

Criminal process and asylum seekers: case studies

My field of expertise is criminal law, in particular, migration law. In recent years I have been involved in several trials that regard the sea rescue of migrants and, more recently, some court cases involving NGOs involved in search and rescue activities in the Mediterranean.

The illegal alien is the latest "enemy" to come under the focus of the punitive system, given that this widespread use of criminal sanctions is a phenomenon of the new millennium.

In this short period of time, however, "the illegal immigrant," in the language often used by the media, has become the main target, the "public enemy number one", to be held up in the court of public opinion as the decisive factor in that "feeling of insecurity" that has dominated public debate in recent years under the governments of both the right and the left in Italy and the rest of the world.

Repression comes in several forms, influenced by the decisions of the Supreme Courts, both national and European, which have left an important mark in defining the features of the system.

A constant feature of the system of fighting illegal immigration has been to place a series of other coercive instruments of an administrative nature alongside the criminal sanction against irregular migrants. A key feature of this is the detention of migrants awaiting repatriation, which in reality has never worked, as the number of repatriations is very low despite the agreements made by our country, even with semi-dictatorial states, most recently the agreement made by the E.U. with the President of Tunisia, Kaïs Saïed, at the instigation of our president Meloni.

In our system, based on individual assessment (Legislative Decree 251/2007 Art. 12), refugee status is not granted when there are reasonable grounds to believe that the foreigner constitutes a danger to the security of the state and when he or she has been convicted by a final judgment for a series of serious crimes (devastation, looting, civil war, mafia-type

association, in Italy or abroad, massacre, murder or attempted murder, robbery, extortion).

In 2018 (d.l.113/2018 art.7, conv. in l. 132/2018), in one of the many security packages that have always raised the penalties for crimes involving foreigners, the crimes that in the event of a final conviction result in the denial and revocation of international protection were expanded to include the hypotheses of criminal acts deemed to be of particular social alarm, such as resistance to a public official, serious bodily harm, serious or very serious bodily harm to a public official on public order duty, female genital mutilation, aggravated theft by carrying a weapon or narcotics and burglaries.

An application for international protection may be suspended when the applicant is undergoing criminal proceedings for one of the offenses that in the event of a final conviction would result in the denial of asylum.

In judicial practice, among the most common crimes in our appellate court district involving foreigners is the crime of aiding and abetting illegal immigration.

We need to differentiate between cases in which those being investigated are the rescuers of the shipwrecked, such as fishermen, often from Tunisia, who are put on trial for having provided assistance, or the recent cases involving NGOs, such as Carola Rackete's Seawatch case, in which I was personally involved, and those actual cases of illegal disembarkation of migrants that occur in Lampedusa, where as a rule the boat crew (the so-called "scafisti", or people smugglers) are placed under investigation.

The relevant fact is that a jurisprudential trend has been established that values grounds of justification, particularly those provided by the performance of a duty and the state of necessity.

In judicial practice, for each irregular landing, a criminal investigation is opened for the crime referred to in Article 12 of the Consolidated Immigration Act, recorded under the title "Provisions against illegal immigration", which punishes in its non-aggravated form: "...anyone who, in violation of the provisions of the Consolidated Immigration Act, promotes,

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directs, organizes, finances or carries out the transportation of foreigners into the territory of the State or performs other acts aimed at illegally procuring their entry into the territory of the State."

Many defendants who were potential asylum seekers have also been put on trial, and from the evidence gathered and presented at these trials, it has been shown that the drivers of the boats came from Libyan detention camps where they were forced to remain in a state similar to imprisonment, characterized specifically by a lack of food, restrictions on freedom of movement and movement outside the facility in which they were located, and the constant threats and assaults to which the defendants themselves were subjected by the Libyan organization.

The most common charge made against defendants accused of the crime of aiding and abetting illegal immigration is that of driving the boat or holding the compass. I have even followed the case of a Syrian national who was remanded in custody in prison for one year only for having passed a Thuraya, a satellite phone, to the driver of a boat overloaded with people, only to be found not guilty and acquitted of all charges.

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Many defendants in the course of the trials have stated that they had been forced, under threat from the Libyans, to drive the boat, and these statements were corroborated by the shipwrecked migrants or passengers who in fact reconstructed the details of the voyage, exonerating the drivers.

The witnesses examined in numerous trials recognized the defendants as those who had in some way taken on a role during the navigation and described in detail the regime of imprisonment or privations of liberty in force in the camps where they were held until embarkation. They spoke of how migrants housed in the camps were recruited and assigned the task of piloting the vessel, of the coerciveness and dramatic conditions of the embarkation. In addition, the various witnesses reported that the boats on which the migrants were crammed were "escorted" into the open sea by other Libyan vessels and spoke of the threats made so that they would not turn around. In some cases, Libyans personally delivered the boats to the open sea

before transferring the passengers to other support boats. In a number of cases, it emerged that none of the defendants had been noticed having a confidential relationship with the armed Libyans or had received favorable treatment from them, and that none of the defendants had in any case assumed violent or threatening attitudes toward their "fellow travelers." Instead, they all shared the danger of the unsafe crossing undertaken.

Other migrants also reported being eyewitnesses to violence or threats against those who had been recruited summarily at the last moment to pilot the vessel or to give assistance to the helmsman (Fofana Ebrina and others, Palermo court ruling no.5602/18; Makuerial + 1, court of Agrigento, second chamber, ruling no.1867/2022).

In many trials in recent years, it has been clearly established that the defendants in this serious crime contributed, from an "objective" point of view, to the transportation of illegal aliens into the territory of the state. Indeed, it is not disputed that they placed themselves at the helm of these boats or helped during navigation to maintain the preestablished route.

However, thanks in part to the intervention and excellent work of many good colleagues, it has been excluded beyond doubt that the defendants were part of the organization that ran the migrant smuggling operation and indeed in several cases it has emerged that "the crew" was identified and selected by the organizers of the crossing only at the time of departure or only a few days before.

In the political chaos that characterizes Libya today, human trafficking is one business among many. Reports from humanitarian organizations, nongovernmental organizations and institutional bodies at various levels have highlighted the dramatic phenomenon of human rights violations perpetrated by various armed gangs operating on the Libyan coast.

It is also certain that the management of departures from Libyan shores to Europe is taking place in an oppressive atmosphere of threats and violence.

It must therefore be supposed that both the departure and the selection of the improvised crews from among the migrants took place in many cases in a heavy climate of generalized terror in

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which specific threats and acts of violence were made to force the defendants to take on some role during the crossing.

It was precisely this use of "improvised crews" that constituted a novelty in the phenomenon of migrant trafficking, a reversal of the "modus operandi" of the Libyan organizations.

As a result of all these elements that I have summarized, the charges were held to be absent of liability because of the state of necessity in which the defendants acted, given the awareness of the danger of serious personal injury, and the proportionality of the conduct with respect to all the elements characterizing the fact.

The jurisprudence on the matter has therefore held that none of the migrants, and therefore not even the defendants recruited among them, although they wanted to leave Libya and had paid for it, could have known or even foreseen that the crossing would be carried out by one of them and not by the so-called "scafisti" or "people smugglers", or at any rate by people with some navigational skills.

It is clear, therefore, that once the sea route has been taken, under extreme sailing conditions - at night, sailing by sight and with precarious instruments, aboard dilapidated dinghies overloaded with people, thousands of miles from the coast - the crossing continues in a state of permanent danger, aggravated by the fact that it has been entrusted to individuals who are completely clueless and lack any navigational skill.

In these cases, the various competent courts have acquitted the defendants, recognizing the exculpatory nature of the state of necessity and holding that the criminal responsibility for transporting and procuring illegal entry into the territory of the state of non-EU citizens rescued in international waters falls entirely on unidentified individuals who are part of the trafficking organizations present on the Libyan coast.

Now I would like to address some cases of potential asylum seekers who were convicted of the crime of aiding and abetting illegal immigration and were subsequently granted international protection.

The first case involves a Gambian boy (G.P.) arrested in Ragusa in 2016 soon after landing and released from prison after he was allowed to plea bargain a sentence of two years' imprisonment, with the benefit of a conditional suspension of the penalty.

It is one of those cases in which the various court-appointed lawyers proceeded with plea bargains that, in many cases, also involved innocent defendants who were forced to drive the boat.

In this specific case, this person had fled Gambia because he was a homosexual, and therefore, was entitled to international protection but unable to obtain it due to a criminal conviction.

After much complex litigation, the Court of Appeals in Caltanissetta (G.P./Min. Interior, Judgment No. 415/2018 RG, Court of Appeals of Caltanissetta, Civ. Sec., dated 01.04.2020) granted humanitarian protection.

Specifically, the Court held that after having verified the applicant's personal condition, there existed the prerequisites for granting humanitarian protection, taking into account that, as stated by the Supreme Court, "on the subject of granting a residence permit for humanitarian reasons, the applicant's condition of 'vulnerability' must be verified on a case-by-case basis, subsequent to an individual assessment of his private life in Italy compared with the personal situation experienced prior to departure and to which he would be exposed in the event of repatriation" (Supreme Court Sec. 1, Judgment No. 13079 of 15/05/2019).

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In this case, the Court of Appeal in Caltanissetta found that the assessment of the subjective and objective situation of the applicant verified that his plausible reasons for emigrating were determined by specific conditions of prejudice. Moreover, in the face of this intrinsic vulnerability, it appears that the applicant had nonetheless made a considerable effort to integrate in the country of destination and in particular in the territory where he resided.

From the documentation produced during the trial (the role of the defense lawyers is crucial here), it emerged that the protection seeker had profitably completed a literacy course and was well integrated in the world of work.

With regard to the criminal conviction that the applicant had received, the Court held that the criminal case involving the protection seeker, which had ended with a sentence of two years' imprisonment, conditionally suspended, could not be considered an obstacle to the granting of humanitarian protection.

The right to a residence permit for humanitarian reasons presupposes the existence of atypical situations that regard the vulnerability of the foreigner. In accordance with international or constitutional obligations, a permit should be awarded if, as a result of repatriation, there is the risk of the applicant being placed in a social, political and environmental context likely to constitute a significant and effective impairment to his or her fundamental rights. It follows that even when the applicant has committed a serious crime outside the national territory (Art. 10, par. 2(b) and 16, par. 1(b), Legislative Decree No. 251 of 2007), if there is the risk that, in the event of their return to their country of origin, the seeker will be subjected to torture or inhuman or degrading treatment, according to the principles affirmed by Article 3 of the ECHR, this must be taken into account by the international protection judge.

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Therefore, the Court of Appeals in Caltanissetta concluded that there existed serious humanitarian grounds for granting a residence permit for humanitarian reasons, in the manner and in accordance with current legislation.

A few months ago, some excellent colleagues applied for and obtained the extinction of the crime, and now the Ghanaian gentleman will be able to reapply for the recognition of international protection because the impediment no longer exists.

The second case concerns a Senegalese boy (B.A.) who was also charged under the provisions against illegal immigration. He was acquitted in first instance because of insufficient evidence by the court in Ragusa, and was granted subsidiary protection by the court in Catania.

Thus, in this case, there was not a conviction but a complicated and lengthy trial that actually prevented the potential applicant from making the application for protection.

In this case, subsidiary protection was granted because of the applicant's area of origin, namely Marsassoum, in the Casamance region of Senegal.

The Casamance region has been characterized by internal armed conflict which, although considered of low intensity, has been going on for many, many years.

There remains in this region an extremely precarious socio-political situation, one that is still characterized by armed clashes that do not permit to exclude the possibility of a real risk of "serious harm" from violence in case of forced repatriation.

For the sake of completeness, when it awarded international protection, the Court of Catania noted that there was no cause for refusal since the applicant had no criminal record.

I would like to conclude this speech by making my own the words of a great Sicilian lawyer who I had the honor of knowing: "In my opinion, defend is a magical, exciting word that evokes generosity, solidarity and strength of spirit: noble characteristics of man, not uncommon but certainly eternal" (Ettore Randazzo, *Difendere*, Giuffrè Editore, 2017)

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With regard to this sensitive matter, it is crucial to train lawyers, to better check on and select court-appointed lawyers, to effectively inform defendants about the choice of form of trial, to improve linguistic mediation not only during the trial but also during defense investigations carried out by the lawyer and in the pre-trial phase in prison, by giving fair compensation to interpreters and perhaps creating a special fund that can be accessed by suspects who are not well-off.

Finally, it is necessary to review current migration policies that continue to be profoundly unsuitable.

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