



**Airport transit zones as places
of arbitrary deprivation
of freedom and
suspension of rights**

Italian legal framework and judicial strategies

The research and drafting of this report were carried out by the **Association for Juridical Studies on Immigration (ASGI)** as a part of the **In Limine** project, with the collaboration of the **Human Rights and Migration Law Clinic (a.a. 2018/2019)** and the **Strategic Litigation: International Human Rights Legal Clinic, Department of Law, University of Turin**.

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Closing date: **January 2021**

The In Limine project was implemented with the support of the "Open Society Foundation"

In collaboration with



ABSTRACT

Monitoring and testing juridical tools to contrast illegitimate praxis

Over the last two years, the Association for Juridical Studies on Immigration (ASGI) in the framework of In Limine project's activities has monitored and provided legal assistance in the Rome Fiumicino and Milan Malpensa's airport transit zones.

With the involvement of a strong network of lawyers and legal advisors - both from ASGI and other organizations - In Limine project came into contact with numerous foreign citizens detained in the airport transit zones while waiting to be rejected. Thanks to the contribution of jurists, lawyers and legal practitioners, it was possible to analyse the functioning of these places and to experiment legal actions to contrast the violations. The collaboration with the Legal Clinics of the University of Turin Law Department of the University of Turin made it possible to compare the practices observed with European legislation and case law.

This report offers a critical overview of the main violations observed and a review of the litigation strategies carried out in order to protect and support foreign citizens rights.

In or out: where are the transit zones?

Airport transit zones are the areas between the landing point of the aircraft coming from abroad and the customs controls. From a legal perspective, however, there is no specific definition. The purpose of establishing such areas is to allow the transit of persons and goods through the national territory without the need for entry formalities. It is generally recognised that it is possible to cross the transit area in order to board another flight, even if one does not have a visa for entry into the country through which one is transiting. By means of a legal fiction, States consider the transit area to be not yet State territory and therefore an extraterritorial zone.

These areas play a key role in the management of migration. Border authorities perform a "fiction of non-entry" to simplify the procedures of expulsion of foreign citizens and to implement mechanisms of informal selection of incoming migrants.

The lack of a clear legal definition of transit zones has led to a basic ambiguity on which illegitimate practices of refusal of entry and detention have been built. The border authorities, considering these areas as extraterritorial, act as if they were free zones exempt from the application of constitutional, national and international standards for the protection of fundamental rights. This interpretation is untenable under the rule of law, since the jurisdiction exercised by the State over such places is not in question.

In spite of the absence of specific regulations, there are in fact several rules in the Italian and European legal systems that establish how these places should operate and what the rights of foreign citizens who find themselves crossing them should be. Foreign nationals who find

themselves in transit zones are entitled to all fundamental rights, including the right to seek asylum, the right to defence, the right to personal freedom and security, the right not to be subjected to inhuman or degrading treatment and the right to private and family life. Moreover, national and EU legislation on entry into the territory of the State and the Union, with the corresponding guarantees, must undoubtedly be applied in these places.

Illegal refoulements

Foreign nationals who present themselves at airport border crossings from a third country are normally subject to entry checks. As a result of these checks, they may be subject to immediate refusal of entry in a wide range of situations.

In some circumstances, serious violations of entry rights occur during these checks. During the monitoring, it has been observed how the authorities systematically implement wrongful practices in violation of foreign nationals' rights, with the aim of preventing them from entering the country. The violations identified can be summarised as follows:

- Violations of the right to non-refoulement: border authorities set up obstacles to effective access to applications for international protection or other residence permits leading to arbitrary exclusion from the right to asylum, lack of effective individualised assessment of the risk of refoulement or sending the alien to a state where he/she may face persecution or serious harm;
- Demand of additional entry requirements for tourism from visa-free citizens. The authorities, following some sort of 'economic profiling' to assess the 'immigration risk', insist on additional justifications or entry requirements to those demanded by law. In this way, to assess who is allowed to enter into the country for tourism, foreign nationals undertake an informal selection;
- The immediate pushback of persons residing in Italy returning from abroad who have been notified in the transit area of measures refusing to renew or revoking their residence permit. In these circumstances, immediate pushback is improperly used as a substitute for the expulsion procedure that should be legitimately implemented following the lawful entry of such persons into the territory.

Such systematic use of detrimental practices is possible as airport transit zones are under the exclusive control of border authorities. Organisations, which are supposed to ensure that the rights of foreign nationals are respected, are not in a position to carry out their mission properly: they are not allowed to enter the security areas where foreign nationals are detained, furthermore foreign nationals have no way of contacting them independently. In fact, border police itself acts as a filter for foreign nationals' access to protection organisations.

Such abuses can have serious consequences on the lives of foreign citizens - especially for those who are unable to seek protection and are sent back to countries where their lives are in danger, or those who are long-term residents in Italy and are turned back at the border, losing their jobs, their homes and their relationships, without the possibility of having their cases reviewed by the judicial authorities.

Arbitrary detention

People who are denied entry at airports are forced to wait for repatriation to their country of origin in transit zones. In some cases this wait can last several days. Foreign citizens are brought back by the same company they traveled with to reach Italy.

During this period, people are arbitrarily detained in grossly inadequate conditions and in the absence of the basic guarantees accorded to persons deprived of their liberty.

Detention takes place in premises that are structurally unsuitable for the purpose, isolated from the outside world, without access to fresh air, with little opportunity to consult a lawyer, without any detention order being issued and therefore without any validation by a judge.

De facto detention is used intensively by the authorities in the management of migratory flows in transit at airports. Such deprivation of personal liberty is enforced in the absence of a legal basis, a maximum period of detention and a judicial review of the legitimacy of the detention, under inadequate conditions and in clear violation of the constitutional requirement.

Exceptional places of confinement

Persons detained in airport transit zones have extremely limited possibilities of getting in touch with organisations, protection bodies, family members and lawyers - as their access to such areas is strictly limited. The obstacles put in place by border authorities to reduce outsiders' access to transit areas result in a series of violations, among which the right to information, the right to defence (it is often impossible for detainees to physically contact a lawyer), effective access to judicial protection. Moreover, the lack of access of civil society to these areas makes them almost invisible to public opinion.

Furthermore - while it is difficult for the outside world to enter the transit zones, the authorities do not take any measures to ensure that detained persons can communicate outwardly. On the contrary, in numerous occasions foreign nationals are informally deprived of their mobile phones and, on several occasions, appointed lawyers have been denied entry on the basis that these areas are considered as 'sterile', meaning that only certain categories of persons may have access.

Transit areas thus often appear to be governed by the exclusive authority of the border police. This impression is reinforced by the fact that border authorities continue to implement and consider legitimate practices that are deemed to be detrimental to the rights of foreign nationals by the courts and monitoring bodies such as the National Guarantor of the Rights of Persons Deprived of their Personal Liberty.

Violation enforcement tools and possible judicial remedies

Over the years, ASGI has experimented with different tools aimed at combating the violations observed in transit zones.

First of all, it has tried to overcome the limits imposed by the authorities to the enjoyment of the rights of foreign citizens illegally detained. To this end, actions aimed at facilitating access to the right of defence and the emergence of protection needs or the right to entry through reports submitted to the competent authorities and guarantee bodies have been tested. In addition, litigation strategies have been developed to meet interim needs for the suspension of refoulement proceedings.

Secondly, a number of actions for damages have been presented to compensate for the harmful consequences of such unlawful acts.

These strategies represent operational proposals aimed at overcoming practical obstacles related to the supposed nature of transit areas as "sterile" zones, where access to the lawyer is not guaranteed and freedom of communication with the outside world is generally precluded.

Conclusions and recommendations

The analysis carried out has highlighted the existence of systematic breaches of foreign citizens rights in transit areas. The overall management of these areas appears to be aimed at restricting the possibilities for foreign nationals to legally enter the territory and at simplifying the procedures for the removal of those deemed 'undesirable'. Strong concerns arise with regard to both the rights of asylum seekers and the fundamental guarantees valid for all foreign citizens.

At this point, it seems essential to both raise public awareness on the violations suffered by foreign nationals in airport transit zones, and keep developing legal actions in order to challenge the legalities of such procedures. This type of action also appears urgent in the light of the latest developments in the European context. The New Pact on Migration and Asylum, presented by the Commission in September 2020, promotes the creation of a border management mechanism that takes over, formalises and extends detention and selection practices tried out by the authorities in transit zones. In order to counteract the serious violations that seem to be looming in the near future, it is necessary to develop appropriate rights protection activities, new forms of border intervention, new tools aimed at monitoring and challenging illegitimate border management practices - especially the ones that result in a further limitation of the access to the right to asylum for foreign nationals.

In view of the above, there is an urgent need to put an end to such violations. Civil society and the judicial authorities must play a primary role in the protection of human rights and act to ensure that the authorities involved in the management of transit zones comply with the existing guarantees in force - established on several occasions by the guarantee bodies, the European Court of Human Rights and domestic courts - regarding the respect of the rights of foreign nationals in such areas.

The competent authorities are specifically recommended to:

- Immediately cease unlawful refoulement practices, ensuring effective access to information and application for international protection to all those who express their will;
- Ensure compliance with the non-refoulement obligation;

- Put an end to the notification in transit areas of refusals to renew or revocations of residence permits and, consequently, to the execution of push backs in the absence of valid entry documentation, which has already been ruled unlawful by domestic courts;
- Ensure the respect of the right to personal freedom by ceasing arbitrary detention practices in transit zones, ensuring that, where it is not possible to immediately execute the refoulement, the guarantees provided by the current legislation for deferred refoulement are applied, with reference to the judicial verification of the measure adopted in the light of its coercive nature and ensuring the effective entry in the Italian territory and access to judicial protection;
- Ensure access to airport transit zones to civil society organizations in order to ensure effective and independent verification of implemented practices and policies;
- Ensure that the reception services at border crossings can play an effective and independent role in protecting and guaranteeing the rights of foreign citizens reaching Italian territory with regard to both access to international protection and to the right of defence of citizens subject to refoulement. To this end, we ask that the procedures for the actions carried out by protection organisations must be made clear, uniform and effective.