

**REPORT**  
**on the Free Movement of Workers**  
**in Italy in 2011-2012**

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## Outlook

The economic and political crisis, which has struck the country, has been at the centre of the public debate. The main emergency was to gather economic resources to avoid the debt crisis. The Government and the Parliament therefore discussed more on tax laws, than on social issues.

Legislative Decree 2007 no. 30, the main provision on EU citizens, has been amended twice. The first amendment was intended to bring Italian legislation more in line with Directive 2004/38/EC, as can be understood from its preparatory works. Nonetheless, it was the occasion for rendering more effective the expulsion for lack of conditions justifying residence. The second amendment relates to remedy and is part of a more general reform process of the civil procedure.

The main problem that EU citizens can encounter in Italy, as far as residence rights are concerned, seems to come from the choice to make registration with the population registry valid also for EU purposes. The 2011 census brought with it the risk for the EU citizen who did not fill the form, to be cancelled from the population registry in a case not provided for by the Directive.

As to the members of the family, it shall be mentioned that sometimes access to work and to social benefits is conditional upon Italian or EU nationality, and non-EU members of the family are barred from access. In addition to that, in some rulings the Supreme Court has stated that the residence card for non-EU family members is constitutive of the rights established by Legislative Decree 2007 no. 30, right of residence comprised, while in other cases it has applied the *Metock* case even without discussing it.

The prohibition of any discrimination on the ground of nationality in the public and private sector, in access to work and in working condition, is well established in Italian national legislation, even though some exceptions happen, mainly relating to access to the public sector and to financial benefits. Cases of direct or indirect discrimination on the ground of nationality are rarely adjudicated under Regulation 1612/68/EEC, and courts make more often reference to Italian Constitution, enshrining the general principle of equality, and to the anti-discriminatory legislation. Financial benefits are as a rule addressed to low income household, not to workers.

Romanian and Bulgarian nationals enjoy free access to the labour market, since the transitional period ceased to produce its effects at the end of 2011.

## Chapter I

### The Worker: Entry, residence, departure and remedies

*Text in force:*

Legislative Decree no. 30 of 2007, transposing Directive 2004/38/CE, has been amended twice during the reporting period: by Decree-Law 23-6-2011 no. 89, turned into Law 2-8-2011 no. 129, in force from 24-6-2011, and by Legislative Decree 1-9-2011 no. 150.

As to Decree-Law 2011 no. 89, the main novelties are:

- a) In order to implement the *Metock* case-law, the references to the entry visa as condition for residence are deleted. Before the amendments, Legislative Decree no. 30 of 2007 asked for an entry visa as a requirement upon which the residence of non-EU members of the family was expressly (residence for more than three months and permanent residence) or implicitly (residence up to three months) conditional.<sup>1</sup>
- b) Some amendments relate to the means of proof of the status of member of the family (see Chapter II).<sup>2</sup>
- c) Economic resources: before the amendment, the legislative decree asked for a fixed amount of resources as a condition for registration of residence for non active EU citizens. After the amendment, it will be added that in any case, the personal situation of the person concerned shall be taken into account in order to appreciate whether his/her economic resources are adequate.<sup>3</sup>
- d) The decree-law makes it clear that public authority can verify where Union citizens or their family members satisfy the conditions upon which residence for more than three months is conditional only where there is a reasonable doubt that they do not fulfill them any more.<sup>4</sup>
- e) The decree-law introduces a provision expressly stating that the possession of a document certifying residence is not a condition for exercising a right.<sup>5</sup>
- f) The definitions of ‘grounds of security of the State’ and ‘imperative grounds of public security’ become less ambiguous. Expulsion orders founded on ‘grounds of security of the State’ or ‘imperative grounds of public security’ will no more be immediately enforced, but any expulsion decision will be immediately enforced only if the *Questore* (Head of Police) will demonstrate, on a case by case basis, that the presence of the person in question in the country is irreconcilable with orderly society.<sup>6</sup>

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1 New Articles 6, 9, and 10 of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. b), c), and d) of Decree-Law no. 89 of 2011.

2 New Articles 3, para. 2, lit. b), 9 para. 5, lit. b), 10, para. 3, lit. b) of Legislative Decree no. 30 of 2007.

3 New Article 9, para. 3-bis, of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. c, of Decree-Law no. 89 of 2011.

4 New Article 13, para. 2, of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. e, of Decree-Law no. 89 of 2011.

5 New Article 19 para. 4 of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. f, of Decree-Law no. 89 of 2011. It aims to correctly implement Art. 14, para. 2, second sentence, of Directive 2004/38/EC.

6 New Article 20 of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. g, of Decree-Law no. 89 of 2011.

- g) It is explicitly stated that recourse to the social assistance system will not as such be a reason for adopting an expulsion order for lack of resources.<sup>7</sup>
- h) The Ministry of the Interior, Department of public security, is the body in charge of providing information concerning previous police records of EU nationals to the requesting authority of another Member State, under Article 27, para. 3, of Directive 2004/38/EC.<sup>8</sup>
- i) One provision has not been introduced to correctly implement EU law, but intends to make expulsion orders grounded on lack of resources more effective: the Prefect is empowered to issue an expulsion decision on grounds of public order against EU citizen who was ordered to leave the country for not fulfilling the conditions justifying residence, and did not comply with the order. The expulsion decision will be immediately enforced by the *Questore*.<sup>9</sup> Before the amendment, not having complied with the expulsion order was a minor criminal offence.

Legislative Decree 2011 no. 150 amended the rules on remedies. The judicial procedure to challenge both the refusal of the right of residence and the expulsion orders has been amended, to strengthen the rights of the defense. The previous procedure was quite fast, but less formal than the ordinary procedure. The new one is more formal than the previous, but still less than the ordinary one.

On the amendments, see:

- A. Lang, Ancora modifiche alla disciplina italiana sulle condizioni di ingresso, soggiorno e allontanamento dei cittadini dell'Unione, *Diritto immigrazione e cittadinanza*, 3-2011, 51-61.
- P. Morozzo della Rocca, Chiaroscuri del decreto legge 23 giugno 2011, n. 89, come modificato dalla legge di conversione, 2 agosto 2011, n. 129, *Corriere giuridico*, 2011, 1345.

## 1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

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## 2. SITUATION OF JOB-SEEKERS

Nothing to add to the previous years' reports. See also the special report on job-seekers.

During the reporting period, no reference to the *Antonissen* case can be found in the case-law or in administrative guidelines.

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7 New Article 21, para. 1, of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. h, of Decree-Law no. 89 of 2011.

8 New Article 23-bis of Legislative Decree no. 30 of 2007, as introduced by Article 1, lit. i, of Decree-Law no. 89 of 2011.

9 New Article 21, para. 4, of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. h, of Decree-Law no. 89 of 2011.

### 3. OTHER ISSUES OF CONCERN

Last years' reports underlined that Italian's decision to make the registration into the population registry valid also for the purpose of Directive 2004/38, can entail unwanted negative consequences.

Italian legislation states that each person is entered into the population registry of the Municipality where s/he lives. The person concerned shall give his/her address and the police authorities check that s/he lives at the given address and in an adequate house. A number of Municipalities asks for additional requirements for entering foreigners into the population registry, concerning the size of the house, the origin of the economic resources, and so on. This kind of provisions aims to control and limit immigration of low income foreigners. In fact, mayors have been given by a law of the Parliament the power to issue orders to face unforeseeable and urgent situations, endangering public order or public security. Many mayors have made great use of the power and issued a number of order tackling a wide range of issues, mainly prostitution and immigration, even though according to Italian Constitution public order and immigration are subjects that shall be regulated only by national law. The aim of the abovementioned law was indeed to localize the power to regulate subjects that should be ruled by law. The Constitutional Court stated that the law is contrary to the Constitution in that it gave regulatory powers to the mayors without guaranteeing that no abuse could take place (judgment 7-4-2011 no. 115). UNAR issued general recommendation no. 15 of 2012, reminding Municipalities of not asking EU nationals to submit more documents than Italians, to be entered in the population registry.

It is foreseeable that mayors will stop adopting this kind of orders, because of the ruling of the Constitutional Court, but also because the political climate has changed since the new government took office, and the presence of foreigners is not so widely seen as a public order issue as before.

During 2011 the census took place. The aim of the census is to count people and houses, and to bring the population registry up to date. A person, who does not fill the census form, is cancelled from the population registry. Cancellation is not automatic, because the person concerned is not cancelled if s/he goes and states that s/he has kept her/his habitual residence in the Municipality (ISTAT, circular letter 13-12-2011 no. 15). Anyway, as unforeseen consequence, the EU citizen who was cancelled from the population registry, would lose his/her registration for the purpose of Directive 2004/38/EC in a case not provided for by the directive itself. In fact, a EU national can lawfully be absent from the country for a rather long period without losing his/her right of residence under Directive 2004/38/EC.

The Ministry of the Interior issued a circular letter listing anew the documents that EU citizens shall submit to be entered into the population registry. (circular letter 27-4-2012) The provision seems not to be in line with Legislative Decree 2007 no. 30, as amended during 2011, since it still require that the EU national, who is not a worker, shall give evidence of having a specific amount of economic resources. In addition, it is not explicitly stated that the documents on the list are necessary only for the first registration of residence, and can not be required when the EU citizen moves his/her dwelling from one municipality to the other. In that case, the EU citizen shall register his/her new residence only for the purpose of Italian law, not of Directive 2004/38.

#### **4. FREE MOVEMENT OF ROMA WORKERS**

The change of government that took place at the end of 2011 brought with it a new attitude towards Roma people. In fact, the Lega Nord, the xenophobic and demagogic party which was mainly responsible for the political line of the previous government, has joined the ranks of the opposition.

For implementing Commission's Communication COM/173/2011, the Office of the Prime Minister established that UNAR is the contact point for promoting active inclusion policy for Roma (Decree 15-11-2011, by the Presidenza del Consiglio dei Ministri) and adopted the National Roma Integration Strategy (28-2-2012). The government will submit a draft law to recognize Roma as national minority. Now, Roma are not recognized as a minority, because only territorial minorities are recognized.

## Chapter II

### Members of the Family

#### 1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

The definition of members of the family is given by articles 2 and 3 of Legislative Decree 2007 no. 30, transposing Directive 2004/38/EC. During the reporting period, the provisions concerning members of the family have been amended by Decree-Law of 2011 no. 89, turned into Law 2011 no. 129, as far as means of proof are concerned (see below, para. 2).

*Reverse discrimination:* Under Article 23 of Legislative Decree 2007 no. 30, the rules on family reunification of EU citizens apply to non-Italian members of the family of Italian citizens whether more favourable to them than any others. Legislative Decree 1998 no. 286, the general legislation on immigration, also regulates the right of residence of non-EU members of the family of Italian nationals. Two provisions shall be mentioned: Article 30 states that the parents of an Italian minor living in Italy can be issued with a residence card for family reasons, even though they do not satisfy the substantial conditions laid down for foreigners in general, provided that they do not forfeit their parental responsibility over the minor according to Italian law; and Article 19 states that the non-EU foreigner who is the spouse or a relative of an Italian citizen, and lives under the same roof, is protected from expulsion and granted with a residence card.

In a number of cases, relating to reunification of minors whose custody is attributed to Italian nationals under the Moroccan rule called *kafalah* (see below), the Supreme Court said that family reunification of Italian nationals comes only within the scope of application of the Legislative Decree.

The Supreme Court also follows a different line of reasoning that is difficult to reconcile with EU law. It states that the residence card as member of the family is constitutive of the rights laid down in Legislative Decree 2007 no. 30, implementing Directive 2004/38/EC (Supreme Court, Civil Branch, First Chamber, judgment 23-7-2010 no. 17346). This reasoning has been stated and followed in cases in which the right of residence of a non-EU spouse of an Italian national was at stake (see also: Supreme Court, Civil Branch, Sixth Chamber, order 20-4-2012 no. 6315; order 10-5-2012 no. 7203; order 10-5-2012, no. 7193; court of first instance of Rimini, 14-4-2012). Therefore, if the non-EU spouse did not ask for a residence card within three months from entry, s/he is not within the scope of the Legislative Decree and his/her case is regulated by the consolidated legislation on immigration, which protects the non-EU spouse of an Italian national from expulsion, provided that the couple lives under the same roof (Art. 19, Legislative Decree 1998 no. 286). Nonetheless, the summary of the case is drafted as to encompass Italian and EU nationals alike. The applicability of Art. 19 to the spouse of an EU citizen has never been stated (nor ruled out, it must be said). This line of reasoning is also difficult to reconcile with the *Metock* case.

The majority of the cases decided by courts are brought by non-EU family members of Italian nationals, but are of interest for EU citizens too. The main problems discussed are the following:

*Same sex spouse:* the court of first instance of Reggio Emilia holds that the concept of 'spouse' under Art. 2 lit. b) 1) of Legislative Decree 2007 no. 30 (corresponding to Art. 2, para. 2) lit. a) of Directive 2004/38/EC) comprises the same sex spouse, when the marriage

took place in a State that allows same sex partners to get married. In the case under review, the applicant, a non-EU national who married his same sex Italian partner in Spain, challenged the refusal of residence card as spouse of an Italian national. The court rules out that that the status of 'spouse' shall be established under Italian law (which does not allow same sex partners to get married), and states that the status of 'spouse' is granted by the law of the place where the marriage took place. The court is aware that during the preparatory works of the directive the issue was discussed and ruled out. In the court's opinion, there are reasons to interpret the concept of 'spouse' as to encompass the same sex spouse: the fact that the number of States that allows same sex marriage has grown subsequently, that the European Court of Human rights has shown a positive attitude toward same sex households, that the EU Charter of fundamental rights grants the right to fund a family to everybody and is not gender-connoted (Tribunale di Reggio Emilia, decreto 13-2-2012, *Diritto immigrazione e cittadinanza*, 2011, 4, 155. On the judgment, A. Costanzo, Matrimonio tra persone dello stesso sesso contratto in Spagna e diritto di soggiorno nell'ambito dell'Unione europea, *Famiglia, persone, successioni*, 2012, 4, 310). The Questura is reported to have released the residence card as EU family member to the applicant, in compliance with the court's ruling (*Il Sole-24 ore*, 27-3-2012, 27).

*Descendants*: last year Report mentioned the judgment of the Supreme Court of 1-3-2010 no. 4868, in which the court said that a minor, whose custody an Italian national obtained in a third country (Morocco) under a customary rule called *kafalah*, can not benefit from family reunification neither under the rule established by Legislative Decree 2007 no. 30, nor by the consolidated legislation on immigration. On the contrary, if the minor is under the custody of a non-EU national, *kafalah* is considered as a valid assumption for family reunification under the general legislation on immigration (Corte di Cassazione, judgment no. 7472 of 2008). The Supreme Court never address the case of a minor under the custody of a EU national, but it would likely be regulated as the one in which an Italian national is involved. Even though criticized by legal scholars<sup>10</sup>, Judgment 2010 no. 4868 has been referred to by a number of courts (Supreme Court, Sixth Chamber, order 23-9-2011 no. 19450, and order 7-10-2011 no. 20722; appeal court of Rome, decree 31-1-2011, *Diritto immigrazione e cittadinanza*, 2011, 2, 183. *Contra* appeal court of Venice decree 9-2-2011, *Diritto immigrazione e cittadinanza*, 2011, 2, 181, which qualifies the minor under *kafalah* not as a descendant but as another family member according to Article 3, para. 2, lit. a) of Legislative Decree 2007 no. 30, corresponding to Art. 3 of the Directive). The Sixth Chamber of the Supreme Court<sup>11</sup> decided to defer the case to the Grand Chamber, which should decide whether the two line of reasoning thus far followed depending on the nationality of the applicant, are still justified.

*Brother*: the Supreme Court said that when the conditions laid down by Article 3, para. 2, lit. a) of Legislative Decree 2007 no. 30 (being dependant on the Union citizen or serious health grounds requiring the personal care by the Union citizen) are met, a right to reunification arises (Supreme Court, Civil Branch, First Chamber, 7-9-2011 no. 18384). This decision is in striking contrast with order 2010 no. 25661 of the Supreme Court, mentioned in last year Report, stating that the sister of the applicant did not enjoy any right to enter Italy for family reunification.

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10 A. Lang, Considerazioni su *kafalah*, ricongiungimento familiare e diritto dell'Unione europea, *Diritto immigrazione e cittadinanza*, 2011/2, p. 52; P. Morozzo della Rocca, Sull'affidamento al cittadino italiano del minore straniero mediante *kafalah* tornerà a pronunciarsi la Cassazione, *Il corriere giuridico*, 2011, p. 847.

11 Supreme Court, order 24-1-2012 no. 996.

## 2. ENTRY AND RESIDENCE RIGHTS

*Entry:* By decree 11-5-2011, the Ministry of Foreign Affairs established new rules on entry visa. The visa for family reunification is necessary both for family reunification of Italian or EU nationals, and for family reunification of non-EU foreigners, but the substantial conditions that are to be met are regulated by different sets of rules. The members of the family listed in Art. 2 of Legislative Decree 2007 no. 30 (corresponding to Art. 2 of the Directive) will ask for that visa. As it was in the past, no specific visa is established for the reunification of the other members of the family (Art. 3 of the Legislative Decree and Art. 3 of the Directive). (*Definizione delle tipologie dei visti d'ingresso e dei requisiti per il loro ottenimento*, OJ 1-12-2011 no. 280).

*Residence rights – means of proof:* The rules laid down by Legislative Decree 2007 no. 30 on entry and residence rights have been amended during the reporting period as far as means of proof of the condition of family members is concerned. As to the EU and non-EU members of the family, who do not enjoy the right of residence by themselves, they shall submit a document issued by the relevant authority in the country of origin or in the country they are coming from, certifying that they are members of the family of the citizen of the Union, and, when required, dependants on the citizen of the Union, or members of the household of the citizen of the Union, or proof of the existence of serious health grounds which require the personal care of the family member by the citizen of the Union (new Article 9, para. 5, lit. b, and Article 10, para. 3, lit. b) of Legislative Decree no. 30 of 2007). The provision reproduces almost *verbatim* Article 8, para. 5, lit. e, of Directive 2004/38/EC. However, the Italian provision seems to be applicable in any case in which a family member has to prove his/her status, while the EU provisions only apply to the other members of the family under Article 3, para. 2, lit. a).

*Rights connected with residence:* Non-EU members of the family seem to face difficulty in access to social assistance benefits. Sometimes, access to benefits is open to Italians and EU nationals without further conditions, and to non-EU foreigners only if they possess a long-term resident's residence permit. Non-EU family members are often assimilated to non-EU foreigners, rather than to Italian nationals. Case-law is a source of information on such legislation. Since often the applicant is a foreigner but not a member of the family, it is difficult to forecast which rules the court should apply to redress the case if the applicant was a member of the family. In fact, courts say that excluding non-EU foreigners who possess a regular permit, even if not the long-term resident's residence permit, from access to the benefit amounts to a discrimination on the basis of nationality, prohibited by the anti-discriminatory legislation and by the Constitution.

*Tribunale di Modena, 14-3-2011:* the application submitted by the father of an Italian national for the *assegno sociale* (that is a financial benefit for poor people) was rejected, because the applicant did not possess the long-term resident's residence permit. The court stated that the residence card as family member of an Italian national is to be equated to the long-term resident's residence permit.

Whether the residence card as family member can be equated to the long-term resident's residence permit, was at the centre of an interesting, albeit different, case, brought to the administrative court of Trentino-Alto Adige (judgment 11-5-2011 no. 132). The applicant, an Egyptian national, married to an Italian national, challenged the refusal of his application to have his illegal non-EU employee benefitting of the 2009-amnesty. In 2009 a sort of amnesty was established for illegal non-EU foreigners working in families as '*badante*', that is a person taking care of elderly or ill people (Law 3-8-2009 no. 102). The application for the

amnesty should be submitted by the employer. An employer having non-EU nationality should apply, provided s/he possessed the long-term resident's residence permit. The applicant in the present case did not possess the long-term resident's residence permit, but the residence card for members of the family. The court dismissed the case. In its opinion, the residence card for members of the family could not be equated to the long-term resident's residence permit, because the latter, contrary to the former, is not permanent.

### **3. IMPLICATIONS OF THE *METOCK* JUDGMENT**

Legislative Decree no. 30 of 2007 has been amended by Decree-Law 2011 no. 89, turned into Law 2011 no. 129, in order to implement the *Metock* judgment. All the references to entry visa as condition for residence has been deleted from Articles 6, 9, and 10 of the Legislative Decree. Before the amendments, Legislative Decree no. 30 of 2007 asked for an entry visa as a requirement upon which the residence of non-EU members of the family was expressly (residence for more than three months and permanent residence) or implicitly (residence up to three months) conditional.

The *Metock* judgment has been quoted and applied in a number of decisions:

- appeal court of Roma, decree 6-6-2011, reversing the judgment of the court of first instance of Velletri (decree 22-10-2009)
- Supreme Court, Civil Branch, First Chamber, order 9-2-2011 no. 3210
- Supreme Court, Civil Branch, Sixth Chamber, order 15-6-2011 no. 13112

### **4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCES AND FRAUD**

Italy did not transpose Article 35 of the Directive.

As already explained in the previous Reports, the Parliament amended the rules of the Civil Code on the marriage of the foreigner in Italy in order to prevent the illegal foreigner from getting married in Italy and subsequently benefitting from the *Metock* ruling. Under the new Article 116, each foreigner who wants to get married in Italy had to submit to the registrar not only a declaration by the competent authority of her/his country of origin stating that there are no impediments to marriage, but s/he also had to prove that her/his presence in Italy is legal. The Constitutional Court declared the amendment as contrary to the right to marry, enshrined in the Constitution and in Art. 12 of the European Convention of Human Rights, as interpreted in the *O'Donoghue vs UK* case (judgment 25-7-2011 no. 245).

The Municipality of Chiari restated the requirement of the legal presence in Italy for getting married, declared null by the Constitutional Court, by way of a municipal order. The court of first instance of Brescia declared the decision as discriminatory and contrary to the Constitution (Tribunale di Brescia, 11-4-2012).

### **5. ACCESS TO WORK**

As stated in last year Report, equality of treatment in access to work is clearly established by law, but a specific provision stating that the members of the family not having the nationality of a Member State are equated with Italian nationals as to access to the public sector is missing.

## ITALY

In many cases competitions for access to public employment are open to Italian and EU citizens alike, but very often non-EU members of the family are not envisaged and remain excluded from the competition. A number of cases can be mentioned, in which a non-EU national challenges a notice of competition issued by a public body requiring Italian or EU nationality as a condition for access to the employment. Even though as a rule the applicant is not a member of the family of a EU national, those cases are evidence of a problem that can impair their rights. The cases are decided under the non-discrimination principle:

- court of first instance of Trieste (order 1-7-2011, upheld by order 22-7-2011): open competition for the selection of nurses
- court of first instance of Milano (order 5-10-2011): open competition for the selection of clerks and social workers
- court of first instance of Firenze (order 27-1-2012): open competition for the selection of employees responsible for auxiliary services

Other notices of competition have not been challenged, for instance the open competition for the selection of bus drivers (AMT Genova).

### **6. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS**

No specific provision addresses this issue and courts discussed the case.

## **Chapter III**

### **Access to Employment**

#### **1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR**

The right to equal access to the employment in the private sector is well established in Italian legislation. No case to report.

##### ***1.1. Equal treatment in access to employment (e.g. assistance of employment agencies).***

Nothing to report.

##### ***1.2. Language requirements***

Nothing to report.

#### **2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR**

Access to public employment is dependent upon the passing of an open competition, which is a principle enshrined into the Constitution and upheld by the Constitutional Court.

##### ***2.1. Nationality condition for access to positions in the public sector***

As a rule, competitions for access to public employment, under both fixed-term contracts or under contracts of indeterminate duration, are open to Italian and EU nationals alike. Nonetheless, some exceptions happen.

The Municipality of Chiari issued a competition for the selection of enumerators open only to Italian nationals. The court of first instance of Brescia declared the notice null and void because issued in breach of the prohibition of any discrimination on the ground of nationality. It has to be highlighted that this case, as many other of similar nature, was brought to court by a non-EU national. (Tribunale di Brescia, order 29-12-2011 no. 3126)

On the contrary, the court of first instance of Rimini decided that opening a competition for the recruitment of one social worker only to Italians was not discriminatory nor unlawful. (Tribunale di Rimini, order 27-9-2011, *Foro italiano*, 2012, I, 936).

##### ***2.2. Language requirements***

Nothing to report.

##### ***2.3. Recognition of professional experience for access to the public sector***

The recognition of professional experience, professional and academic diplomas for access to posts in the public sector is regulated by Article 38 para. 3 of Legislative Decree no. 165

of 2001, which has been amended during the reporting period by Art. 8 of Decree-Law 9-2-2012 no. 5, turned into Law 4-4-2012 no. 35. According to this provision,<sup>12</sup> the professional experience or the professional diploma acquired by EU nationals and necessary to participate to the open competition or to be appointed in the public sector, is recognized by a Decree of the President of the Council of Ministers – Department for the Civil Service, after the positive opinion of the Ministry for Education, University and Research. The same procedure applies when it comes to recognition of academic diplomas or seniority for access to the open competition or to be appointed in the public sector.

### 3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

#### *Residence as a condition for access to employment:*

The 2009 amendment to Legislative Decree 2001 no. 165, on the General legislation on the employment in the public sector, enables the Public administration to reserve access to public employment to people already residing in the place of employment, or to give additional points to residence. Article 35, section 5-ter, third sentence, provides that: ‘with regard to admittance requirements based on the place of residence of applicants the principle of equal conditions of access to public employment is guaranteed by specific provisions set forth in the competition notice, where the admittance requirement based on the place of residence is necessary in order to guarantee the performance of services otherwise totally unfeasible or at least unfeasible with the same results’.<sup>13</sup> Legal scholars have underlined that giving residence more relevance than merit can be contrary to the Constitution and to the free movement of workers (see A. Riccobono, *Commento all’art. 51 del Decreto legislativo 2009 n. 150, Nuove leggi civili commentate*, 2011, 1164-1166). The legality of the provision has never been raised by courts till now. On the contrary, the administrative court of first instance upheld the notice of competition attributing 20 points out of 50 to residence, provided that the decision is duly motivated (TAR Sicilia, Palermo, judgment 7-2-2011 no. 241), but annulled the decision of the public administration, appointing the candidate that ranked second only because, contrary to the first, he resided in the place of employment (TAR Sicilia, judgment 31-5-2011 no. 1010). It has to be noted that the applicant was not a EU nationals in either cases.

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12 ‘3. Nei casi in cui non sia intervenuta una disciplina adottata al livello dell’Unione europea, all’equiparazione dei titoli di studio e professionali provvede la Presidenza del Consiglio dei Ministri - Dipartimento della funzione pubblica, sentito il Ministero dell’istruzione, dell’università e della ricerca. Secondo le disposizioni del primo periodo è altresì stabilita l’equivalenza tra i titoli accademici e di servizio rilevanti ai fini dell’ammissione al concorso e della nomina.’

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## **Chapter IV**

### **Equality of Treatment on the Basis of Nationality**

#### **1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION**

The prohibition of discriminations in working conditions is well established in Italian legislation.

Nothing to report.

##### ***Specific issue: Working conditions in the public sector***

According to Article 45 of Legislative Decree no. 165 of 2001, every public administration department has to grant equality of treatment to its employees.

Nothing to report.

#### **2. SOCIAL AND TAX ADVANTAGES**

Nationality is rarely a condition for access to social benefits or tax exemptions. As a rule, those benefits are designed for ‘workers’ in general. When they address low income workers or people, the ISEE index is used as evidence of need. The ISEE index is calculated from the taxable income declared for the previous-year IRPEF (*imposta sul reddito delle persone fisiche* – personal income tax) and from the movable and immovable property own by the applicant<sup>14</sup>. The ISEE index is objective, but can only be calculated if during the previous year, the applicant’s income was taxed in Italy. Therefore, during his/her first year in Italy, the EU worker could face difficulties in obtaining social benefits for low income people, because calculating his/her ISEE index would prove quite difficult.

Art. 5 of Decree-Law 2011 no. 201, turned into Law 2011 no. 214, entrusts the Government with the task of revising the ISEE index, in order to take account of the assets own in Italy and abroad.

The Municipality of Chiari laid down that EU nationals can apply for social benefits provided they possess a residence card and sufficient economic resources for themselves and for their family. (Decision no. 182, adopted by the Municipal Council at the meeting of 26-10-2011) The residence card for EU nationals is not prescribed by Italian legislation, and the proof of having sufficient economic resources can not be asked to EU workers as a condition for access to social benefits. UNAR, the National office against racial discrimination, was asked to evaluate the case, and recognized the discriminatory and unreasonable nature of the decision. (Decree REP.2, 10-1-2012).

##### ***2.1. General situation as laid down in Art. 7 (2) Regulation 1612/68***

As already pointed out in the previous years’ reports, in general terms, Italian legislation seems to be in line with EU law since the principle of non-discrimination for workers is well established. As to our knowledge, Courts have never discussed the scope of application of

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<sup>14</sup> See Legislative Decree no. 109 of 1998.

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Art. 7 (2) of Regulation 1612/68, nor apply it in any given case. On the contrary, regional and municipal legislation is less often in conformity with EU law. Nationality or residence are common requirements upon which financial benefits issued by local authorities are conditional. This legislation is often brought to court, and the cases adjudicated according to the anti-discriminatory provisions of the general legislation on immigration. When the courts refer to Regulation 1612/68, it is only to reinforce the solution they have already reached under the other set of rules. Since courts have never discussed the scope of application of Art. 7(2) of Regulation 1612/68, the relevant case-law is presented under Chapter V.

### ***2.2. Specific issue: the situation of jobseekers***

As pointed out in last-year Report, under Article 19 para. 3 of Legislative Decree no. 30 of 2007 (transposing Directive 2004/38/EC), Union citizens who entered Italy in search for a job are not entitled to social assistance for the first six months of stay, unless these allowances are granted by the law. See also the answers to the questionnaire on jobseekers.

Financial benefits equivalent to the ones which were in question in the *Collins, Ioannidis* and *Vatsouras* cases do not exist in Italy.

## Chapter V

### Other Obstacles to Free Movement of Workers

During the reporting period, a number of cases in which discriminatory provisions were at stake took place. The cases were brought to courts, but also to UNAR, the public body in charge of examining complaints about discriminations. The subject matter very often consists of the conditions for access to financial benefits issued by regional or municipal authorities. Those benefits are mainly addressed to low income people or household, and are not limited to workers.

#### *Direct discrimination:*

Art. 3 of Legislative Decree no. 77 of 2002 reserves to Italian nationals access to the civic service. The law established the civic service as an alternative to the compulsory military service. But once the military service was not compulsory any more, the civic service remains in force, as an instrument of social policy. During the reporting period, on the one hand UNAR asked the Parliament to modify the law in order to make access open to foreigners alike, and on the other hand the court of first instance of Milan decided that the nationality requirement was discriminatory and interpreted the law as if it referred to residence (Tribunale di Milano, order 12-1-2012 no. 15243/11).

A number of competitions for access to benefits was only open to Italian nationals:

The public body in charge of postal services issued a notice for an open competition for the sale of houses and flats it owns, reserved to Italians (UNAR, opinion 25/2011)

The Municipality of Osimo awarded a financial contribution to the main rental for low-income families, only to Italian nationals with a 5-year residence (UNAR, opinion 34/2011)

The Municipal Council of the Veneto Region awarded a financial benefit for low income large family, only to Italian nationals residing in the Region for 5 years (UNAR, opinion 35/2011)

The Municipality of Roccafranca made access to public housing conditional on Italian nationality and a 10-year residence (decision held discriminatory by the court of first instance of Brescia, order 17-10-2011 no. 7280);

#### *Indirect discrimination.*

Regional laws sometimes make access to social benefits conditional on residence, and even a long period of residence. The example of the Friuli-Venezia-Giulia Region is of interest. It established a 10-year residence in Italy, of which 5-year in the Region, for access to social benefits, but exempted people, who was born in the Region but lived abroad, moving back their residence. The Municipalities can decide how to allocate their resources, within the guidelines established by the Region law:

Some courts of first instance stated that making access to a financial contribution conditional upon the aforementioned requirements amounted to a discrimination on the grounds of nationality (Tribunale di Gorizia, order 26-5-2011, benefit for newborn child; order 30-6-2011, contributions to the main rental; Tribunale di Trieste, order 5-8-2011, access to social housing).

During 2011 the Friuli-Venezia-Giulia Region modified the law on access to social benefits, taking the case-law into account. Regional law 30-11-2011 no. 16 now requires a 24-

month residence to Italian and EU nationals alike for access to financial benefits, aimed to support the family, grant access to public housing, foster educational rights. The Council of Ministries has brought the law to the Constitutional Court, for infringement of the Constitution (case no. 25/2012, pending).

The Province of Bolzano made access to a financial contribution to the main rental for low income tenants on a previous declaration attesting to which linguistic group the applicant belongs. The rules governing the prescribed declaration were such as to render it more difficult for a EU than an Italian national. The court of first instance of Bolzano found the provision as amounting to a discrimination prohibited by EU law (Tribunale di Bolzano, order 20-7-2011 no. 342/2011).

UNAR issued general recommendation 14/2012, about regional or municipal regulations submitting access to contributions to the main rental or to social housing upon long periods of residence. It stated that long periods of residence are unreasonable and therefore discriminatory.

The administrative court of first instance of Lombardia took a different approach to the 5-year residence for access to social housing established by the Regional law of Lombardia. Even if the court did not quote it, it followed its previous case-law (quoted in last year Report), and stated that the requirement is reasonable and justified by the need to allot the Region's limited financial resources (T.A.R. Lombardia Milano, Chamber III, judgment 5-8-2011 no. 2094).

#### *Tax on immovable property*

During the reporting period, new taxes have been introduced.

IMU is a property value tax, payable by the owner of a property located in Italy. The tax amounts to 0,4% of the value of the principal residence (where the owner and his/her family live), and to the 0,76% of the value of other properties which are not the principal residence of the owner. The land registry value is the basis for the assessment of the tax. A deduction of 200 to 400 eur is allowed on the payable amount of the tax on the principal residence. Italian and foreigners' property in Italy alike is taxable; and provided that the property is located in Italy, residents and non residents alike shall pay the tax. The law allows the Municipalities, by a specific decision, to consider as principal residence the property of an Italian national living abroad, provided it is not rented.<sup>15</sup> A survey of the newspaper *Il Sole-24 Ore* shows that very few Municipalities adopted a decision on the subject (9-6-2012, 25).

IVIE is a property value tax, payable by taxpayers residing in Italy who own a property located abroad. The tax amounts to 0,76% of the value of the property. The land registry value is the basis for the assessment of the tax. If the land registry value is not available, the tax basis is the price paid as established in the purchase contract, or the market value of the property.<sup>16</sup>

IVIE has some equivalence with IMU, but the main differences relate to deductions, which are not admitted from IVIE, the reduced rate, which applies only to IMU, the calculation of the basis of assessment of the tax, the use to which the revenue from the tax is put.

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<sup>15</sup> Art. 13, Law-Decree 2011 no. 201, as amended by Decree-Law 2012 no. 16, turned into Law 2012 no. 44.

<sup>16</sup> Art. 19, para. 13-17, of Decree-Law 2011 no. 201, turned into Law 2011 no. 214, and modified by Decree-Law 2012 no. 16, turned into Law 2012 no. 44.

## Chapter VI Specific Issues

### 1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

No cases about frontier workers have been found. It shall be noted that residence is often a condition for access to social assistance benefit established by regional and municipal legislation (see above, Chapter V).

### 2. SPORTSMEN/SPORTSWOMEN

Regulations issued by Sport Federations distinguish players not on the basis on nationality, but rather depending on where they have been trained. Therefore, a EU national trained in Italy is equated to Italian nationals trained in Italy, and an Italian national coming from a foreign federation can be considered as a foreign players. Only EU players trained abroad seem to encounter obstacles, not as far as affiliation in concerned, but rather since some Federation maintains restrictions on the number of players that can be field.

#### *Football*

The rules described in last year Report are still in force.

#### *Basketball*

The rules described in last year Report are still in force.

#### *Volleyball*

The rules described in last year Report are still in force.

#### *Handball*

EU citizens can be affiliated without limitations, both if coming from a foreign federation and for the first time, but they can be field only within the quota established by the *Vademecum 2012/2013*: for instance, clubs taking part in the men's A Championship can include in the referee's report only one (EU and non-EU) foreigners players. On the contrary, players trained in Italy (*giocatori di formazione italiana*), even not having Italian nationality, can be field without restrictions.

#### *Rugby*

The rules described in last year Report are still in force.

#### *Ice-Hockey*

Players are divided into two groups: Italian players trained in Italy or having Italian nationality (A category) and players having foreign nationality and/or trained abroad (B category). The A category includes: 1) Italian national players who have never been affiliated to a foreign Federation and are affiliated to the Italian Ice-Sports Federation (FISG) for the first time; 2) Italian national players coming from a foreign Federation if they have already played in Italy for two successive seasons or are eligible to join the Italian National team;

3) foreign national players even if coming from a foreign Federation provided that they have played in the FISG National Youth Championships for at least three consecutive seasons; 4) foreign national players who have never been affiliated to a foreign Federation and are affiliated to the FISG for the first time. The B category includes: 1) players already affiliated to a foreign Federation and having EU nationality or an equivalent nationality (i.e. a nationality of a country having concluded a treaty providing for free movement of people and, in any case, whose entrance in Italy does not require a visa); 2) non-EU players who have been already affiliated to a foreign Federation; 3) players coming from a foreign Federation and having Italian nationality provided that they have not played in Italy for at least two whole seasons or are not eligible to join the Italian National team.

For the 2012/2013 season, clubs taking part in the men's A Championship shall fill out the referee's report so as to include no less than 16 players of A category and no more than 6 players of B category; clubs taking part in the Italian A2 Championship shall fill out the referee's report so as to include 20 players belonging to A category and 2 players belonging to B category maximum. Compared to the rules applicable during the previous season, the number of players of A category in the referee's report has grown.

### **3. THE MARITIME SECTOR**

The Ministry of Infrastructures and Transport adopted a decree establishing the procedure for access to the post of captain and chief mate on board ships flying Italian flag, implementing art. 292-bis of the Navigation Code. Access is conditional on the knowledge of Italian language and legislation. Captains and chief mates, who are nationals of a Member State and qualified in a Member State, can have access to posts on board ships flying Italian flag after passing an examination on Italian language and legislation. (Ministerial Decree 1-2-2012, *Programmi di qualificazione professione e procedure per la verifica della conoscenza della lingua e della legislazione italiana per le funzioni di comandante e primo ufficiale di coperta, a bordo delle navi battenti bandiera italiana, da parte dei cittadini comunitari, nonché individuazione dell'organismo competente allo svolgimento delle procedure di verifica dei requisiti ai sensi dell'articolo 292-bis del codice della navigazione*, OJ 8-2-2012 no. 32)

### **4. RESEARCHERS/ARTISTS**

Nothing to report.

### **5. ACCESS TO STUDY GRANTS**

The Accademia dei Lincei,<sup>17</sup> a public body which promotes scientific research, assigns study grants and awards, by open competition. Some competitions are open to Italian and EU nationals alike (but not to non-EU nationals who are members of the family of the EU or Italian

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<sup>17</sup> <http://www.lincei.it/>.

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nationals), while others are open only to Italian nationals. No reasons are given in the notice of competition.<sup>18</sup>

UNAR released a critical report on the law establishing grants for studying abroad. Law 30-11-1989 no. 398 makes access to grants for students who want to undertake post-graduate courses abroad conditional on Italian nationality. (Rep. 3-5-2012 no. 109)

### **6. YOUNG WORKERS**

Nothing to report.

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18 The list of notices is available at: [http://www.lincci.it/modules.php?name=Borse\\_premi&file=lista](http://www.lincci.it/modules.php?name=Borse_premi&file=lista).

## **Chapter VII**

### **Application of Transitional Measures**

#### **1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS**

Italy lifted the transitional arrangements regarding workers from A8 during 2006.

#### **2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA**

The transitional period for workers from A2, decided in 2007 for one year and subsequently renewed, ceased to produce its effects by the end of 2011. The Ministries of the Interior and for Social Solidarity made it clear that Italy decided not to renew the transitional period for the year 2012 (Prog. 35/0000620, 3-2-2012).

Many Bulgarian and Romanian nationals still lived in Italy, sometimes as irregular migrants, when the two countries became members of the Union. As EU citizens, they benefited from the rules regulating residence of EU citizens, and could regularise their situation, if they met the prescribed requirements. One non-intentional consequence of the change of their status, from irregular migrants to EU citizens, is the reduction of the healthcare services some of them are entitled to.

In fact, Article 35 of Legislative Decree 1998 no. 286 (the consolidated law on immigration) grants urgent and essential treatment in case of sickness or accident to foreigners who are in Italy, even if they do not fulfil the conditions for entry and residence. EU citizens who stay in Italy as workers can register with the Italian national health service and are treated as Italians. EU citizens who are not workers can register their residence if they have a comprehensive sickness insurance. EU citizens who do not come within those categories are in a worse position than irregular migrants. According to circular letter 19-2-2008 no. DG/RUERI/II/3152.P/1.3.b/1, issued by the Ministry for Health, EU citizens are in all cases entitled to emergency treatment and to treatment that cannot be postponed, among which is that related to minors and maternity protection (including abortion), and can also benefit of vaccination campaigns and treatment for contagious diseases. But they can not be treated for mild or chronic diseases, or buy medicine other than non-prescription medicines. A survey conducted by NAGA, a medical ONG, reckoned that in Lombardia (the richest among Italian Regions) there are between 20 to 40 thousand EU nationals who were entitled to health care services under Art. 35 of the consolidated law on immigration, but not as EU nationals, and can be treated only by volunteers (*Comunitari Senza Copertura Sanitaria*, March 2012).

## **Chapter VIII Miscellaneous**

### **1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFUE AND REGULATION 1612/68**

The national case-law on Regulation no. 1408/71/EEC is very abundant. On the contrary, Regulation no. 1612/68/EEC is seldom invoked in front of national judges in cases that involve social security allowances. As far as we know, during the reported period no discussion regarding the relationship between Regulation no. 1408/71/EEC or Regulation no. 883/04 and Regulation no. 1612/68/EEC has taken place, neither in legal writings nor in front of courts.

### **2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS**

As far as we know, during the reporting period no discussion regarding the relationship between Directive no. 2004/38/EC and Regulation no. 1612/68/EEC for frontier workers has taken place, neither in legal writings nor in front of courts.

### **3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS**

#### ***3.1. Integration measures***

The general legislation on immigration provides for the implementation of integration measures for foreigners. Since for the purpose of the said legislation foreigners are non-EU nationals, citizens of the Union do not benefit from integration measures. Nonetheless, some Regions have established integration measures, mainly in the field of social assistance and healthcare, which Union citizens in need can benefit from.

#### ***3.2. Immigration policies for third-country nationals and the Union preference principle***

The number of foreigners that can be admitted for working reasons is established yearly by way of a Decree of the President of the Council of Ministers (the so called '*decreto flussi*' – flows decree). For the year 2012, the following quotas are allowed: 35.000 entries for seasonal workers coming from the States listed in the decision and 4.000 non seasonal workers who completed a training and education program, organized by Italy in their country of origin (Decree 17-2-2011).

#### ***3.3. Return of nationals to new EU Member States***

The provisional outcome of the 2012-census shows that the number of foreigners having their habitual dwelling in Italy has grown to 2.434.629, that is 282%, in 10 years.

According ISTAT, the Italian Statistical Institute, foreigners keep on growing, albeit at a slower pace. At 1-1-2011, foreigners residing in Italy were 4.570.317. EU nationals are 29,2% of all foreigners, and amount to 1,3 million. In the list of the twenty biggest national groups, Romanian nationals rank first (968.576, +9,1%), Polish nationals ninth (109.018, +3,2), and Bulgarian nationals twentieth (51.134, +11,1%). EU-14 are 171.351.

#### **4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED**

Italy does not have a developed tradition of non-judicial bodies or in general of alternative dispute settlement proceedings. Besides the SOLVIT system, only the UNAR (*Ufficio nazionale antidiscriminazione razziale* – National office against racial discrimination) can be pleaded to. The victim of a discrimination on the ground of race or nationality can submit his/her case to UNAR, which can issue recommendations. As has been highlighted in some chapter of the present Report, UNAR has become very active, both in issuing reports and recommendations on its own motion, and in answering to private parties' complaints.

#### **5. SEMINARS, REPORTS AND ARTICLES**

Italian legal scholars do not devote much attention to the free movement of workers. The relevant articles dealing with specific problems, published during the reported period, have been quoted in the other chapters of the present report.

#### ***Legislation***

DECRETO LEGISLATIVO 1 settembre 2011, n. 150 Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69. (GU n. 220 del 21-9-2011 )

##### **Art. 1 – Definizioni**

1. Ai fini del presente decreto si intende per:

- a) Rito ordinario di cognizione: il procedimento regolato dalle norme del titolo I e del titolo III del libro secondo del codice di procedura civile;
- b) Rito del lavoro: il procedimento regolato dalle norme della sezione II del capo I del titolo IV del libro secondo del codice di procedura civile;
- c) Rito sommario di cognizione: il procedimento regolato dalle norme del capo III bis del titolo I del libro quarto del codice di procedura civile.

*omissis*

##### **Art. 3 –Disposizioni comuni alle controversie disciplinate dal rito sommario di cognizione**

- 1. Nelle controversie disciplinate dal Capo III, non si applicano i commi secondo e terzo dell'articolo 702-ter del codice di procedura civile.
- 2. Quando la causa è giudicata in primo grado in composizione collegiale, con il decreto di cui all'articolo 702-bis, terzo comma, del codice di procedura civile il presidente del collegio designa il giudice relatore. Il presidente può delegare l'assunzione dei mezzi istruttori ad uno dei componenti del collegio.

3. Fermo quanto previsto dai commi 1 e 2, quando è competente la corte di appello in primo grado il procedimento è regolato dagli articoli 702-bis e 702-ter del codice di procedura civile.

*Omissis*

Art. 5 – Sospensione dell’efficacia esecutiva del provvedimento impugnato

1. Nei casi in cui il presente decreto prevede la sospensione dell’efficacia esecutiva del provvedimento impugnato il giudice vi provvede, se richiesto e sentite le parti, con ordinanza non impugnabile, quando ricorrono gravi e circostanziate ragioni esplicitamente indicate nella motivazione.

2. In caso di pericolo imminente di un danno grave e irreparabile, la sospensione può essere disposta con decreto pronunciato fuori udienza. La sospensione diviene inefficace se non è confermata, entro la prima udienza successiva, con l’ordinanza di cui al comma 1.

*Omissis*

Art. 16 – Delle controversie in materia di mancato riconoscimento del diritto di soggiorno sul territorio nazionale in favore dei cittadini degli altri Stati membri dell’Unione europea o dei loro familiari

1. Le controversie previste dall’articolo 8 del decreto legislativo 6 febbraio 2007, n. 30, sono regolate dal rito sommario di cognizione.

2. E’ competente il tribunale del luogo ove dimora il ricorrente.

Art. 17 – Delle controversie in materia di allontanamento dei cittadini degli altri Stati membri dell’Unione europea o dei loro familiari

1. Le controversie aventi ad oggetto l’impugnazione del provvedimento di allontanamento dei cittadini degli altri Stati membri dell’Unione europea o dei loro familiari per motivi imperativi di pubblica sicurezza e per gli altri motivi di pubblica sicurezza di cui all’articolo 20 del decreto legislativo 6 febbraio 2007, n. 30, nonché per i motivi di cui all’articolo 21 del medesimo decreto legislativo, sono regolate dal rito sommario di cognizione, ove non diversamente disposto dal presente articolo.

2. E’ competente il tribunale, in composizione monocratica, del luogo in cui ha sede l’autorità che ha adottato il provvedimento impugnato.

3. Il ricorso è proposto, a pena di inammissibilità, entro trenta giorni dalla notificazione del provvedimento, ovvero entro sessanta giorni se il ricorrente risiede all’estero, e può essere depositato anche a mezzo del servizio postale ovvero per il tramite di una rappresentanza diplomatica o consolare italiana. In tal caso l’autenticazione della sottoscrizione e l’inoltro all’autorità giudiziaria italiana sono effettuati dai funzionari della rappresentanza e le comunicazioni relative al procedimento sono effettuate presso la medesima rappresentanza. La procura speciale al difensore è rilasciata altresì dinanzi all’autorità consolare.

4. Il ricorrente può stare in giudizio personalmente.

5. L’efficacia esecutiva del provvedimento impugnato può essere sospesa secondo quanto previsto dall’articolo 5. L’allontanamento dal territorio italiano non può avere luogo fino alla pronuncia sull’istanza di sospensione, salvo che il provvedimento sia fondato su una precedente decisione giudiziale o su motivi imperativi di pubblica sicurezza. Il giudice decide sull’istanza di sospensione prima della scadenza del termine entro il quale il ricorrente deve lasciare il territorio nazionale.

6. Quando il ricorso è rigettato, il ricorrente deve lasciare immediatamente il territorio nazionale.

*Omissis*

### ***Courts’ rulings***

*Cass. civ. Sez. I, Sent., 07-09-2011, n. 18384*

1.- Il Tribunale di Bologna, con decreto del 20.1.2009, ha accolto il ricorso proposto da L.F. (cittadina italiana) tendente ad ottenere il rilascio del visto di ingresso per ricongiungimento familiare in favore del fratello L.O. e la Corte di appello di Bologna, con decreto del 14.5.2009, ha accolto il reclamo del Ministero degli Affari Esteri, così revocando il provvedimento del Tribunale.

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Ha osservato la Corte di appello che L.F., conseguita la cittadinanza italiana, ha ottenuto il ricongiungimento con i suoi genitori pur non potendo ignorare che si sarebbe determinata una situazione di abbandono del fratello, affetto da malattia cronica invalidante. Talchè se L.O. si trovava nelle condizioni previste dal D.Lgs. n. 30 del 2007, art. 3, ciò era dipeso da scelte consapevoli e volontarie della sorella e siffatta situazione non era meritevole di tutela da parte dell'ordinamento giuridico.

Contro il provvedimento della Corte di appello L.F. ha proposto ricorso per cassazione affidato a un solo motivo.

Il Ministero intimato non ha svolto difese.

1.1.- La presente sentenza è redatta con motivazione semplificata così come disposto dal Collegio in esito alla deliberazione in camera di consiglio.

2.- Con l'unico motivo di ricorso la ricorrente denuncia violazione e falsa applicazione del D.Lgs. n. 30 del 2007, art. 3, comma 2.

Formula il quesito: se il D.Lgs. n. 30 del 2007, art. 3, comma 2, lett. a), che testualmente prevede 'Senza pregiudizio del diritto personale di libera circolazione e di soggiorno dell'interessato, lo Stato membro ospitante, conformemente alla sua legislazione nazionale, agevola l'ingresso e il soggiorno delle seguenti persone:

a) ogni altro familiare, qualunque sia la sua cittadinanza, non definito all'art. 2, comma 1, lett. b), se è a carico o convive, nel paese di provenienza, con il cittadino dell'Unione titolare del diritto di soggiorno a titolo principale o se gravi motivi di salute impongono che il cittadino dell'Unione lo assista personalmente;

richiede, ai fini della sua applicazione, che venga accertato che il soggetto richiedente il rilascio del visto di ingresso per ricongiungimento familiare non abbia determinato o concorso a determinare la situazione che impone che il cittadino dell'Unione assista personalmente il familiare che versi in gravi condizioni di salute'. 3.- Osserva la Corte che l'unico motivo di ricorso è fondato perchè il D.Lgs. n. 30 del 2007, art. 3, comma 2, lett. a), non richiede altro requisito - ai fini dell'esercizio del diritto al ricongiungimento con altro familiare diverso da quelli definiti all'art. 2 - che quello di essere a carico o di convivere, nel paese di provenienza, con il cittadino dell'Unione titolare del diritto di soggiorno a titolo principale ovvero la ricorrenza di gravi motivi di salute che impongano che il cittadino dell'Unione lo assista personalmente. Gravi motivi che il provvedimento impugnato espressamente riconosce come sussistenti ma erroneamente ritenuti neutralizzati da un precedente comportamento della cittadina italiana non contemplato dalla norma.

Il provvedimento impugnato, dunque, deve essere cassato con rinvio alla Corte di appello di Bologna per nuovo esame e per il regolamento delle spese.

P.Q.M.

La Corte accoglie il ricorso, cassa il provvedimento impugnato e rinvia per nuovo esame e per le spese alla Corte di appello di Bologna, in diversa composizione.

*Cass. civ. Sez. VI, Ord., 10-5-2012, n. 7203*

Il Collegio che il relatore designato nella relazione depositata ex art. 380 bis c.p.c. ha formulato considerazioni nel senso:

CHE il cittadino egiziano M.H.M.B., irregolarmente presente in Italia, in data 4.6.2007 contrasse matrimonio con cittadina italiana ma si vide rifiutare il 2.3.2009 il permesso di soggiorno per coesione familiare dal Questore di Genova al quale egli aveva proposto richiesta; il Tribunale di Genova adito fece applicazione del D.Lgs. n. 30 del 2007, art. 23 e pertanto, escluso rilievo al requisito della convivenza ed escluso carattere di ostatività automatica al permesso della riportata condanna per reato attinente agli stupefacenti, con decisione 30.9.2010 annullò il diniego ed ordinò il rilascio del permesso; la Corte di Genova, adita con reclamo del Ministero dell'Interno, andò di contrario avviso e con sentenza 18.5.2011 rigettò la opposizione del cittadino egiziano affermando che non dovesse

trovare applicazione il D.Lgs. 30 del 2007 afferente solo i diritti circolatori e non quelli di ingresso, che al ricongiungimento familiare faceva ostacolo ai sensi dell'art. 4, comma 3 novellato la sola registrazione della condanna penale indicata, che comunque difettava il requisito della convivenza essa dovendosi ritenere affatto cessata almeno 20 giorni prima dell'arresto del M. come si evinceva da dati inequivoci (i punti 1-2-3 della sentenza); CHE per la cassazione di tale sentenza il M. ha proposto ricorso il 18.6.2011 affidato a tre motivi ai quali si è opposto il Ministero con controricorso del 16.9.2011;

CHE il ricorso deve essere rigettato per manifesta infondatezza; CHE con riguardo al primo motivo, che censura la sentenza per non aver fatto applicazione alla specie, quindi escludendo il requisito della convivenza, del D.Lgs. n. 30 del 2007, artt. 2, 3 e 20 è ben vero che l'argomento adottato in sentenza afferente la attinenza del decreto alla sola 'circolazione' dei familiari dei cittadini comunitari è errato, ma è anche vero che, in tal guisa dovendosi correggere la motivazione della giusta decisione di rigetto, questa Corte ha affermato e ribadito che alla coesione familiare di extracomunitario con cittadino della U.E. non si applica altro che il T.U. di cui al D.Lgs. n. 286 del 1998 sino a che il predetto non abbia conseguito la carta di soggiorno di cui alla normativa del 2007, evento non occorso nella specie: Cass. 17346 del 2010 (massima) ha infatti affermato che il familiare coniuge del cittadino italiano (o di altro Stato membro dell'Unione europea), dopo aver trascorso nel territorio dello Stato i primi tre mesi di soggiorno 'informale', è tenuto a richiedere la carta di soggiorno ai sensi del D.Lgs. n. 30 del 2007, art. 10 e, sino al momento in cui non ottenga detto titolo (avente valore costitutivo per l'esercizio dei diritti nell'Unione europea), la sua condizione di soggiornante regolare rimane disciplinata dalla legislazione nazionale, in forza della quale, ai fini della concessione del permesso di soggiorno per coesione familiare (del D.Lgs. n. 286 del 1998, art. 19, comma 2, lett. C), e del D.P.R. n. 394 del 1999, art. 28), nonchè ai fini della concessione e del mantenimento del titolo di soggiorno per coniugio, è imposta la sussistenza del requisito della convivenza effettiva il cui accertamento compete all'Amministrazione ed è soggetto al controllo del giudice. CHE in relazione al secondo motivo è certamente errata la statuizione della Corte di Genova sulla ostatività automatica delle riportate condanne ad impedire il rilascio di un p.d.s. per coesione (così come avviene per il rilascio di un permesso per ricongiungimento). Il rinvio che l'art. 19, comma 2 del T.U. fa, quale clausola di esonero del divieto di espulsione e del connesso obbligo di rilascio del permesso per coesione familiare D.P.R. n. 394 del 1999, ex art. 28 non modificato dal D.P.R. n. 334 del 2004), all'art. 13, comma 1 del T.U. (contemplante casi di competenza ministeriale alla adozione della espulsione per motivi di ordine pubblico e sicurezza dello Stato), importa che in sede di rilascio del titolo per coesione familiare la ipotesi eccezionale escludente sia quella descritta. La situazione ostativa de qua non è quindi equivalente a quelle che, con varie ma ricorrenti formule, adottano le disposizioni dei D.Lgs. n. 30 del 2007, e D.Lgs. n. 32 del 2008 facendo richiamo, quali clausole ostative al ricongiungimento, al rinnovo od al rilascio di permessi per ragioni di famiglia del familiare di cittadino comunitario o quali ragioni poste a fondamento dell'allontanamento del cittadino comunitario o del suo familiare (motivi imperativi di pubblica sicurezza o motivi di pubblica sicurezza), essendo ben chiara la differenza, quanto a gravità ed a presupposti della situazione, tra le ragioni di pubblica sicurezza ed i motivi di sicurezza dello Stato o di ordine pubblico (tra le ultime Cass. 13972 del 2011). Ma nella specie l'errore di diritto sulla affermata ricorrenza di una causa di ostatività automatica al permesso per coesione, perde ogni rilievo stante la permanente validità delle affermazioni fatte dalla Corte in ordine alla inesistenza del requisito, positivo, della convivenza;

CHE infatti la Corte di merito ha fondato la sua valutazione su dati esaminati con attenzione e illustrati con proposizioni logiche (vd. pagg. 4 e 5 sentenza punti 1-2-3) nel mentre il terzo motivo del ricorso è affidato a generiche valutazioni ed a richiami privi di autosufficienza a 'copiosa istruttoria testimoniale' od alla invocazione di 'fatti notorii', di guisa che resta immune da censure la valutazione sulla cessazione della convivenza e quindi conservata la validità della affermazione per la quale, su tali premesse, il p.d.s. non spettava'; CHE ove si condivida il testè formulato rilievo, il ricorso può essere trattato in camera di consiglio e respinto per manifesta infondatezza.

OSSERVA

## ITALY

La relazione, ad avviso del Collegio, non fatta segno ad alcun rilievo critico da parte del ricorrente, deve essere pienamente condivisa. Segue il rigetto del ricorso e la condanna del ricorrente alle spese del giudizio in favore della contro ricorrente Amministrazione.

P.Q.M.

Rigetta il ricorso e condanna il ricorrente a corrispondere alla controricorrente Amministrazione le spese di giudizio che determina in Euro 1.000 oltre a spese prenotate a debito.

*T.R.G.A. Trentino-Alto Adige Trento Sez. Unica, Sent., 11-5-2011, n. 132*

Con ricorso ritualmente notificato e depositato, il cittadino tunisino A.B.A., in qualità di datore di lavoro nell'ambito della procedura prevista dal D.L. 1.7.2009, n. 78, ha impugnato il provvedimento del Direttore del Servizio Lavoro della Provincia autonoma di Trento di data 10 marzo 2010, con il quale è stata rigettata l'istanza di emersione dal lavoro irregolare presentata in favore del collaboratore familiare di nazionalità egiziana A.A.A.M..

Avverso tale provvedimento l'interessato ha formulato la seguente articolata censura in diritto:

1) erronea applicazione della legge, eccesso di potere e falsa rappresentazione della realtà in riferimento al disposto di cui all'art. 1 ter L. n. 102/2009 e art. 9 D.lgs. n. 286/1998.

Si sono costituite in giudizio sia la P.A.T., che l'Amministrazione dell'Interno, opponendo l'infondatezza del ricorso.

All'udienza pubblica del 7 aprile 2011 la causa è stata trattenuta in decisione.

Motivi della decisione

1. Occorre, anzitutto, premettere che la regolarizzazione concessa dal D.L. n. 78/2009 si inserisce pur sempre nel più generale contesto della disciplina dell'immigrazione, rispetto alla quale detta procedura si pone l'obiettivo di consentire e promuovere l'emersione del lavoro irregolare tra gli immigrati c.d. clandestini e a tal fine ne prevede, per l'appunto, la possibilità di regolarizzazione sotto il profilo delle norme sull'immigrazione.

In proposito, il D.L. 1.7.2009, n. 78, all'art. 1ter, comma 1, stabilisce che 'le disposizioni del presente articolo si applicano ai datori di lavoro italiani o cittadini di uno Stato membro dell'Unione europea, ovvero ai datori di lavoro extracomunitari in possesso del titolo di soggiorno previsto dall'articolo 9 del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286, e successive modificazioni, che alla data del 30 giugno 2009 occupavano irregolarmente alle proprie dipendenze, da almeno tre mesi, lavoratori italiani o cittadini di uno Stato membro dell'Unione europea, ovvero lavoratori extracomunitari, comunque presenti nel territorio nazionale, e continuano ad occuparli alla data di presentazione della dichiarazione di cui al comma 2, adibendoli:

a) ad attività di assistenza per se stesso o per componenti della propria famiglia, ancorché non conviventi, affetti da patologie o handicap che ne limitino l'autosufficienza;

b) ovvero al lavoro domestico di sostegno al bisogno familiare'.

2. Il ricorrente contesta, con un unico motivo di ricorso, il diniego all'accoglimento dell'istanza di emersione del rapporto di lavoro irregolare dallo stesso presentata in favore del collaboratore familiare di nazionalità egiziana A.A.A.M..

Al riguardo, si osserva che l'art 1 ter, D.L. n. 78/2009, intendendo ammettere, in via eccezionale, la sanatoria delle situazioni di molti stranieri irregolarmente occupati in attività di rilievo sociale, ha voluto dettare alcuni limiti derivanti, peraltro, dalle condizioni soggettive del datore di lavoro.

In particolare, la norma preclude l'accoglimento di istanze di emersione, e conseguentemente la regolarizzazione degli eventuali beneficiari, ove la presentazione di esse sia effettuata da quanti non godano della presupposta qualità di soggiornante di lungo periodo CE.

Nella specie, il titolo di soggiorno a validità quinquennale in possesso del sig. A.B.A. non è, contrariamente a quanto assunto dal deducente, equiparabile a quello previsto dall'art. 9 del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286.

## ITALY

Si deve infatti rammentare che, per un verso, il permesso di soggiorno CE per soggiornanti di lungo periodo, ai sensi del citato art. 9 D.Lgs. 286/1998, è attribuito a tempo indeterminato (salvi i rinnovi ordinari), sicché non è dato comprendere come possa il ricorrente ritenerlo assimilabile al proprio titolo di soggiorno di durata limitata a 5 anni; per altro verso, la norma appare assolutamente chiara e precisa nel richiedere il possesso di quella specifica tipologia di permesso di soggiorno, sottraendosi pertanto a qualsiasi manipolazione interpretativa.

Di conseguenza, a nulla rileva che il ricorrente soggiorni da tempo in Italia e sia allo stato in possesso di permesso di soggiorno quinquennale con scadenza nell'anno 2014.

Del resto, l'attuale posizione del ricorrente, che si correla allo status di cittadina italiana del coniuge sig.ra H.F., è riconducibile al combinato disposto degli artt. 10 e 23 del D.Lgs. 6.2.2007 n. 30. recante 'Attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri', stante l'applicabilità della vista disciplina ai cittadini extracomunitari che siano congiunti di cittadini italiani.

Dunque, in base a quanto previsto dall'art. 14 della ridetta normativa, il ricorrente potrà acquisire il diritto di soggiorno permanente, qualora abbia soggiornato legalmente in via continuativa nel territorio nazionale unitamente al proprio coniuge, già cittadino dell'Unione, al decorso dei cinque anni di validità della carta di soggiorno attualmente in suo possesso.

In definitiva, sussiste la vista condizione ostativa all'applicazione della legge sull'emersione.

3. Per le suesposte considerazioni, il ricorso non può quindi essere accolto.

Le spese del giudizio possono essere compensate fra le parti in causa, avuto riguardo alla particolarità della vicenda sopra definita.

P.Q.M.

Il Tribunale Regionale di Giustizia Amministrativa di Trento (Sezione Unica) definitivamente pronunciando sul ricorso n. 115/2010, lo respinge.

Spese del giudizio compensate.

### *Tribunale di Reggio Emilia, 13-02-2012*

Considerate la finalità del D.Lgs. n. 30/2007 (attuativo della direttiva 2004/38/CE) e le nozioni di 'matrimonio' e 'coniuge' secondo la Carta europea dei diritti fondamentali, se in uno Stato membro dell'Unione Europea due persone dello stesso sesso hanno contratto valido matrimonio la libera circolazione del cittadino e del suo familiare deve essere garantita anche quando la legge dello Stato membro ospitante o la legge nazionale dei coniugi non consente alle coppie omosessuali di accedere al matrimonio (nella specie, il giudice, annullato il provvedimento di diniego, ha riconosciuto il diritto al rilascio della carta di soggiorno in favore di cittadino uruguayano che aveva contratto matrimonio in Spagna con cittadino italiano dello stesso sesso e che aveva deciso di trasferirsi col coniuge in Italia).