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**A. MOST RELEVANT ISSUES CONCERNING ITALIAN LEGISLATION FOR THE PROTECTION OF VICTIMS OF TRAFFICKING**

**B . ALIEN CHILDREN VICTIMS OF TRAFFICKING**

## **A. MOST RELEVANT ISSUES CONCERNING ITALIAN LEGISLATION FOR THE PROTECTION OF VICTIMS OF TRAFFICKING**

1. **Article 18 of Consolidated Law on Immigration**, in accordance with Legislative Decree 286/98, allows for a special residency permit to be issued to the alien exposed to violence or severe 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 their pleas during criminal proceedings. The residency permit for social protection (currently called residency permit for humanitarian reasons) can be issued both in consequence of the charges pressed by the victim (“judicial programme”, upon proposal or after approval by the Public Prosecutor) or without these (“welfare programme”).

### **The most relevant problems**

- a) Central police stations reserve the right to a widely discretionary evaluation of the prerequisites required by the law in order to issue residency permits. Consequently, practices vary very widely across Italy.
- b) Authorities tend to persistently prefer the judicial programme to the welfare programme, so much so that often police stations refuse to receive the residency permit application if the foreigner does not press charges against their traffickers.
- c) Within this framework, training of the Judicial Authority and of law enforcement personnel, still not sufficiently widespread, is specifically important.
- d) It is often difficult to renew or convert the residency permit issued in accordance with article 18 of Consolidated Law on Immigration into other types of residency permits.
- e) There is a tendency not to apply article 18 to cases of severe exploitation other than sexual exploitation.

**2.Regarding trafficking in human beings**, with special reference to sanctions, law 228/03 changed article 601 of the criminal code. At the time of writing, Italy has very recently transposed **Directive 2011/36/EU** in a very questionable way.

**With reference to what the Italian transposition law needs to contain here are the most important issues:**

- it does not set forth tools to facilitate coordination of actions to protect victims of trafficking and refugees,
- it fails to define mechanisms for the identification and fair protection of unaccompanied minors victims of trafficking, and postpones the definition of a multidisciplinary procedure for age determination to a Ministerial decree which is supposed to be released by 26<sup>th</sup> November;

3. **Directive 2009/52/EU** on the use of illegal labour has also been transposed: Legislative Decree 109 passed on 16<sup>th</sup> July 2012 introduced some rules about sanctions for employers (article 22 paragraph 12bis of Legislative Decree 286/98) and about the special residency permit which may be issued under specific circumstances (article 22 paragraph 12quater of Legislative Decree 286/98).

Concerning the area of **labour exploitation**, the new legislation introduced by Legislative Decree 109/12 (which amended article 22 of Consolidated Law on Immigration 286/98) is too new to be pondered objectively, even though the ways the rules are set up make their implementation really difficult. In fact, the envisaged circumstances which give workers the right to receive the special residency permit do not match with the circumstances of real-life labour exploitation, so this legislation beats its own purpose.

For example, the law subordinates issuing the residency permit to the existence of “specific labour exploitation”, without giving any parameter to determine the “specificity” of the exploitation and thus leaving it up to the Public Prosecutor’s or the police commissioner’s discretion. Furthermore, the new article 22 does not state clearly if the residency permit can be renewed at the end of the criminal proceedings against the employer charged with exploitation. As a result of this state of uncertainty, there is a risk that the alien worker will not press charges against his/her employer.

4. Regarding the **protection of victims** in the judicial context, we would like to point out that article 601 of the Italian criminal code is very rarely used in criminal proceedings, also due to

its prolix phrasing and the very limited number of cases in which the victims were compensated, because there is no effective compensation scheme. The decree does not establish a specific public fund, and the compensation system laid down by it is minimal and totally inadequate.

5. With reference to **victims of trafficking for sexual exploitation**, who access or could access international protection, we would like to point out that the former, on the one hand, are granted international protection with great difficulty (sexual exploitation is not considered a factor of persecution factor or of serious damage, despite the fact that victims, a majority of whom are women, risk re-trafficking), and, on the other hand, that there is no connection whatsoever between the administrative bodies in charge of granting this protection (“local commissions”) and the local social services (the local commission could refer victims of trafficking to local social services and consequently activate the welfare programme according to article 18 of Consolidated Law on Immigration 286/98).

## **6. Recommendations**

It is necessary to promote 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.

Along this line of thought it is necessary to:

1. Fully implement the transposition 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:
  - the lack of lawsuits brought by the victims of criminal activities;
  - the need to guarantee assistance and support to the victims regardless of their collaboration with a judicial authority;
  - granting victims of crimes connected to trafficking in human beings and of other types of

severe exploitation effective compensation tools.

2. Grant victims effective access to protection systems provided by existing laws (article 18 of Consolidated Law on Immigration 286/98 and article 13 of Law 228/2003) through:
  - a) the full and correct implementation of article 18 of Consolidated Law on Immigration 286/98;
  - b) the introduction of an amendment to article 18 of Legislative Decree 286/98 with a clear regulation concerning issuing of residency permits regardless of the victim's collaboration with the Judicial Authority, as provided by Directive 2011/36/EU;
  - c) the introduction of a regulation regarding the "reflection period" (ok) as required by Directive 2004/81/EU and Directive 2011/36/EU to grant potential victims of trafficking the chance to recover and free themselves from traffickers without risking to receive an order of removal or actual deportation during this time;
  - d) the reinstatement and reorganisation of monitoring and control bodies focused on trafficking in human beings;
  - e) the provision of substantial financial aid to assistance and social integration projects.
  
3. Grant victims of trafficking effective access to existing systems of international protection through:
  - a) a redefinition of the concept of the right of asylum, subsidiary protection and humanitarian protection to include trafficking in human beings for sexual exploitation among risk factors, with a specific reference to persons exposed to the risk of re-trafficking;
  - b) the provision of organized co-ordination tools between territorial commissions,

which grant international protection, and local social services, in order to plan effective protection of the victims of trafficking in human beings for sexual exploitation.

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

a) amendments to the criminal offences defined by current legislation as relating to severe labour exploitation (articles 22 paragraph 12 bis of Consolidated Law on Immigration approved with Legislative Decree 286/98, as amended by Legislative Decree 109/2012; crime of unlicensed gangmastering and labour exploitation laid down by article 603 bis of the Criminal Code), as they currently lack internal coherence do not effectively prevent and repress severe labour exploitation. The amendments should also encompass the possibility to issue a residency permit regardless of the alien victim's cooperation in the criminal proceedings;

b) complementary actions, also by means of by-laws, in order to ensure the full implementation of all provisions of the above-mentioned directive, and to provide information to and protection for exploited labourers, enabling them to press charges against illegal employment contracts, recover payments and unpaid benefits, obtain assistance and, if illegal, a residency permit; implementation of effective routine checks on employment contracts all over the country, with a view to identifying reckless employers and exploiters in advance, prosecute them and encourage cooperation by exploited alien workers, regardless of their legal status on Italian territory.

## **B . ALIEN CHILDREN VICTIMS OF TRAFFICKING**

### **1.B The general legal framework**

The consolidated Law on Immigration, Legislative Decree 286/98, offers some important tools for the protection of alien 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 alien children below the age of 18 who have entered the national territory without parents). According to article 19 paragraph 2 letter a) of the consolidated Law on Immigration, alien children cannot be deported with the only exception of children who must follow their parent(s) who has/have received an order of removal. This means that they are entitled to a residency permit.

If the protection of foreign youngsters is without doubt effective when parents are there, the situation 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 come of age (18 years), when prohibition of deportation no longer stands and the renewal 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 reduced 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 favourable way for foreign children. Today, in order to renew their current residency permit, foreign youngsters turning 18 must show, alternatively, either that they have participated in a social integration project for 2 years (and that they have been in Italy for at least 3) or (if such conditions are not met) they must receive consent from the “Committee for foreign children”.

The law does not specify when this consent must be issued: thus, there is a risk that this consent includes an assessment, on the basis of criteria which are not spelled out by the norm, on whether the child deserves to stay or not.

**2.B Age determination** of an unaccompanied minor is usually carried out with a simple wrist X-Ray, a test which the international scientific community considers inadequate to determine the age of an individual.

In 2009, the Ministry of Labour, together with the Ministry of the Interior, requested a Scientific Committee to draft a Protocol for age determination of unaccompanied minors. The findings indicated that it would be best to take a multidisciplinary approach including X-Ray tests (which need to take into account the youngsters' countries of origin), 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 test. In case of doubt, it must be assumed that the person in question is underage. **This, however, is the object of a protocol** (Ascone Protocol of 2009) **which has never been applied** and thus, today, the age of foreign children (or alleged children) is still determined with a simple wrist X-Ray test.

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

3.B An additional problem which has been recorded in relation to the treatment of unaccompanied children and which has profound implications on the status of trafficked migrants, relates to the **appointment of a guardian**. According to Italian legislation, children do not have full legal capacity. Therefore, they must always have a legal representative, normally a parent(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 can then be said to be purely formal (the Councillor is normally overwhelmed with responsibilities, thus guardianship is generally delegated to the Head of the Social Services department, who also is



overwhelmed with duties).

This negatively impacts effectiveness of guardianship and may ultimately make it impossible to appraise the situation of the trafficked migrant and, thus, identify adequate steps to ensure protection and freedom from the trafficking racket.

#### **4. B Recommendations**

**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 and take into account other findings of the scientific community. This multidisciplinary approach, to be implemented by specialized professionals, is laid down by the law transposing Directive 2011/36/EU on the prevention and prosecution of trafficking of human beings and protection of victims;

**b.** effective Protocols granting unaccompanied minors the right to be appointed a guardian immediately after their entry in Italy must be urgently adopted. Special attention must be paid to the appointment of effective guardians, placement in safe shelters and the provision of information related to the possibility to seek asylum and to enjoy effective protection, so as enable them to exit the trafficking ring;

**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 of the consolidated Law on Immigration 286/98, namely to the welfare programme.