

MAIN RELEVANT ISSUES WITH REGARD TO THE ITALIAN LEGISLATION IN DEFENSE OF VICTIMS OF TRAFFICKING

The current context

The phenomenon of trafficking in human beings keeps on expanding in Italy, with different types of exploitation.

In fact other forms of exploitation have been established, in addition to sexual exploitation, that in the last years has been object of continuous changes regarding the routes, the organisation of the criminal networks and the methods of coercion of the victims.

Today the phenomena of serious labour exploitation, especially in some productive areas, of the exploitation connected to illegal activities or through the begging are much more evident.

Furthermore, trafficking with the purpose of illegal international adoptions and forced marriages are phenomena not clear yet but definitely undeniable.

Since 15 years the Italian legal order has adopted a very important legal instrument to defend victims of trafficking: article 18 of Consolidated Law on Immigration, in accordance with Legislative Decree 286/98.

Article 18 allows the issue of a special residency permit to the foreigner exposed to violence or serious exploitation, when his/her safety is in danger as a result of the attempt to avoid the conditioning of a criminal organisation or as a result of the pleadings given during criminal proceedings.

The residency permit for social protection (currently called residency permit for humanitarian reasons) can be issued both in consequence of the victim's report (judicial programme, on the proposal or after approval of the Public Prosecutor) and without it (social programme). The provision of a social programme represents the most important and peculiar feature of the law, because it gives the exploited person the freedom to avoid the risk of retaliation after the report.

This residency permit has an initial legal soundness of 6 months but it can be renewed after expiring because of work or study related reasons, giving the foreigner the full and ultimate chance to be integrated in the social context.

The prevision of the double track, the not rewarding nature of this legal instrument, the guarantee of a complete and ultimate integration of the victim in the social context make article 18 a unique rule of law in the international current law system.

In terms of the regulation in force regarding the topic of trafficking in human beings, with especial reference to the sanctions, the law 228/03 has reformulated article 601 of the criminal law code and it

currently says: “whoever commits trafficking of a person who finds himself/herself in the conditions described in article 600 of the criminal code (reduce to or retention in slavery) or, with the purpose of committing the crimes described in paragraph 1 of the same article, persuades a person with deceive or forces with violence, threat, abuse of authority or by taking advantage of a position of physical or psychic inferiority or a condition of need, or through promising or giving a lump sum or other advantages to somebody who has authority on this person, to enter or stay or leave or to move to the territory of a State, is punished with detention from 8 to 20 years. The punishment imposed is increased from a half to a third if the events of paragraph 1 are committed against minors or with the purpose of exploitation of prostitution of with the aim to take the victim’s organs”.

In terms of a systematic intervention, unfortunately Italy has not implemented yet the Directive 2011/36/EU (the deadline for implementation expired on 6th April 2013) even though article 5 of the European delegation law n. 96, adopted on 6 August 2013, ask the Government to realize a legislative intervention in line with the Directive.

The delegation law focuses, among other things, on the need to establish tools that facilitate the coordination of the interventions to protect victims of trafficking and refugees, to define mechanism for identification and fair protection of unaccompanied minors victims of trafficking and to establish lessons on the issues regarding trafficking in human beings and international protection in the educational trainings for public officers, which could get in contact with victims or potential victims of trafficking.

On the other hand the Directive 2009/52/EU concerning the use of irregular manpower has been implemented. It includes important rules regarding the “specific exploitation” of migrants workers in irregular condition: The Legislative Decree 109 adopted on 16th July 2012 introduced in the Consolidated Law on Immigration some rules about sanctions for employers (article 22 paragraph 12bis of Legislative Decree 286/98) and about the special residency permit that can be issued to workers in presence of some specific conditions (article 22 paragraph 12 quarter of Legislative Decree 286/98).

The most relevant problems

Even though during the years the Ministry of Interior has been offering clarifications concerning the correct interpretation of article 18 of Legislative Decree 268/98, still there are in the praxis many big difficulties in the issuing of the special residency permit:

- a) Central police stations reserve the right to a wide discretionary evaluation of the prerequisites required by the law in order to issue of the residency permit, with a consequential very different praxis in the Italian territory;
- b) There is a persistent trend of authorities to prefer the judicial programme to the social

programme, so much so that often the police stations refuse to receive the residency permit application if the foreigner does not report against their traffickers.

In this context the training of Judiciary Authority and of personnel of Public Security, still not sufficiently widespread, takes a specific importance.

Further problems in the application of the rule can be observed in the procedure of renewal and conversion of the residency permit issued in accordance with article 18 of Consolidated Law on Immigration.

Finally, there is not trend established to apply article 18 to cases of serious exploitation different from sexual exploitation. In the last years anyway the number of applications for residency permit in these areas of exploitation has increased and there are cases of residency permit for social protection issued exclusively as a result of the victim's report, thus through the judicial programme.

Concerning the area of **labour exploitation**, the new legislation introduced by the Legislative Decree 109/12 (that amended article 22 of Consolidated Law on Immigration 286/98) is too new to be pondered objectively, even though the method of construction of the rules make really difficult their implementation. In fact, the expected circumstances for the issue of the special residency permit in favour of workers do not coincide with the circumstances of labour exploitation observed in reality and in this way the purpose of the legislation is frustrated.

For example, the rule subordinate the issue of the residency permit to the existence of "a specific labour exploitation", without giving any parameter to determine the "specificity" of the exploitation and on this way leaving a discretionary evaluation of it to the Public Prosecutor or the police commissioner. Furthermore, the new article 22 does not make explicit if, at the end of the criminal proceeding against the employer charged with exploitation, the residency permit can be renewed. As a result of this state of uncertainty, there is a risk that the foreigner worker is not pressing charges against the employer.

Regarding the **protection of the victims** in the judicial context, we point out the insufficient use of article 601 of criminal code in criminal proceedings, also due to its prolix phrasing, and the very limited number of cases of compensation of the offences to the victims, because there is not an effective compensation scheme, eventually through the creation of a specific public fund.

Finally we point out that in the last years, opposite to the constant work of all the organizations offering protection and assistance to the victims of trafficking and serious exploitation, there is an increasing institutional lack of interest in this subject and a trend against the reinforcement of a system that contribute to prevent the exploitation of irregular immigration. It is necessary instead to reinstate the control and monitoring authorities of the phenomenon and enable public and private bodies, that during the years have been offering programs of protection to the victims, to keep on guaranteeing their services through an adequate structural and financial support.

There is a specific problem regarding the victims of trafficking with the aim of sexual exploitation, who accede or could accede to international protection. Concerning the first category (the ones who accede the system of international protection) we point out on the one hand a huge difficulty in the admission to international protection (sexual exploitation is not considered a criterion of persecution or serious damage despite the fact that victims, in majority women, are subject to re-trafficking), on the other hand we point out an absolute lack of connection between the administrative bodies in charge of this admission (territorial commissions) and local social services (the territorial commission could refer victims of trafficking to local social services and consequently activate the social programme according to article 18 of Consolidated Law on Immigration 286/98).

The priorities

It is necessary to promote the correct implementation of the regulation already in force in order to protect the victims and to fully adopt EU and supranational regulations in the Italian legal order.

Following this perspective it is necessary to:

1. Fully implement the regulation of Directive 2011/36/EU concerning the prevention and prosecution of the crime of trafficking in human beings and the protection of the victims, with a specific focus on (in addition to the prevision of the law of European delegation):

the correct definition of the crime of trafficking, also through the modification of articles 600 and 601 of criminal code according to the provisions of the EU Directive;

the lack of lawsuits on initiative of the victims of criminal activities;

the need to guarantee assistance and support to the victims regardless of their collaboration with the Judicial Authority;

the guarantee of effective tools of compensation to the victims of crimes connected to trafficking in human beings and of other types of serious exploitation.

2. Guarantee to the victims the effective access to the systems of protection provided by the existing regulation (article 18 of Consolidated Law on Immigration approved with Legislative Decree 286/98 and article 13 Law 228/2003) through:
 - α) the correct and fully implementation of the regulation provided by article 18 of Consolidated Law on Immigration 286/98;
 - β) the introduction in article 18 of Legislative Decree 286/98 of a clear regulation providing the issue of the residency permit regardless of the victim's collaboration with the Judicial Authority, according to the Directive 2011/36/EU;
 - γ) the introduction of a regulation regarding the "reflection period" required by the Directive 2004/81/EU and Directive 2011/36/EU to guarantee to potential victims of trafficking the chance to recover and free themselves from the traffickers, without the chance of adoption or execution of any expulsion order during this time;
 - δ) The reinstitute and reorganisation of control and monitoring bodies focused on trafficking in human beings;
 - ε) The provision of consistent financial appropriations for projects of assistance and social integration.

3. Guarantee an effective access to the existing systems of international protection to the victims of trafficking, through:
 - a redefinition of the concept of political asylum, subsidiary protection and humanitarian protection that number the trafficking in human beings with the purpose of sexual exploitation among the risk factors, with a specific reference to the persons exposed to the risk of re-trafficking;
 - the provision of systematic tools of connection between territorial commissions for the recognition of international protection and local social services, to plan an effective protection of the victims of trafficking in human beings with the purpose of sexual exploitation.

4. Reinforce the prevention and the fight against labour exploitation in order to effectively protect victims of trafficking and labour exploitation and remedy the inadequate and incomplete reception by legislative Decree 109/2012 of Directive 2008/52/EU through:

a) amendments of the criminal offences foreseen by the current legislation related to serious labour exploitation (articles 22 paragraph 12 bis of the Consolidated Law on Immigration approved with Legislative Decree 286/98, as amended by Legislative Decree 109/2012; crime of illicit intermediation and labour exploitation foreseen by article 603 bis of the Criminal Code), as they are currently lacking internal coherence and are unable to effectively prevent and repress situations of serious labour exploitation. The amendments should also encompass the possibility to issue a residency permit regardless of the foreign victim's cooperation in the relevant criminal proceedings;

b. complementary interventions, also by means of by-laws, in order to ensure full implementation of all provisions of the above-mentioned Directive, also to ensure information to and protection of exploited labourers, enabling them to report irregular labour relationships, recover payments and unpaid social contributions, and obtain assistance and, if irregular, a residency permit;

c. implementation all over the Country of effective and regular checks on labour relationships with a view to identify in advance and prosecute employers without scruple and exploiters and favour cooperation by exploited foreigner workers, regardless of their status on the territory.

FOREIGN CHILDREN VICTIMS OF TRAFFICKING

The general legislation framework

According to the 2012 UNICEF Report on the condition of foreign children in Italy ("*Facce d'Italia. Condizione e prospettive dei minorenni di origine straniera*" – *Faces of Italy. Conditions and perspectives of children of foreign origin*) "*Children and women ... represent a big portion of the global refugee population and of victims of trafficking. Furthermore, child and teenage migrants, either unaccompanied or travelling with their families, are particularly vulnerable to abuse and exploitation*".

The consolidated Law on Immigration, Legislative Decree 286/98, offers some important tools for the protection of foreign children in general and of unaccompanied children in particular (article 1 of the Decree of the President of the Republic 535/199, defines unaccompanied children as foreign children below the age of 18 who have entered the national territory without parents).

The last official data provided by the Ministry of Labour (where the former Committee for Foreign

Children, foreseen by article 33 of the consolidated Law on Immigration, is currently located) indicate that the on 28 February 2013 the number of unaccompanied children amounted to 7066. Of these, 1455 could not be located (meaning that after having been reported to the Social Services, they could not be found). The vast majority of such children (93%) are male and only 6,1% are female.

According to article 19 paragraph 2 letter a) of the consolidated Law on Immigration, foreign children cannot be expelled with the only exception of the case in which they have to follow their parent(s) who has/have been expelled. This means that they are entitled to a residency permit.

If the protection of foreign youngsters is with no doubt effective when parents are present, the condition of unaccompanied children is clearly more problematic. Their status is regulated by article 32 of the consolidated Law on Immigration (Legislative Decree 286/98).

The main problem related to the treatment of unaccompanied children arises when they reach the age of majority (18 years), when they no longer enjoy the prohibition of expulsion, as the prolongation of their residency permit is subject to a number of conditions.

Article 32 of the consolidated Law on Immigration (Legislative Decree 286/98) has been the object, following its entry into force, of numerous amendments (Laws 189/2002 and 94/2009). In most cases, such amendments have limited the conditions for the prolongation of the residency permit of foreign minors upon reaching the age of 18.

Currently, with the last legislative intervention of 2011 (article 3 paragraph 1 letter g-bis of the Decree 89/2001, converted with amendments by Law 129/2001) article 32 has been modified again. This time, however, in a way so as to favour foreign children. Today, in order to prolong their current residency permit, foreign youngsters turning 18 must demonstrate, alternatively, either to have followed a social integration project for 2 years (and to be in Italy from at least 3) or (lacking such conditions) to be the recipient of a positive opinion from the Committee for foreign children.

The law does not clarify when the opinion has to be issued: thus, there is the risk that the opinion in fact also encompasses the assessment, on the basis of criteria which are not spelled out by the norm, on whether the child is meritorious or not.

Unaccompanied children and trafficked youngsters

Although there are no specific studies available on the size of the phenomenon of unaccompanied minors who are victims of trafficking, certainly the problem exists.

Recently a few criminal investigations have been launched (Rome, Bologna) in relation to illegal trafficking of persons allegedly underage.

The idea is that the victims are in fact adult and that the criminals smuggle them taking advantage of their apparent minor age, using forged documents (passports, birth certificates....).

The management of the investigations and, most of all, the immediate implications for the unaccompanied children have varied from town to town. In Rome, for instance, the foreign children have received expulsion orders, even though the criminal proceedings are still pending and, thus, there is no final evidence as to their age. On the basis of such expulsion orders, victims have been confined in the Temporary Centres for Immigrants.

One of the most problematic issues that have emerged during the investigations is represented by the **determination of the age**. Regardless of the nature of the alleged crime, the age has been determined with a simple wrist X-Ray, an exam that the international scientific community considers inadequate to determine the age of an individual.

In 2009, the Ministry of Labour, together with the Ministry of Interior, requested a Scientific Committee to draft a Protocol for the determination of age of unaccompanied minors. The findings indicated the opportunity to proceed with a multidisciplinary approach encompassing X-Ray exams (that need to be taken into account the Countries of origins of the youngsters), a paediatric examination and psychological consultations, with the presence and the help of specialised professionals. In addition, guardians should always be appointed and consent to the exam given. In case of doubt, presumption of minor age should prevail.

Such Protocol, however, has never been applied and thus, today, the age of foreign children (or alleged children) is still determined with a simple wrist X-Ray.

This practice seriously infringes the rights of unaccompanied children. In addition, it proved inefficient in the fight against trafficking of children.

It is worth recalling, here, the UN Committee on the Rights of the Child's Recommendation to Italy according to which "*Point 67: The Committee recommends to the State Party to introduce a complete legislation, with a view to guarantee assistance and protection to unaccompanied minors, whilst taking into consideration the principles expressed in General Comment no. 6. Specifically, the Committee recommends to the State Party to create a permanent, dedicated national authority entrusted with monitoring the conditions of unaccompanied children in order to identify their needs, to tackle the challenges of the current system and to draft operational guidelines on the subject, including shelter, identification, need assessment and protection strategies. The Committee recommends to the State Party to adopt a unified procedure to determine the age of unaccompanied children. Such procedure should be multidisciplinary and fully in line with the principle of the benefit of the doubt.*"

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An interesting example of correct approach to the phenomenon of trafficking of foreign children and/or adults is the one partly implemented by the Public Prosecutor's Office and the Police in Bologna. In relation to some foreigners involved in criminal proceedings related to trafficking of unaccompanied children coming from Bangladesh, such institutions have made use of the provision enshrined in article 18 of the consolidated Law on Immigration 286/96, even though only in relation to the judicial programme. As a result, in the presence of cooperation of the foreign youngster (declaration of real age and identification of smugglers), the latter was entitled to a residency permit on the basis of article 18.

Such approach bears two advantages: first, youngsters are taken out from the trafficking circle and, secondly, they assist investigators in their fight against trafficking, by revealing the network and the organization.

This is clearly a very interesting approach that rightly takes into account the vulnerability of the trafficked migrant, offering concrete protection. Flaws, however, exist. As already said, such approach was only applied to the judicial programme foreseen by article 18 of the Consolidated law on immigration 286/98: this means that trafficked (or alleged trafficked) young migrants cannot capitalize the social integration programme undertaken under the supervision of the Social Services (that took them into care when they were considered unaccompanied children). In addition, this approach requires cooperation in the investigations, which often exposes the victim and their families to serious threat.

Indeed, trafficking networks are rooted in the Countries of origin and count on individuals who are in close relationship with the family members of the trafficked migrant.

An additional problem that has been recorded in the relation to the treatment of unaccompanied children, which has deep implications on the status of the trafficked migrants, relates to the **appointment of a guardian**.

According to the Italian legislation children do not have full legal capacity. Therefore, they must always have a legal representative, normally the janitor(s). In the absence of parents, however, a guardian must be appointed.

In practice, in Italy, unaccompanied children's appointed guardians are normally representatives of the Municipality (generally the Councillor for Social Policies). This, however, means that the guardian will not actually play its role, which then can be said a purely formal (the Councillor is normally overwhelmed by responsibilities thus guardianship is generally delegated to the Head of the Social Service Sector, who is in turn overwhelmed by duties).

All this impacts negatively on the effectiveness of the guardianship and can eventually entail the practical impossibility to know the situation of the trafficked migrant and, thus, identify the adequate steps to ensure protection and freedom from the trafficking network.

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A special sensitive area is represented by the phenomenon of asylum-seekers unaccompanied children.

Although the law calls for special attention and protection since the beginning of the asylum administrative process, practice reveals the presence of numerous violations.

Children reaching Italy on the shore of the Mediterranean Sea (Sicily) are often kept in structures also hosting adults. In some cases such structures are closed institutions, whereas in others can be open. In both cases, the State violates its obligation to place unaccompanied children in safe places.

Furthermore, often guardians are not appointed and the information provided to the children on their right to seek asylum is often lacking.

Requests:

- a.** Italy must urgently, officially and formally adopt a Protocol for the determination of the age of children on the basis of the findings of the Ascone Protocol of 2009 and also taking advantage of the other findings of the scientific community. The multidisciplinary approach, to be implemented by specialized professionals, is already foreseen by Law 96/2013 with which Italy identified the guidelines for implementation of Directive 2011/36/EU related to prevention and prosecution of trafficking of human beings and protection of victims. The deadline for implementation of this Directive expired in April 2013 and therefore the provisions of the Directive that are self-executing can be immediately applied;
- b.** Effective Protocols ensuring the rights of unaccompanied minors to be appointed a guardian since their entry into Italy must be urgently adopted. Special attention must be paid to the appointment of effective guardians, the placement in safe shelters and the provision of information related to the possibility to seek asylum and to enjoy effective protection, so as to be able to exit from the trafficking circle;
- c.** It is imperative that in all proceedings affecting children their right to be heard is implemented and, if possible, their informed consent is acquired;
- d.** It is imperative that trafficked foreign young people enjoy full and effective access to article 18 on the consolidated Law on Immigration 286/98, also in relation to the social programme.