the effective exercise of democratic liberties guaranteed by Italian Constitution. In that event the Court recognized a deep compression existence in Turkey of fundamental freedom and, related to Kurdish people, the effective exercise of civil liberties guaranteed by Italian Constitution.

In Italian legal order there is not a law that enforces article 10 of Constitution. That lack put the problem whether the constitutional disposition is directly applicable.

Ordinary jurisdiction, after an initial negative pronouncement^[1], admitted the immediate application of Constitutional disposition even if there is not an ordinary law of the article 10 Constitution actuation.

Administrative regional courts^[2] had instead admitted directly constitutional principle application.

The Consiglio di Stato underlines the refugee condition is like a “species” compare to the asylum right “genus”.^[3]

Therefore, Italian legislation adopts in promiscuous meaning the terms of asylum and refugee status.

2. Refuge status

The main national legislative sources concerning refugee status in ratification of international Convention are:

- Act of Parliament July 24th 1954, n. 722, in ratification of Geneva Convention July 28th 1951, relative to refugee status, modified by New York protocol of January 31st 1967;
- Act of Parliament December 23rd 1992, n. 523, in ratification of Dublin Convention June 15th 1990, relative to the determination of appropriate State for the asylum request examination, submitted in one of European community member State.

Art. 1 Act n. 722/1954 assigns refugee status to a person who has real reasons to be regarded victim of persecution in cause of his race, religion, nationality, political opinion or membership of a particular social group in the origin country, and he could not receive protection in his own country.

There are also two other relevant legal rules:

1. Legislative decree November 19th 2007, n. 251 that, in application directive 2004/83/CE, assigns the rules for no European community citizens refugee status and the admission of subsidiary protection.
2. Legislative decree January 28th 2008, n. 25 that, in application directive 2005/85/CE, determines the procedures for the examination of international protection for no European community citizens and procedures for retraction and recognized status ending. [\[4\]](#)

According to the Italian legislation – that implements European legislation – "refugee" is foreign citizen who, because of fear of persecution, stays outside the territory of his own country and he cannot or do not want ask for the protection in that country. The same protection is assigned to a stateless person.

Legislative decrees 251/2007 and 25/2008 distinguish two conditions:

- 1. "refugee status", acknowledgment by the State of the refugee condition in favour of foreign citizen;
- 2. "subsidiary protection", in favour of foreign citizen whom cannot be recognized status refugee to, but there are founded reasons that involve, in case of return in his own country, sever risks to undergo damages.

Article 5, paragraph 1st, legislative decree 286/1998 clarifies that a foreigner in possession of stay paper or stay permit (for study, job, family re-union, asylum) can stay in Italy.

It important to stress that the article 18 legislative decree 286/1998 provides particular kind of stay permit, establishes to insure social protection to foreigners who have been victims of violence or exploitation from criminal organisation, in connection with drug pushing or prostitution.

3. Asylum right

Local commissions (Commissioni territoriali per il riconoscimento della protezione internazionale) are the appropriate authority to examine the asylum request (art. 3, l.d. 25/2008).

National commission for asylum right (Commissione nazionale per il diritto di asilo) has the power to revoke the previous admission of international protection status, according to legislative decree 251/2007 (art. 5 l. d. 25/2008). National commission supervises and coordinates local commissions. It has also the role of training and upgrading the components of local commission. It has to provide the implementation of informatics databank concerning the useful information to grant asylum request, and a documentation centre about political, social and economics situation in the origin countries of the asylum seekers, also about the monitoring of influxes.

International protection application is submitted personally by asylum seekers at the frontier police office at the entrance in national territory or at the police office of the district where the person will establish his house.

Asylum seeker is authorized to stay in Italian territory, on the exclusive scope of the procedures, until local commission decision in order his request.

International protection request cannot be rejected in cause of that did not formulated on time.

The determination on a singular seeker is individual, objective and impartial.

According to the law, every request is examined on the base of accurate and updating information about the general situation in the origin country of the asylum seeker. National Commission avails itself of information by United Nation High Commissariat.

Every communication is formulated in the first language indicated by the seeker or, if is not possible, in English, French, Spanish or Arab, according the indicated preferences. In any case it is guaranteed an interpreter.

Asylum seeker must cooperate with the authorities in the procedure and gives them documents and information, useful to facilitate the examination.

The local commission can decide to interview the asylum seeker, on motivate request of him, without public. That commission can also delegate the interview to one of his components, if possible of the same gender of the seeker.

For the international protection procedure is also applicable Italian Act 241/1990 about administrative proceedings that guarantees full participation to that procedure.

Decisions about the request of international protection are written and immediately communicated to the applicant. In case of rejection it must be motivate de facto and de jure and it shows how to challenge the decision.

National commission edits an information brochure about the procedures, the principal rights and duties during the residence in Italy, medical assistance, that has be given to the applicant.

In each step of the procedures asylum seeker can contact High Commissariat or other asylum organisation.

Parliament Act July 30th 2002, n. 189, confirming general restrictive tendency, is direct to resolve problem of fictitious asylum request, submitted to exclusive aim to avoid the execution of imminent expulsion. Simple procedure counts four cases in which the law requires to temporarily detention - tree optional and one compulsory - the claimant in the CID (Centre of identification and ejection), for the time strictly necessary to definition of the admission to stay in the national territory :

1. verification of claimant identity or nationality, in case of lack or falsity of documents;
2. verification of the circumstances in support of the request if they were not immediately available;
3. during the procedure to recognize the right to be admitted in the national territory;
4. asylum request of foreigner stopped to have elude or tempt to elude the frontier control.

There is, at last, compulsory detention, care of CID in the event of presentation of asylum request by a foreigner subject to an act of expulsion or pre- ejection. In that case there is a presumption of unfounded request, to avoid or postpone the expulsion.

The terms of simple procedure are twenty days from the request to the pronouncement.

In the whole other cases Italian authorities resort to ordinary procedure.

4. Asylum in the event of mass influx

To complete, it is useful remember legislative decree April 7th 2003 n. 85, in application directive 2001/55/CE, related to leave temporary protection in the event of mass influx of displaced persons.

Article 7 legislative decree 85/2003 asserts principle that the admit of measure of temporary protection does not prevent the request for acknowledgment of refugee status according Geneva Convention.

About Asylum right, the event of mass influx (legislative decree 85/2003) has to be distinguished from the event of individual asylum request (Act decree 416/1980 and at present legislative decree 25/2008).

Legislative decree 85/2003 defines the procedure as “outstanding” applicable in the event of serious risk that asylum system cannot bear a mass influx (art. 2, par. 1, lett. a)

On base on article 1 and 2 legislative decree 85/2003, the legal discipline is applicable in event of:

- a. Mass influx: are not sufficient events of group or individual immigration being essential that the influx concerns a considerable number of displace people coming from a specific country or area;
- b. Constricted abandon as reaction to an intolerable situation or evacuation plans;
- c. Armed conflict or endemic violence situation and systematic violation of human right in the area of origin such as it is impossible the repatriation in safe and steady conditions.

PART II

ASYLUM AND HUMANITARIAN RESIDENCE PERMIT

By M. Laura Maddalena

Humanitarian residence permit and asylum disputes before civil and administrative jugdes

In Italy, there are four instruments of aliens’s protection:

- 1) constitutional right of asylum;
- 2) international protection;
- 3) subsidiary international protection;
- 4) humanitarian residence permit.

In 2008, according to data given by the National Commission for the asylum right (Commissione nazionale per il diritto di asilo), 22.000 plus asylum claims have been evaluated. The 49 per cent have been granted some form of protection. In particular:

- 8 per cent status refugee;
- 32 per cent subsidiary protection;
- 9 per cent humanitarian permit.

The remaining 51 per cent have the potential to appeal to a Court. The problem is which court.

In Italy, distinction between civil and administrative jurisdiction is stated by our Constitution (art. 24 and 103). According to this criteria, civil judges deal with “full right” disputes, even if a Public administration is involved; instead administrative judges deal with legitimate expectations (interessi legittimi) and provide judicial review of administrative decisions.

Only administrative judges, therefore, can invalidate an administrative act, when it is unlawful.

In particular, in the immigration field, administrative judges deal with residence permit disputes (according to art. 6 paragraph 10 legislative decree 286/1998) while the civil judges deal with expulsions of illegal immigrants.

This system, as it is, creates lot of conflicts, also in asylum disputes.

Up to 1999, civil judges dealt only with asylum disputes based on the art. 10, 3rd paragraph of our Constitution, the so called constitutional right of asylum, because this was considered a fundamental and constitutional right that, according to several judiciary decisions [\[5\]](#),

can be applied even despite the emanation of the law which the article itself mentions and even if the alien is not present in the Italian territory (as it was recognized in the Ocalan case by the tribunal of Rome, October 1st 1999) [\[6\]](#).

Instead, at that time, administrative judges dealt with refugee status disputes (regulated

by the Geneva Convention and by European laws) because there was a national law^[7], emanated to enforce international treaties, that provided the administrative jurisdiction regarding the judicial review on administrative acts that denied the refugee status^[8].

In 1999, after the rule was abrogated^[9], the Corte di Cassazione^[10] decided that the civil judges had to deal not only with asylum but also with refugee status disputes, because both of them have been considered perfect rights and not legitimate expectations.

As a result of the above, a better protection for the applicant was provided.

That is due to two reasons:

- a) the civil judge can directly recognize the refugee status, instead the administrative courts could only invalidate the refusal of the refugee status and then the procedure had to start again;
- b) the civil judge can, in case of lack of refugee status conditions, grant the constitutional right of asylum, easier to provide, requiring only that democratic freedoms are not guaranteed in the applicant's country.

Nevertheless, since 2006, things changed when Corte di Cassazione expressed a different opinion.

The Court stated that, having to follow the same procedure to be obtained, constitutional asylum right and refugee status are similar.

According to this judiciary interpretation, after the enforcement of European and international rules in Italy, constitutional right of asylum has to be interpreted looking at European and international refugee's protection, so that Italian Constitution can only provide the right to obtain a temporary residence permit, during the time of the refugee status recognition procedure^[11].

As a result of this new statement, applicant protection went down again.

Instead, some other decisions of administrative judges, while denying their jurisdiction, go on saying that there is still a difference between Italian constitutional right of asylum and refugee status because the first doesn't need any proof of persecution^[12].

The recent facts of immigrant's boats sent back towards the Libyan coasts by Italian Government raised again the issue: UNHCR and many experts have said that the international and constitutional right of asylum has been violated. If among the immigrants there were some asylum seekers, they would have been prevented from applying for international protection.

Regarding the fair trial procedure, in 2008, the Corte di Cassazione^[13] changed his previous opinion regarding an important issue in asylum disputes.

The Court said that, according to the European principles (stated by the 2005/85/EC dir.), the applicants must not give the full proof of being persecuted. They only have to collaborate, with administration before and then with judges, in order to let them verify the international protection conditions.

The asylum trial, according to this decision, is to be considered different from the other civil trials because it must be less formalistic and more flexible. Judges must provide any kind of proof could be necessary, asking for information, documents, ect.. As a consequence, they cannot reject the appeal because of the lack of proof.

Moreover, the judge can decide if providing the international protection or the subsidiary one.

In conclusion, at present time, civil judges deal with asylum and international protections disputes, including subsidiary protection.

A free legal assistance is provided if only applicants declare, on their own responsibility, that they don't income more then a certain amount of euros per year.

They deal also with temporary residence permits (granted during the time the asylum procedure lasts).

In the past, there were also some problems in distinguishing the jurisdiction when a temporary residence permit had been revoked, in consequence of the denial of the refugee status.

It is necessary to specify that, according to article 7 of d.lgs. n. 25/2008, an alien who enters the state territory, in order to apply for the refugee status, has the right to obtain a temporary residence permit, during the time the procedure lasts.

As generally administrative judges deal with residence permits (except the family ones), according to some judiciary decisions, they also ought to deal with these permits. Anyway, at the end, courts have agreed that these disputes belong to civil judges because the temporary residence permit must be revoked in consequence of the deny of refugee status^[14]. If there is no discretion, there is not administrative jurisdiction

Instead, administrative judges deal with residence permits for humanitarian reason.

This is not only stated by the law (art. 6 paragraph 10 d.lgs. 286/1998) but it is also provided by the general principles mentioned above, because this kind of disputes concerns legitimate expectations and exercise of administrative discretion^[15].

Humanitarian residence permit is grant by the Questore (the chief Police of the district) to aliens that cannot be expelled because they are under age, pregnant women, relatives of Italian citizens or because they are at risk of persecution for racial, sexual, linguistic, political, religious reasons, but the refugee status cannot be granted.

In fact, the law says that if the territorial Commission for the recognition of international protection doesn't provide either international protection or subsidiary protection, the Commission itself can transmit acts to the Questore,.

It's questionable if the Questore can appreciate the situation and decides if it is serious enough to give humanitarian protection. If the Questore, in other term, having discretion in this field, can appreciate the effective situation and decide if it is serious enough to give humanitarian protection.

Recently, The Corte di Cassazione, United Sections, affirmed for the first time the civil judge jurisdiction regarded to the Questore denial to the issue of humanitarian residence permit^[16].

The Court so decided, setting the legislation evolution off in that matter. The art. 32 legislative decree n. 25 of the 2008 (confirmed by the following legislative decree n. 159 of the 2008), in issued in application of European directive 2005/85/CE, assigns to the Local Commission the task to decided in order the asylum request. In the case of refusal of asylum but in presence of serious reasons, the Local Commission must send the documents to the Questore for the issue of humanitarian residence permit. According the Italian legislation, Local Commission must value the circumstances not only for the request of asylum but also for the acknowledgment of humanitarian permit; while the Questore has only the task to carry out the commission deliberations without some further margin of an independent appraisal on the alien "humanitarian condition".

The absence of some discretionary evaluation by the Questore implies the civil jurisdiction.

Humanitarian permission allows the aliens to remain in Italy as long as it is necessary.

The Corte di Cassazione^[17] dealt with the case of a Russian whose husband was a fighter for the independency of Cecenia, who claimed not only refugee status but also humanitarian permission.

The Court, first of all, stated the jurisdiction of administrative judges on the humanitarian permission dispute.

The Court said that humanitarian permit can't be refused only because the territorial Commission has denied the refugee status.

Also some administrative tribunals^[18] and the Consiglio di Stato^[19] had stated that the Questore had to verify the conditions for giving the asylum seeker a humanitarian permission, even if the Commission had already refused the asylum.

This can happen because the persecution that is necessary to obtain the refugee status must be personal and directly related to the applicant and must to come from a political authority of the State, so that it is not possible to recognize the refugee status if persecution is general and referred to a whole population^[20]. In those cases, nevertheless, humanitarian permit can be grant.

So we can say that in Italian law alien's protection can be assured, by humanitarian permit, even if there are not the conditions issued to obtain the refugee status. This instrument can be used when there is no proof of an individual persecution (that allows the refugee status) or when the bad treatment suffered by the applicant can't be qualified as a persecution.

The contents of protection, different in a previous time, are now the identical. The foreigner who is granted the refugee status enjoys of the same protection that Italian legal order assigns to a person whom is recognized asylum right.

Legislative decree July 25th 1998 n. 286, on immigration and condition of foreigner, even if it does not make reference to asylum or refugee, let understand that Italian legal order has unified general level of protection of foreigner.

[1] Court of Rome, 13 February 1997

[2] Tribunale amministrativo regionale Friuli Venezia Giulia February 19th 1992, n. 91; Tribunale amministrativo regionale Lazio, Roma, sec. I, May 15th 1986, n. 659

[3] Consiglio di Stato, sec. IV, July 11th 2002, n. 3874.

[4] Conditions of ordinary procedure were disciplined by legislative decree May 30th 2005 n. 140, in application directive 2003/9/Ce which establish minimum standard for the welcome of the asylum seeker in one of the European member country.

Art. 2, par. 1, legislative decree n. 140/2005 clarifies that for “asylum seeker” shall mean the alien who asks for acknowledgment of refugee status, according to Geneva Convention of 28 July 1951.

[5] Corte cass., Sez. Un. Civ., n. 4674/97; 907/99, sez. I, 8423/2004.

[6] There are many discussions about the actual content of the constitutional right of asylum: some think that it is a fundamental right provided directly by the Constitution, that consists in the right to receive a permanent residence permit in every case in which democratic freedoms are not guaranteed in the alien’s country (M. Benvenuti, *Il diritto di asilo nell’ordinamento costituzionale: un’introduzione*, Padova, 2007), some others think that the constitutional right has been enforced by the laws about refugee status, subsidiary protection and humanitarian protection (cfr. P. Bonetti, *Il diritto di asilo in Italia dopo l’attuazione della direttiva comunitaria sulle qualifiche e sugli status di rifugiato e di protezione sussidiaria*, in *Diritto immigrazione e cittadinanza*, 2008, pp. 13 - 53).

[7] art. 46, l. n. 40 del 1998 and art. 5, d.l. n. 416 of 1989 - l. n. 39 of 1990

[8] As everybody knows, the refugee status, now called international protection, can be recognized only if there is a proof of a political, religious, ethnical, social persecution

[9] By the art. 47 of d.lgs. n. 286 del 1998.

[10] Corte Cass., sez. un. Civ., n. 907/1999.

[11] F. ex. Corte Cass., sez. I civile, n. 25028/2005 stated that the constitutional right of asylum must be considered not as the right of permanent residence in the territory of the State, but only as the alien’s right to enter the State in order to apply for the recognition of refugee status. The asylum right is nowadays not more that the right to obtain a temporary permit residence during the time of the refugee status recognition procedure. This statement has been strongly criticized by constitutionalists because it seems to go against the immediate application of art. 10, 3 paragraph Cost. (M. Benvenuti, *Asilo (diritto di)*, Enc. Giur. Aggiornamento, 2007, p. 4 and E. Cavasino, *Un passo indietro nell’interpretazione dei rapporti tra diritto di asilo e status di rifugiato nell’ordinamento in Giur. it.* 2007, p. 318).

[12] Consiglio Stato, sez. VI, n. 2274/2008 e n. 5605/2006.

[13] Corte Cass., sez. un. civ., n. 2731/2008.

[14] Corte Cass., sez. I civ., n. 18549/2006; Consiglio Stato, sez. VI, n. 6196/2007; n. 362/2007; Tribunale amministrativo Lazio, Roma, sez. II, July 10th 2006, n. 5739.

[15] Administrative jurisdiction was affirmed also by Corte Cass., sez. un. civ., n. 7933/2008.

[16] Corte Cass., sez. un. civ., May 19th 2009 n. 11535.

[17] Corte Cass., sez. un. civ., n. 7933/2008.

[18] Tribunale Amministrativo Lazio, Roma, sez. II, October 8th 2008 , n. 8831

[19] Cons. Stato, sez. VI, n. 2868/2006;

[20] Tribunale Amministrativo Emilia Romagna, Bologna, sez. II, April 27th 2004, n. 607 e Tribunale Amministrativo Abruzzo, L’Aquila, January 27th 2004, n. 5