

## CASE LAW COVER PAGE TEMPLATE

<b>Name of the court</b> <sup>1</sup> (English name in brackets if the court's language is not English): <b>Corte Suprema di Cassazione – Sezioni Unite Civili (Italian Supreme Court)</b>			
<b>Date of the decision:</b>	(2008/10/21 – 2008/11/17)	<b>Case number:</b> <sup>2</sup>	Sentenza 27310/2008
<b>Parties to the case:</b> A. M. H., Ministry of Interior			
<b>Decision available on the internet?</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
If yes, please provide the link: <a href="http://www.asgi.it/public/parser_download/save/cassazione.su.27310.2008.pdf">http://www.asgi.it/public/parser_download/save/cassazione.su.27310.2008.pdf</a>			
(If no, please attach the decision as a Word or PDF file):			
<b>Language(s) in which the decision is written:</b> Italian			
<b>Official court translation available in any other languages?</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
(If so, which):			
<b>Countr(y)(ies) of origin of the applicant(s):</b> Iraq			
<b>Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s):</b> Italy			
<b>Any third country of relevance to the case:</b> <sup>3</sup>			
<b>Is the country of asylum or habitual residence party to:</b>			
The 1951 Convention relating to the Status of Refugees <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Relevant articles of the Convention on which the decision is based:	
<b>(Only for cases with statelessness aspects)</b> The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes <input type="checkbox"/> No		Relevant articles of the Convention on which the decision is based:	
<b>(Only for cases with statelessness aspects)</b> The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes <input type="checkbox"/> No		Relevant articles of the Convention on which the decision is based:	
<b>(For AU member states):</b> The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes <input type="checkbox"/> No		Relevant articles of the Convention on which the decision is based:	
<b>For EU member states:</b> please indicate which EU instruments are referred to in the decision		Relevant articles of the EU instruments referred to in the decision: article 4 of the Directive 2004/83/CE; article 8 of the Directive 2005/85/CE; article 3 of the ECHR	

**Topics / Key terms: (see attached 'Topics' annex):**

**Key facts (as reflected in the decision):** [No more than 200 words]

IC is an Iraqi citizen who claimed to have been subject to acts of persecution because of his Kurdish ethnicity and his religion, as he is a Shiite muslim, and also because he joined a group of opponents to the Saddam Hussein's regime.

In 2001, the Central Commission (administrative level) denied the refugee status, because the applicant did not gave evidence on risks for his personal safety, but only on general danger caused by armed conflicts in some areas of Iraq. In 2003, the Tribunal of Florence reviewed the decision of the Central Commission and recognized the applicant's refugee status. In 2005, the Court of Appeal of Florence reviewed the Tribunal decision and denied the refugee status. Reasons supporting the decision were the lack of evidence on the applicant's asserted belonging to the Kurdish minority and the fact that the situation of general persecution against Kurds and Shiites by Iraqi authorities did not demonstrate that the applicant was, or risked to be, individually persecuted.

Against the Court of Appeal's decision IC applied to the Italian Supreme Court (Corte Suprema di Cassazione), which decides on the correct interpretation of law and through its decisions assures the uniformity of the application of the law in Italy.

**Key considerations of the court (translate key considerations (containing relevant legal reasoning) of the decision; include numbers of relevant paragraphs; do not summarize key considerations) [max. 1 page]**

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**Decision and reasoning** - In this case the Italian Supreme Court established that in the RSD subject the rules on the burden of proof are procedural ones. Therefore, given the procedural nature of this kind of law, the *tempus regit actum* principle is relevant. Contrary to rules that regulate rights, rules that regulate proceedings are subject to change during the trial, if a new law comes into force.

As established by previous case law and according to general criteria established by article 2697 of the Italian civil code on the burden of proof, the evidence must be given, “as far as possible”, by the applicant. This “softened” burden of proof means that the applicant must give evidence, at least through presumptions (evidence on something proved that permits to deduce something not proved), about the actual danger he/she would face after repatriation, taking into account the effectiveness and reality of the risk.

Directive 2004/83/EC establishes that “*Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application*”. “*Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met: (a) the applicant has made a genuine effort to substantiate his application; (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (e) the general credibility of the applicant has been established*”. As a result, both the Territorial Commission (administrative level) and the judge must cooperate in verifying the conditions for recognizing international protection, gathering country of origin information about its legal order and political situation. The applicant's good faith and diligence are supplementary to the evidence. The Supreme Court stated that this constitutes a clear reversal of common Italian rules and principles on the burden of proof.

The “*decreto legislativo 251/2007*” establishes that the applicant must present all necessary elements and documents, but the Commission and the judge have an active and supplementary role in examining the application. That is to say, the examining authority must gather all information and documentation in order to ascertain the conditions for international protection recognition.

In addition, the “*decreto legislativo 25/2008*”, implementing Directive 2005/85/EC, establishes that every application is verified in the light of up-to-date information provided by the National Commission for the Right of Asylum.

**Outcome** - In this case, the “*Sezioni Unite*” of the Italian Supreme Court decided that the law on the burden of proof in international protection applications had to be interpreted in the light of the relevant European Directive. As a consequence, the previous decision by the Court of Appeal was reviewed, because it observed Italian general principles on the burden of proof, instead of following European law, which introduced a true reversal of the burden of proof. Indeed, European law required to the judge a duty to cooperate in determining important facts in order to recognize refugee status.

In conclusion, the Italian Supreme Court invalidated the decision and sent back the decision to the Court of Appeal of Florence, in order to review it.

**Other comments or references (for example, links to other cases, does this decision replace a previous decision?)**

The decision replaces previous decision by the Court of Appeal of Florence of 11 February 2005.

The present decision refers to other relevant case law: Corte Suprema di Cassazione 18353/2006, 26822/2007, 28775/2005, 26278/2005, 2091/2005; Corte Suprema di Cassazione - Sezioni Unite 4674/1997, 8423/2004, 25028/2005, 9867/2007, 2434/2008.

Court of Justice of the European Union: 13 November 1990, C-106/89, Marleasing sa; 25 February 1999, C-131/97, Carbonari; 5 October 2004, n. from C- 397/01 to C- 403/01, Pfeiffer; 7 September 2006, n. from C-187/05 to C- 190/05, Areios Pagos

## **EXPLANATORY NOTE**

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.
2. Where applicable, please follow the court's official case reference system.
3. For example in situations where the country of return would be different from the applicant's country of origin.

For any questions relating to this form, please contact the RefWorld team at the address below.

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