The international protection before the judge

A research on the decisions of the Tribunal of Bologna

- Main findings -

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The purpose of this short paper is to present a (non-official) summary of the main findings in English for a wider dissemination.

You can find the complete version of the research here (Italian).

Asilo in Europa, March 2020

Introduction

The research stems from a **cooperation** between the Emilia-Romagna Regional Authority (DG Social integration), the Tribunal of Bologna and Asilo in Europa and analyses the activity of the Tribunal of Bologna in the field of international protection, a field which suffers from a chronic lack of scientific studies in Italy and where even having access to reliable figures is all but easy. The Tribunal of Bologna - 2nd instance body, competent for the judicial review of the 1st instance administrative decisions taken within the regional territory of Emilia Romagna - gave Asilo in Europa's researchers access to its database in order to collect data and information. The desk study was carried out between **June and July 2019**. A first draft of the research was then rewieved by the Tribunal of Bologna and the Region Emilia-Romagna; their comments were extremely accurate and important for the drafting of the final version which was then uploaded on the Region Emilia-Romagna's website and disseminated.

"*La protezione internazionale davanti al giudice*"[1] is therefore a "collective work". However, the responsibility for its quality rests entirely with Asilo in Europa.

The research is made of two different sections. The first one shows the figures on the recognition rate regarding all decisions taken by the Tribunal of Bologna on the appeals lodged between 17/08/2017[2] and 31/12/2018, with a **focus on Bangladesh and Nigeria** (two of the most important Countries of origin over the last decade in Italy), whose data are further broken down by sex and type of protection granted. The second section contains the most important findings of the in-depth legal analysis of 87 decisions issued by the Tribunal (regarding asylum seekers from Bangladesh and Nigeria only), with a focus on the legal reasoning, the credibility assessment, the use of COI, the approach towards the most recurrent claims (e.g. LGBTI cases).

1 Italian original title.

2 Entry into force of the decree-law 17 February 2017, n. 13 which hugely modified the rules on the judicial phase of the asylum proceedings.

Part 1: General and specific statistics

1. At the end of July 2019, the decisions[3] taken by the Tribunal of Bologna globally (regardless of the nationality of the applicant) on appeals in the field of international protection – lodged starting from the 17th of August 2017[4] – were 1.730. The **workload was impressive and fast-growing**. At the end of December 2018, the pending cases were 3.801, but in June 2019 they were already 6.207 and after three months (end of September 2019)[5] 7.657.

2. The overall rate of recognition was low. Around **1 out of 5 (20.9%)** of the appeals examined in the merits by the Tribunal of Bologna were successful (meaning recognition of international or national/humanitarian protection).

3. As far as the two Countries of our interest are concerned, during the relevant period of time, the Tribunal of Bologna examined 313 appeals lodged by Nigerian citizens and 228 appeals lodged by Bangladeshi citizens. They were successful in **19.5%** (61) and **12.3%** (28) of cases respectively.

4. For both Nigerians and Bangladeshis the most frequently granted form of protection was the **humanitarian** one. However, while for Bangladeshis that represents virtually the only form of protection granted (25 cases out of 28 positive decisions – in the remaining 3 cases refugee status was recognised), the rate of recognition of the refugee status for Nigerians was not insignificant (20 out of 61 positive decisions – humanitarian protections were 36, subsidiary protections only 5).[6]

5. As far as the **sex** of the applicants is concerned, Nigerians were predominantly men (259 or 82.7% vs. 54 or 17.3%). Nevertheless, women were most frequently recognised with a form of protection, both in relative (57,4% vs. 11.6%) and in absolute terms (31 cases vs. 30). In

3 When using the word "decisions" throughout this paper, we mean only decisions on the merits of the case (e.g.: appeals declared inadmissible or joint with others are **not** included).

4 See footnote 2.

5 This was declared by the President of the Tribunal of Bologna in the Preface to the Italian version of the study.

6 Relevant statistical tables are available in the Annex.

particular, the rate of recognition of **refugee status to Nigerian women** is noteworthy: 24.1%, which rises up to 50% if one considers only the appeals lodged in 2018. Remarkably, not even a single appeal among those lodged by Bangladeshis and examined by the Tribunal in the relevant period concerned a woman.

Part 2: Legal analysis

Composition of the sample

For the purpose of this study, we analysed – directly from the Tribunal's database – 87 decisions. For the composition of the sample the following **criteria** were taken into consideration: i) *time*: Only appeals lodged after the 17th of August 2017.[7] More precisely, 50 appeals were lodged in 2017 and 37 in 2018; ii) *Country of origin*: as agreed with the Tribunal of Bologna and the Emilia-Romagna Regional Authority, the study is focused on applicants coming from Nigeria (55) and Bangladesh (32), which have been two of the most important Countries of origin of asylum seekers in Italy over the last decade; iii) *sex of the applicant*: Appeals lodged by women make up the 20% of the sample (around two times the percentage of women among all decisions regarding Nigerians and Bangladeshis);[8] iv) *type of decision*: We wanted to highlight the main reasons behind the Tribunal's positive decisions, which are 39, or 44% of the sample. Indeed, many negative decisions concerning Nigerians and Bangladeshis are quite similar (often because appeals are very repetitive, if not just "copy-paste"), whereas positive decisions are much more interesting from a legal perspective.

Duration of the procedure

According to the Italian law, the maximum time limit for concluding the 2nd instance (judicial) asylum procedure is four months from the lodging of the appeal. The average duration of the procedure before the Tribunal of Bologna, during the relevant period, was **slightly less than 9 months**, with a remarkable

7 See footnote 1.

8 During the preparatory phase, it was agreed that one of the aims of this study would be to shed a light on the main trends regarding women applicants.

decrease in the most recent cases (around 5/6 months) but a worrying trend in the stock of pending cases, due to an exponential rise in the number of appeals lodged in 2019.[9]

Quality of the appeals

This research was not focused on analysing the appeals but the decisions. However, we cannot avoid to underline that many claims in our sample of cases were extremely **repetitive**, if not just "copy-paste" (sometimes even without properly inflecting verbs or adjectives according to the sex of the applicant). The personal story of the applicant fade often into the background: only 15 times out of 87 the lawyers submitted "specific" Country of Origin Information (i.e. directly related with the case), whereas in 54 cases the COI mentioned/quoted in the appeal were just of a general nature (e.g. on the situation of human rights in Nigeria). Only 12 times a sort of "primary evidence" (i.e. coming directly from the Country of origin: newspapers, report from hospitals, party cards,...) was attached. This was not always the case, but – unfortunately – within our sample the appeals with a detailed description of the personal story of the applicant and of the consequences that he/she would face in case of return to his/her Country of origin were not the majority.

Credibility assessment

The structure of the 87 decisions examined was always the same. The judge recalls the reasoning on which the 1st instance (administrative) decision was based and the applicant's requests (explained both in the complaint and, personally, during the hearing before the judge). Then, it comes the credibility assessment, based on the applicant's efforts to substantiate the application, on the elements that he/she submitted and the explanation regarding any lack thereof, and on the internal and external coherence.[10] When the assessment leads to a negative conclusion, the judge is **exonerated from the duty to cooperate**

9 In the preface to the research the President of the Tribunal of Bologna describes the workload as "unbearable".

10 In line with art. 4 Directive 2011/95/EU.

with the applicant in establishing the facts, in accordance with an important decision of the Italian Supreme Court.[11]

Therefore, credibility assessment is obviously crucial. Out of 48 negative decisions among the 87 which make up our sample, in just five cases the applicant was deemed credible, but the alleged facts were not considered to reach the threshold for a protection. In all the other negative decisions, the judge based her/his opinion first and foremost on the lack of credibility. "How" the judges reached a conclusion on the credibility/non-credibility of the applicants was outside the scope of this research. However, it is noteworthy that in almost all the 87 decisions the Tribunal also based the credibility assessment **on COI research** and not only on contradictions in the applicant's narrative.

Country of Origin Information (COI)

Relevant COI was mentioned/quoted in all 87 decisions and the trend was increasing (from an average of 3 different sources mentioned/quoted in the first decisions to 4.5 in the decisions taken in 2019). Also the **diversity of sources** taken into considerations by the judges was positively on the rise: Human Rights Watch, EASO and UNHCR were basically 'the' sources of COI in the appeals examined by the Tribunal of Bologna in 2017 and in the first half of 2018, whereas starting from the second half of 2018 we often found further sources mentioned/quoted in the Tribunal's decisions, such as Amnesty International, Freedom House, USDOS, Norwegian Refugee Council, IRBC, ILGA Europe, Save the Children, etc. Furthermore, the information relied upon by the judges was generally relevant, up-to-date and came from sources generally considered as reliable. In just one case out of 87 the judge mentioned a source which is not considered reliable in this field (wikipedia).

11 "*Le dichiarazioni intrinsecamente inattendibili alla stregua degli indicatori di genuinità soggettiva contenuti nell'art. 3, effettivamente non richiedono un approfondimento istruttorio officioso se la mancanza di veridicità non derivi esclusivamente dall'impossibilità di fornire riscontri probatori sulla situazione oggettiva dalla quale scaturisce la situazione di rischio descritta*", Cass. Civ., sez. VI-1, ordinanza 10 aprile 2015, n. 7333.

Negative decisions

As far as applicants from Bangladesh are concerned, one of the most frequently rejected claims concerned people who got into **heavy debts** and are at risk of forced labour if returned to Bangladesh. In these cases within our sample, the judge always deemed the applicant's statements as not coherent, generic, and thus not plausible. Sometimes Bangladeshi applicants tried to leverage on a **serious illness** in order to be granted at least a humanitarian protection and got a negative decision in case the Tribunal was not convinced that repatriation would lead to a crucial lack of adequate health care. Also **natural disasters** were among the most frequently rejected claims for Bangladeshi applicants, when the judge considered that the applicant could go back to his country "*safely and in dignity*".

As regards Nigerians, the overwhelming majority of negative decisions within our sample concerned applicants allegedly persecuted by **confraternities** involved in violent activities. The Tribunal generally deemed the applicant's statements as not plausible. In virtually all 55 appeals lodged by Nigerian applicants, the subsidiary protection ex art. 15 c) Qualification Directive was asked on the basis of an alleged "**general situation of violence/violation of human rights**" in Nigeria (or in the Nigerian State of origin), with no direct links to the applicant. The Tribunal constantly rejected this assumption, with just a few exceptions (see below).

Both Bangladeshi and Nigerian applicants often aimed at obtaining a humanitarian form of protection on the basis of a positive **integration** process (e.g. alleging work contracts), but, as a general rule, integration is not considered by the Tribunal of Bologna as sufficient, *per se.* In our sample we found some exceptions though, as we will describe further on.

Positive decisions: Refugee status

Membership of a particular social group for reason of one's sexual orientation or for being a victim of trafficking is virtually the only one among the five grounds laid down by the 1951 Geneva Convention which lead to the recognition of

refugee status in the analysed sample of cases. As far as **sexual orientation** is concerned, the Tribunal deemed the applicants' statements plausible, coherent, detailed; sometimes, it took positively into consideration both "primary" (online newpapers' articles) and "secondary" (written declarations of a local NGO, active in the promotion of the rights of LGBTI people) evidence. As regards **victims of trafficking**, we found in our sample one case of a Nigerian man who was considered by the Tribunal as trafficked for the purpose of labour exploitation and four cases of Nigerian women trafficked for sexual exploitation. It is interesting to note that the judges considered (even not minor) contradictions in the applicants' narrative as not decisive in reaching a conclusion on their credibility. Rather, the decisions on cases related to alleged victims of trafficking took much more into consideration other aspects, such as the correspondance between the applicants' main features and the indicators contained in UNHCR's guidelines. Once the applicant's credibility was established, the Tribunal constantly concluded for a risk of persecution from private actors (family/community members, criminal networks, etc.) in a context of a general inability of the Nigerian State to offer adequate protection to victims of trafficking.

In our sample of cases we also found one person who was recognised as refugee for his **political opinion** (he was a member of an organisation for the independence of Biafra) and one applicant from Bangladesh who was recognised as a refugee because at risk of persecution for his **religion** (Hindu). In both cases the Tribunal found the applicants' statements plausible and coherent with the relevant COI.

Positive decisions: Subsidiary protection

Subsidiary protection is the less recognised form of protection for citizens of Bangladesh and Nigeria (see the Annex). In the four decisions within our sample which ended with the recognition of the subsidiary protection (all related to Nigerian citizens), i) one applicant was considered at risk of **death penalty** (art. 15 lett. a, QD) from a para-military organisation in the Niger Delta; ii) one applicant was involved in illegal bunkering activities and considered by the judge as being at risk of **torture or inhuman/degrading treatment** (art. 15 lett. b, QD)

by the Nigerian penitentiary system (the judge did not take into consideration the exclusion clauses); iii) two applicants were considered at risk of serious and individual threat by reason of **indiscriminate violence** in situations of international or internal armed conflict (art. 15 lett. c, QD). In one case the judge considered as plausible the statement that the applicant, who was born in the South of Nigeria, had then moved with his family to a Northern State when he was 5, because he was able to provide a valid address and to give some references (a hospital, a church, etc.) that the judge found on Google maps. Once the credibility of the applicant as regards his "Country of origin" was established, the judge considered that in that Nigerian State the level of violence is so high and indiscriminate that any civilian would, solely on account of his presence on the territory of that region, face a real risk of serious harm.[12] In another case, the applicant was considered at risk because of the violent clashes between his ethnic group (mainly composed of farmers) and a rival group (herders) and the inability of the Nigerian government to prevent or stop the conflict. In this case, the Tribunal did not recognise the refugee status because the applicant did not allege any past persecutions. The judge did not consider the risk of *future* persecutions, which in our opinion could have lead to a different conclusion.

Positive decisions: Humanitarian protection

Humanitarian protection was provided for by art. 5.6 of the Italian Code on Immigration,[13] which was modified by the Italian legislator in 2018.[14] Art. 5.6 used to provide for a two-year permit of stay to be granted in case of serious reasons, in particular of humanitarian nature, arising from constitutional or international obligations. Humanitarian residence permits gave access to the right to work, access to health care, etc., and could also be converted into residence permits for "working reasons" if some requirements were met. After the recent change in legislation, the humanitarian permit as such **does not exist anymore** in the Italian law and the competent authorities in charge of examining the asylum requests can only grant a (much narrower in scope and content)

12 At the time of the decision, Italy did not apply the Internal Protection Alternative concept (art. 8 Qualification Directive) which was transposed into national legislation only at the end of 2018.
13 Decreto legislativo 286, 25 July 1998.
14 Decreto legge 113, 4 October 2018.

"special protection".

According to a pivotal judgement (February 2019) by the **Italian Supreme Court,**[15] however, asylum claims lodged before the entry into force of DL 113/2018 (05/10/2018) must be examined according to the previous legislation. This means that judges have to consider whether or not the applicant meets the qualification for being granted a humanitarian protection. This approach was not taken for granted before the decision of the Supreme Court and lower Tribunals took different paths. The Tribunal of Bologna was among those which decided to apply the law in force at the time of the lodging of the asylum request. This is the reason why we found within our sample four cases of humanitarian protection granted after the entry into force of DL 113/2018 and before the first judgement of the Supreme Court (19 February 2019).

Another important judgement by the **Supreme Court** was released in February 2018.[16] In substance, the judges stated that the humanitarian protection cannot be granted **only on the basis of a virtuous integration process**. It always requires a certain, specific (i.e. directly linked with the applicant), degree of vulnerability.

As regards the humanitarian protection in our sample, whereas in the decisions released before the Supreme Court's judgement n° 4455/2018 we found two cases of applicants who were granted protection only on the basis of their stable presence in Italy and of their positive process of integration, starting from February 2018 we found two different kinds of decisions: i) humanitarian protection granted only because of the **specific vulnerability** of the applicant, without even considering their degree of integration: Four new-parents with their infant, one pregnant women,[17] one applicant with a serious heart disease who was in need of specific treatments which could not be granted in Bangladesh; ii) humanitarian protection granted following **a balance of interests** between the specific vulnerability, on the one hand, and the integration process, on the other. In these cases, the Tribunal considered that the specific vulnerability of the applicants did not reach the sufficient threshold alone and had therefore to be

15 Cassazione, I Sezione Civile, 4890/2019, confirmed by Cassazione, Sezioni Unite, 29460/2019.
16 Cassazione, I Sezione Civile, 4455/2018.
17 These categories of people cannot be expelled according to the Italian law.

balanced with the integration process. The most recurring case (7) in our sample concerned people who left their country of origin when they were very young, coming from contexts of extreme marginalisation, with a complete lack of positive interpersonal relations. These applicants, who managed to undertake a virtuous process of integration in Italy (demonstrated primarily through work contracts and language skills), were granted humanitarian protection by the Tribunal.

Annex – Statistical tables

Tab. 1 - Appeals in the field of international protection lodged to the Tribunal of Bologna between the 17/08/2017 and the 31/12/2018 – outcomes at the date of 31/07/2019.

	Total	**%**
Positive decisions (RS, SP, HP)[18]	361	20,9%
Negative decisions	1369	79,1%
Total	1730	100,0%

Source: Asilo in Europa, based on Tribunal of Bologna's database.

Tab. 2 – Appeals in the field of international protection lodged to the Tribunal of Bologna by **Nigerian** citizens (males and females) between the 17/08/2017 and the 31/12/2018– outcomes at the date of 31/07/2019 by type of protection and sex.

	Total	**% on TOTAL**	**% on TOTAL M / F**
Humanitarian Protection	36	11,5%	/
M	18	5,7%	6,9%
F	18	5,7%	33,3%
Subsidiary Protection	5	1,6%	/
M	5	1,6%	1,9%
F	0	0,0%	0,0%
Refugee Status	20	6,4%	/
M	7	2,2%	2,7%
F	13	4,2%	24,1%
Total positive decisions	61	19,5%	0,0%
M	30	9,6%	11,6%
F	31	9,9%	57,4%

18 RS = Refugee Status, SP = Subsidiary Protection, HP = Humanitarian Protection

Total negative decisions	252	80,5%	0,0%
M	229	73,2%	88,4%
F	23	7,3%	42,6%
TOTAL	313	100,0%	/
TOTAL M	259	82,7%	/
TOTAL F	54	17,3%	/

Source: Asilo in Europa, based on Tribunal of Bologna's database.

Tab. 3 – Appeals in the field of international protection lodged to the Tribunal of Bologna by **Bangladeshi** citizens (only males) between the 17/08/2017 and the 31/12/2018 – outcomes at the date of 31/07/2019 by type of protection.

	Total	**% on TOTAL**
Humanitarian Protection	25	11,0%
Subsidiary Protection	0	0,0%
Refugee Status	3	1,3%
Total positive decisions	28	12,3%
Total negative decisions	200	87,7%
TOTAL	228	100,0%

Source: Asilo in Europa, based on Tribunal of Bologna's database.