

**REPORT**  
**on the Free Movement of Workers**  
**in Italy in 2010-2011**

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## Introduction

### *Outlook*

Free movement of persons is more and more perceived as a question of public security. The Government is still in search of a way for expelling all foreigners that do not fulfill the conditions upon which residence is conditional. At least part of the public opinion upholds this feeling and believes, for instance, that Roma shall be expelled, because they do not satisfy the conditions for staying. At the end of 2010, the Government submitted a draft-law to the Parliament, and in June 2011 adopted a Decree-Law, explaining to the press that expulsions will be made easier to decide and enforce. In reality, both acts (and the latter replaces the former) are mainly intended to ensure a better and more faithful transposition of Directive 2004/38/EC. The threat of an infringement procedure was the real boost for the Government. Among the amendments, it is worthy of notice that the entry visa shall not be required any more for the registration of the residence of the non-EU family members, following the *Metock* judgment of the Court of Justice.

Italian legislation established that the treatment of non-EU members of the family of Italian nationals is regulated by the rules applicable to EU citizens. By this means, reverse discrimination can be avoided. However, when dealing with non-EU members of the family of Italian nationals, judges not always interpret the law taking account of its Community origin. The risk is that this line of reasoning could extend to non-EU members of the family of EU nationals alike. Lower courts are often more faithful to EU law than last instance ones. For instance, the Supreme Court holds that the non-EU family member of an Italian national is within the scope of Legislative Decree no. 30 of 2007 only after s/he has been issued with a residence card, which does not have declaratory value but gives rise to the rights laid down by the law. Until then or when the residence card has not been issued for not fulfilling the prescribed conditions (for instance, as in the present case, for lack of a valid entry visa), the presence of the person concerned in the country is regulated by Italian law (judgment no. 17346 of 2010).

The principle of non-discrimination, on the ground of nationality or on any other grounds, is well established in Italian legislation. Nonetheless, each year judges have to decide cases of discrimination. Non-EU family members are the most affected group. Residence is more and more often required as a condition for access to employment or to benefits. The aim is to establish a stricter connection with the territory and to better allot scarce resources, of course, but foreigners are the mainly affected groups. Very often judges are ready to redress these cases.

The economic crisis and the efforts to reduce Italian public debt, the political distress of the Government, are all factors that can explain the stalemate and the conservative attitude of the country.

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

### *Text in force:*

Legislative Decree no. 30 of 2007, transposing Directive 2004/38/CE, amended, during the reporting period, by Decree-Law 23-6-2011 no. 89, in force from 24-6-2011.

In November 2010, the Government submitted a draft law amending Legislative Decree no. 30 of 2007 to the Parliament.<sup>1</sup> The draft law is headed ‘New provisions on public security’ and was presented to the press as a tool to enforce public security and to make expulsions easier. Some newspapers published shocking headlines, like ‘*Il Giornale*’: ‘*Ora possiamo cacciare i Rom*’ (Now we can turn Roma away) or ‘*Libero*’: ‘*Ecco la legge caccia-Rom*’ (Here is the law that turns Roma away). In reality, only Art. 7 of the draft dealt with EU citizens (one article out of ten) and amended Legislative Decree no. 30 of 2007. All the amendments but one aimed to avoid the threat of an infringement procedure. Only one amendment concerned expulsion (on the draft law, see the comments by B. Nascimbene, ‘Rom, rumeni e bulgari: una diversa applicazione delle norme dell’Unione europea sulla libera circolazione?’, *Il corriere giuridico*, 2010, p. 1546-1550).

The Parliament did not discuss the merit of the proposal.

In June 2011, the Government passed Decree-Law no. 89 amending Legislative Decree no. 30 of 2007, and containing almost all the provisions on EU citizens of the abovementioned draft law. The Parliament shall turn it into law within 60 days from publication, otherwise the decree loses effect from its inception.

According to the Constitution, the Government is empowered to adopt decree-laws only in extraordinary cases of necessity and urgency. The reasons given for the adoption of Decree-Law no. 89 of 2011 relate to the necessity of preventing an infringement procedure from being launched by the European Commission. The decree-law amends Legislative Decree no. 30 of 2007, implementing Directive 2004/38/EC, and transposes Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals into Italian legal order.

As far as EU citizens are concerned, 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>2</sup>

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<sup>1</sup> Draft Law (DDL) no. 2494, submitted to the Parliament on 13-12-2010.

<sup>2</sup> 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. These amendments were already contained in draft law no. 2494.

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- b) Some amendments relate to the means of proofing the status of member of the family (see Chapter II).<sup>3</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>4</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>5</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>6</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>7</sup>
- 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>8</sup>
- h) The Ministry of the Interior, Department of public security is the body in charge of providing information concerning previous police records to the requesting authority of another Member State, under Article 27, para. 3, of Directive 2004/38/EC.<sup>9</sup>
- i) One provision has not been introduced to correctly implement EU law, but aims to make expulsion orders grounded on lack of resources more effective: the Prefect is empowered to expel on grounds of public order a 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>10</sup> Before the amendment, not having complied with the expulsion order was a minor criminal offence.

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3 New Articles 3, para. 2, lit. b), 9 para. 5, lit. b), 10, para. 3, lit. b) of Legislative Decree no. 30 of 2007. These amendments were not contained in draft law no. 2494.

4 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. This amendment was already contained in draft law no. 2494.

5 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. This amendment was already contained in draft law no. 2494.

6 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. This amendment was not contained in draft law no. 2494. It aims to correctly implement Art. 14, para. 2, second sentence, of Directive 2004/38/EC.

7 New Article 20 of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. g, of Decree-Law no. 89 of 2011. These amendments were already contained in draft law no. 2494.

8 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. This amendment was already contained in draft law no. 2494.

9 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. This amendment was already contained in draft law no. 2494.

10 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. This amendment was already contained in draft law no. 2494.

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In the last years, some Italian Municipalities have decided that registration of residence of EU citizens was conditional on having available housing corresponding to particular health and sanitary conditions.

A group of EU citizens and foreigners challenged the decisions of the Municipalities of Lazzate, Lissone, Biassono, Seregno, Cogliate, Lesmo. The administrative tribunal of first instance declared the decisions null and void, because the Municipalities can not add any conditions to those established by Legislative Decree 2007 no. 30. (TAR Lombardia, judgment of 16-5-2011 no. 1238)

The decision of the Municipality of Calcinato was contested through collective anti-discrimination action. The judge found the decision to be discriminatory, because Italian nationals are not submitted to the same requirements, and ordered the Municipality to amend it. (Tribunale of Brescia, order of 31-3-2011)

### 1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Nothing to add to the previous year report:

‘As far as the worker is concerned, Legislative Decree no. 30 of 2007 does not state which documents the citizen of the Union is required to submit in order to prove his/her status. It only states that the citizen of the Union has to submit appropriate documentation to support his/her status (see Article 9). More details are provided for in the circular letter of the Ministry of the Interior no. 45 of 2007. The status of worker is proved by a pay slip, or a receipt for payment of pension contributions, or a work contract bearing the INPS (National Social Welfare Institution) and INAIL (National Institution for Insurance against Accidents at Work) code of the worker, or a communication of the hiring to the employment centre, or a receipt for the notification of the employment relationship to INPS; or a notification of the employment relationship to INAIL. The status of self-employed worker is proved by a certificate of registration in the register of the chamber of commerce, or a VAT number, or a certificate of registration with a professional association. The status of posted worker is proved by a declaration issued by the Italian branch of the parent company. The provision offers workers a wide range of documents to prove their status and shall be deemed in line with the spirit of EU law.

If the applicant is a Romanian or Bulgarian citizen, the ‘*nulla osta*’ required to work (when it is required: see Chapter VII) shall be attached to the application for residence (see circular of the Ministry of the Interior no. 19 of 2007). This document is not necessary if the applicant was already legally resident in Italy before the entry into force of the Accession Treaty (see circular of the Ministry of the Interior no. 45 of 2007).

Article 7 para. 3 of Legislative Decree no. 30 of 2007 transposes *Article 7 (3) of Directive 2004/38/EC* but states that when one of the four circumstances listed thereafter are met, the worker or self-employed person retains the right to reside and not the status of worker or self-employed person as required by the Directive. As far as the four circumstances, two points are worthy of comment. Firstly, the act states that the worker in involuntary unemployment retains the right to reside if s/he is registered with a ‘*centro per l’impiego*’ (employment centre) or has offered his/her availability to work within a new job, pursuant to Article 2 para. 1 of Legislative Decree no. 181 of 2000. Secondly, if the worker is in the condition of Article 7 para. 3 lit. c (worker in involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months), s/he retains the status of worker for one year (the Directive reads ‘for no less than six months’).

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Article 13 para. 3 lit. a-b) of Legislative Decree no. 30 of 2007 transposes *Article 14 (4 a-b) of the Directive*: workers and self-employed persons are therefore protected from expulsion except when the decision is based on reasons of public policy or public security.

Article 15 of Legislative Decree no. 30 of 2007 corresponds almost verbatim to *Article 17 of the Directive* (Exemptions for persons no longer working in the host Member State and their family). The only point worthy of notice is that while the Directive states that Union citizens ‘who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week’ acquire the right of permanent residence by way of derogation even though they do not fulfil the general requirements laid down in Article 16 of the Directive, the Legislative Decree states that, in order to benefit from this exemption, these Union citizens have to retain their place of residence in Italy, while being employed in another Member State, and have to keep on satisfying the conditions for registration into the population registry.

Article 19 para. 3 of Legislative Decree no. 30 of 2007 implements *Article 24 (2) of the Directive*. Under this provision, workers are entitled, even during the first three months, to those social benefits which are automatically connected to his/her job or are otherwise provided for by the law.’

## 2. SITUATION OF JOBSEEKERS

In last year Report we wrote:

‘As far as the job-seeker is concerned, whether s/he would be treated as a worker or as a non-worker, and therefore required to have sufficient economic resources, is not clear. Neither Legislative Decree no. 30 of 2007, nor the implementing circular letters devote specific provisions to the registration of the job-seeker’s residence. Nevertheless, the protection of the job-seeker from expulsion is stated (Article 13 (3) corresponding to Article 14 (4) of the Directive) and applies both if the Union citizen can prove that s/he has been registered with an employment centre for less than six months, or if s/he has offered her/his availability to work within a new job.’

Jobseekers can be registered as workers, as least if they have worked in Italy beforehand. A Romanian national who had worked under three fixed-term contracts and afterward registered with an employment centre (*Centro per l’impiego*) has been registered with the population registry as a worker (see *Lo stato civile italiano*, 2010, 2, 41).<sup>11</sup>

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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<sup>11</sup> The journal ‘*Lo stato civile italiano*’ (ISSN 17203228) is an interesting source of information. The publisher, SEPEL Editrice, is an enterprise providing services to the municipal offices of civil status and population registry. Officials of the population registries can submit questions to the journal and obtain authoritative, albeit not official, answers. Browsing the questions-and-answers section, an idea of the practical problems the local population registries are faced with comes out. The answers are not always the best from a EU perspective, but are quite interesting all the same.

### 3. OTHER ISSUES OF CONCERN

Nothing to report.

### 4. FREE MOVEMENT OF ROMA WORKERS

The status of Roma is a highly controversial subject, hotly debated and discussed, but still in search of a comprehensive approach. Roma and foreigners alike are perceived in the public discourse as public order problems. Notwithstanding this rather unsatisfactory background, the debate in some cases is serious and professional. The following initiatives are worthy of mention:

- in 2010 an academic conference on Roma took place in Milan (16/18-6-2010, ‘The legal status of Roma and Sinti in Italy’).
- in 2011 the Senate adopted a special report on Roma (*Rapporto conclusivo dell’indagine sulla condizione di Rom, Sinti e Caminanti in Italia*). The picture that comes out of it is quite a serious and worrying one. Roma seem to be widely discriminated and in all regards.
- UNAR, the Italian anti-discrimination body, launched a study on the condition of Roma.

170,000 Roma are reckoned to live in Italy, of which about 50% are Italian nationals, 25% citizens of the Union, and 25% third country nationals or stateless persons (mainly from the Balkans). The number of unaccompanied minor is rather high, even if the precise number is unknown. Nevertheless, it is widely believed that Roma are foreigners. This prejudice is widespread among media and public opinion, but even the public administration is not free from this prejudice, since Roma are within the scope of the Department of the Ministry of the Interior responsible for foreigners.

At national level no piece of legislation deals with Roma and addresses their case. The legal status of Roma people and the rights they enjoy depend on their nationality.

Eleven Regions out of twenty have adopted special legislation on Roma, mainly in order to address their housing problems and the management of the settlements where many Roma people live (40% of Roma are reckoned to live in camps). Due to political choices adopted at national level, Roma people are let to live in camps, which are often far from downtown and lack of regular public transportation connections. Mainly ONG and catholic organizations deal with Roma and take responsibility for them. State and Regions very often let these organizations find proper solutions for Roma people’s problems.

Reliable data on employment rate among Roma are lacking. Working opportunities for Roma are difficult, due to their low professional qualifications and the discriminations they face.

Roma are more concerned by some practices than the other foreigners: collective expulsions; past-and-copy individual decisions on expulsion; individual decisions on expulsion for lack of resources; financial incentives to voluntary return to their country of origin.

The housing situation of Roma is perceived as the main (and sometimes only) problem to address. In 2008 the new installed right-wing Government decided to close the illegal set-

tlements, even with recourse to force, and to improve the health and social standards of the legal ones. For these reasons, the Government appointed representatives in the Regions where the main settlements are located (Campania, Lazio, Lombardia, Piemonte, and Veneto), and vested them with special powers. The state of emergency, proclaimed till the end of 2008, has been subsequently extended and it will last till 31-12-2011 (see Decree of the President of the Council of Ministers, 17-12-2010, OJ no. 304 of 30-12-2010). Media covered the forced evictions of illegal camps and the Government presented each case as a success. This practice has been criticized by many national and international bodies.<sup>12</sup> The real problems turned out to be providing the people who lived in the camps with housing. Religious organizations very often played a fundamental role. On the contrary the decisions of the Government were often dictated by populist concerns. It is not immaterial that the Ministry of the Interior is an outstanding member of the Lega Nord, a xenophobic and racist political party, but essential for the survival of the Government. One case can be recalled as illustrative of the mixed feelings that the Roma issue involve.

The Municipality of Milan signed an agreement with a catholic ONG for the relocation of some families of Roma origin living in a camp. The deal provided for the rent of flats of social housing owned by the Municipality, that the ONG would put at the disposal of the families after renovating. The Municipal authorities suspended the implementation of the agreement after the public statement of the Ministry of the Interior according to which letting flats of social housing to Roma was unacceptable. The Roma families sued the Ministry and the Municipality, claiming to have been discriminated on the ground of their ethnical origin. The court upheld the claim (Tribunale of Milan, order of 20-2-2010) and the appeal of the public authorities was dismissed (Tribunale of Milan, order of 24-1-2011).<sup>13</sup> The court ordered the public authorities to put the flats at the disposal of the applicants.

It happens that EU citizens of Roma origin often do not register their residence under Legislative Decree no. 30 of 2007, implementing Directive 2004/38/EC. They can face difficulties in obtaining healthcare services. Some ONGs, as NAGA, provides unregistered foreigners with health services, but they can not provide them with healthcare services other than first aid. The unregistered foreigners receive first aid, but often can not buy medicines because they do not have the required prescription and pharmacies can not sell medicines (other than non-prescription medicines) to people without prescription.

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12 See for instance, ENAR, *Shadow Report 2009-10, Racism and Discrimination in Italy*; and *Supplemental report: Ethnic Profiling in Italy*; Human Rights Watch, *Every Day Intolerance. Racist and Xenophobic Violence in Italy*, 2011.

13 Both judgments are published in *Foro italiano*, 2011, I, 583 ff.

## 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 no. 89 of 2011, as far as means of proof are concerned (see below, para. 2).

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. Paradoxically, the Supreme Court has interpreted this provision in a way that brings to a result seemingly less favourable to the applicant than the general legislation on immigration, which would have been applied in the absence of the abovementioned Article 23.

By judgment of 1-3-2010 no. 4868, the Supreme Court said that, since Legislative Decree 2007 no. 30, which laid down the rules on family reunification of Italian nationals, provide for the reunification of the direct descendant of the applicant, that provision could not be interpreted as to encompass the minor whose custody the Italian national obtained in a third country (Morocco) under a customary rule called *kafalah*. By this line of reasoning, the Supreme Court accepted a discriminatory treatment of Italians compared to foreign nationals. In fact, it has followed a different approach when a non-EU foreigner applied for family reunification of a minor under *kafalah*. In that case, *kafalah* is considered as a valid assumption for family reunification under the general legislation on immigration (Corte di Cassazione, judgment of 28-1-2010 no. 1908).

By order of 17-12-2010 no. 25661, the Supreme Court said that the family members that are entitled to reunification under Legislative Decree 2007 no. 30 may not be interpreted broadly, as to encompass the sister of the applicant. In the present case the Court said that a sister was neither a member of the family under Article 2 of Legislative Decree no. 30 of 2007, nor under Article 3 (other family members), since the conditions therein established were not met. According to the Court, the obligation for the State to ‘facilitate entry and residence’ of the other members of the family entails that the person can be issued with a residence permit other than the one for family reasons, provided that the required conditions are met.

The search for a definition of family under EU law attracted much attention from legal scholars. See, for instance:

- E. Bergamini, ‘La famiglia quale oggetto di tutela nel diritto dell’Unione europea e nella giurisprudenza della Corte di giustizia’, *Diritto pubblico comparato ed europeo*, 2010, p. 457-471.
- G. Rossolillo, ‘Rapporti di famiglia e diritto dell’Unione europea: profili problematici del rapporto tra dimensione nazionale e dimensione transazionale della famiglia’, *Famiglia e diritto*, 2010, p. 733-741.

- A. Adinolfi, ‘Il diritto alla vita familiare nella giurisprudenza della Corte di giustizia dell’Unione europea’, *Rivista di diritto internazionale*, 2011, p. 5-32.

## 2. ENTRY AND RESIDENCE RIGHTS

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 partner, the durable relationship shall be ‘officially attested’, while before the amendment it should be ‘duly attested by the Union citizen’s State’ (new Article 3 para. 2, lit. b of Legislative Decree no. 30 of 2007). The amendment is to be welcomed, because the previous provision was unreasonably restrictive. As to the EU and no-EU members of the family, who do not enjoy by themselves of the right of residence, they shall submit a document issued by the relevant authority in the country of origin or 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 Union citizen, or proof of the existence of serious health grounds which require the personal care of the family member by the Union citizen (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 cases in which a family member has to prove his/her status, while the EU provision only apply to the other members of the family under Article 3, para. 2, lit. a).

The Ministry of the Interior, by circular letter 23-8-2010 no. 5493, lists the documents that foreign nationals shall produce as evidence of being the spouse of an Italian or EU national, when the marriage took place abroad. If the other spouse is an Italian national, a certificate of marriage issued by Italian civil registrars is required; if the spouse is a EU national, a certificate of marriage issued either by Italian civil registrars or by foreign civil registrars is required.

The difference in treatment can be explained – in the present rapporteur’s view – in that the civil status records of Italian nationals is kept and updated even when the individual is abroad or was born abroad, while foreigners are registered only when residing in Italy. Therefore, an Italian national getting married abroad under the law of the foreign country, produces his/her certificate of marriage issued by the local authorities to Italian consular or diplomatic authorities, who transmit it to Italian civil registrars for updating the Italian civil status records. On the other hand, a EU national can have his/her certificate of marriage recorded by Italian civil registrars only when residing in Italy.

TAR (Regional Administrative Tribunal) Campania, chamber III, judgment 28-1-2010 no. 458, *K.N. c. Comune di Napoli*: the applicant, an Ukraine woman married to an Italian man and holding a residence card as a family member of a Union citizen, challenged the refusal of the Municipality of Naples to grant her a maternity benefit under Art. 74 of Legislative Decree no. 151 of 2001. The Municipality justified its decision by saying that the applicant did not hold a long-term residence permit as required by Italian law. The judge

upheld the appeal. It said that the law asks for an effective and stable link between the applicant and the country as condition for allowing the financial benefit, and the residence permit held by the applicant, even if not mentioned by the law, is adequate evidence of such link.

As it appears from the previous lines, the judge did not make any reference to EU law, but resolved the case by referring to Italian laws and Constitutional provisions on the protection of the family.

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

One of the main problems in Italy is the treatment of non-EU family members of Italian nationals. Italy decided to avoid reverse discrimination by extending to non EU family members of Italian nationals the same treatment granted to non-EU family members of EU citizens. Since there are far more non-EU foreigners than EU foreigners, the case-law of Italian judges deals very often with non-EU foreigners. The *Metock* case is therefore very important and often quoted. The law now in force has been put in line with the *Metock* judgment by the amendments brought by Decree-Law no. 89 of 2011. Before the amendments, the entry visa has to be attached to the request for residence card, in case of residence for more than three months or of permanent residence, and having complied with the requirements for entry was necessary for residence for up to three months. The amendments repealed the requirement for the entry visa, and a valid passport will be the only document that the non-EU family member will need.

Even before the amendments, the Ministry of the Interior issued a second circular letter (after circular letter of 28-8-2009, quoted in last year Report) addressed to local authorities, pointing out that the law in force was not in line with EU law and should be disregarded. (circular letter 10-11-2010 no. 7645).

As in the previous years, first instance courts are ready to follow the *Metock* judgment and annul the decisions of refusal of residence due to the absence of an entry visa, or in case the applicant overstayed in the country (Court of first instance of Vicenza, decree 6-4-2010; Court of first instance of Asti, decree 30-7-2010; Court of first instance of Vicenza, decree 7-10-2010).

On the contrary, the Supreme Court rendered two judgments that seem not in line with EU law and with the lower courts case-law: Cassazione, Civil Branch, judgment 23-7-2010 no. 17346 and Cassazione, Criminal Branch, judgment 28-4-2010 no. 16446. In both judgments the Supreme Court stated that the residence card for non-EU family members, provided for by Legislative Decree no. 30 of 2007, transposing Directive 2004/38/EC, does not have declaratory value but gives rise to the rights laid down by the law.

The first case (no. 17346) is worthy of closer attention. The Court holds that the non-EU family member of an Italian national is within the scope of Legislative Decree no. 30 of 2007 only after s/he has been issued with a residence card. Until then or when the residence card has not been issued for not fulfilling the prescribed conditions (for instance, as in the present case, for lack of a valid entry visa), the presence of the person concerned in the country is regulated by Italian law. In that case, Art. 19 of the general legislation on immigration can

apply: the spouse of an Italian national shall not be expelled, and shall be issued with a residence permit for family reasons, only if the spouses live under the same roof.

On the judgement of the Supreme Court no. 17346 of 2010: P. Morozzo della Rocca, 'Sul coniuge di cittadino europeo (italiano) la Cassazione non si conforma alla giurisprudenza della Corte di giustizia', *Corriere giuridico*, 2010, p. 1582.

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

Italy did not transpose Article 35 of the Directive.

As already explained in last year Report, the Parliament amended the rules of the Civil Code on the marriage of the foreigner in Italy<sup>14</sup> in order to prevent the illegal foreigner from getting married in Italy and subsequently benefitting from the *Metock* ruling. Now it is clear that the provision does not apply to the EU national, but can apply to the non-EU family member of the EU citizen.

This provision attracted much attention also during the reporting period:

D. Berloco, 'I casi più ricorrenti di matrimoni tra cittadini e stranieri', *Lo stato civile italiano*, 2010, 3, p. 7-14.

P. Palermo, 'Diritto al matrimonio e "clandestinità": tra diritti fondamentali e discrezionalità del legislatore', *Famiglia e diritto*, 2010, p. 1155-1164.

#### 5. ACCESS TO WORK

As stated in last year Report, Article 6 para. 3 of Legislative Decree no. 30 of 2007 says that, subject to special regulations in line with the EC Treaty and EC laws, the family members of the Union citizen staying in Italy for up to three months, are subject to the same obligations as Italian nationals in the exercise of activities permitted by law.

Article 19 para. 1 of Legislative Decree no. 30 of 2007 states that the family members of the Union citizen who enjoy the right of residence or of permanent residence, are entitled to engage in employment or self-employment in Italy, with the exception of those activities that the law, in conformity with EC law, reserves to Italian nationals.

Besides these general provisions, a specific provision stating that the members of the family not having the nationality of a Member State are equated with Italian nationals as far as access to the public sector is concerned is missing.

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 lay outside the scope of application of the competition. The Court of first instance of Venezia (order of 8-10-2010) decided that the Albanian wife of an Italian national, holding a residence card under Legislative Decree no. 30 of 2007, is entitled with the right to participate to a competi-

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14 Under the new Article 116, each foreigner who wants to get married in Italy shall 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 must prove that her/his presence in Italy is legal.

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tion for access to a post of street educator called by the Municipality of Venezia. It argued that in not opening the competition to family members of EU and Italian nationals, the Municipality infringed the legislative decree, which asks for non discrimination of EU citizens and family members alike, in the access to employment (art. 19) and in general (art. 23).

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

No specific provision addresses this issue.

## Chapter III: Access to employment

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

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

RAI (Radiotelevisione italiana), the concessionary of the Italian public broadcasting service, published on its web site a notice of an open competition for the selection of professional journalists for its regional editorial offices. Among other requirements, the applicant shall be resident within the region for which the application is intended at the date of 20-7-2010, that is before the notice of competition (published on 1-9-2010), on pain of exclusion. No explanation nor reasons are given.

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

Nothing to report.

#### *1.2 Language requirements*

Language requirements are established for the access to both the public and the private sector in the Province of Alto Adige, where the German-speaking minority lives. In the *Angonese* case (C-281/98 [2000] ECR I-4139), the Court of Justice found that ‘Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State’. This particular diploma, named ‘*attestato di bilinguismo*’, was – and still is – regulated by Decree of the President of the Republic 1976 no. 752. During the reporting period the Decree no. 752 has been amended by Legislative Decree 14-5-2010 no. 86 (OJ 14-6-2010 no. 136), and now it is no more the only evidence of the required linguistic knowledge. Other certificates attesting the knowledge of German and Italian, or secondary school and University diplomas, issued by schools and Universities where courses are taught in Italian and/or in German, are deemed as equivalent to the ‘*attestato di bilinguismo*’. The provision does not explicitly state that the schools or Universities or institutions issuing the diploma or certificate shall be sited in Italy, but the literal interpretation leads to this result.

### 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. In order to guarantee the principle of equal conditions of access, competition notices should not re-

quire, as a rule, a fixed-term professional experience or a specific professional qualification in a particular field as a condition for participation in recruitment procedures. The principle has been reaffirmed during 2010 by the Constitutional Court, which found Regional laws providing for privileged access to public employment for specific categories of persons as illegal for breach of Article 97 of the Constitution (judgments 17-3-2010 no. 100: Regional Law of Campania; 13-5-2010 no. 169: Regional Law of Liguria; 4-6-2010 no. 195: Regional Law of Lazio).

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

The public employment is undergoing a major reform process and the Parliament has vested the Government with the power to amend Legislative Decree no. 165 of 2001, laying down the general legislation on the employment in the public sector. Within the aforementioned reform process, the President of the Council of Ministers issued a Decree establishing the rules on the access to management posts by way of open competition (DPCM 26-10-2010, published in the OJ 2-5-2011 no. 100). The posts are reserved to Italian nationals. Those who passed the open competition, before being hired, have to complete a six-month preparatory training period at a public administration of another Member State or at the European Union. At the end of the training period, the foreign administration shall report to the Italian administration on the evaluation of the performance of the Italian candidate. If the evaluation is good, the candidate is hired by the Italian administration.

Court of first instance of Bologna, judgment of 8-3-2011 no. 528/2010: a EU citizen brought an action for damage against the Ministry of the Interior, because it called a competition for 650 fixed-term posts as junior accountant at the one-stop-shops for immigration, open only to Italian nationals. The Court found that the Ministry infringed Article 39 EC (now Article 45 TFUE) and Article 19 of the Legislative Decree no. 30 of 2007, corresponding to Article 23 of Directive 2004/38/EC, and ordered it to pay an amount of money corresponding to the salary the applicant would have received from the time she had been hired to the date of her effective recruitment (since the Ministry offered her a different position).

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

See above, under para. 1.2.

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

See below, Chapter IX.

### 3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

Residence as a condition for access to employment: The Government enacted Legislative Decree no. 150 of 2009, establishing – among other things – that public administrations can require previous residence in a particular place, as a condition for access to the public sector, provided that this requirement is necessary in order to guarantee the performance of services otherwise totally unfeasible or at least unfeasible with the same results (whatever it means: neither the Parliament nor the Government have explained when this condition is satisfied). This provision enables public administrations to introduce residence requirements until then not allowed.

Administrative court of first instance, judgment of 7-2-2011 no. 241: the court said that when a public administration decides that residence shall be a condition for access to public employment or for obtaining additional points in an open competition, it is under an obligation to give reasons for its decision. Vague reasons are not acceptable. Instead, the public administration shall prove that residence is essential to adequately perform the tasks associated with the public post in question.

*Legal literature:*

- B. Gagliardi, ‘Libertà di circolazione dei lavoratori, concorsi pubblici e mutuo riconoscimento dei diplomi’, *Foro amministrativo: Consiglio di Stato*, 2010, 735-750 (comments on case C-586/08 [2009] *Rubino*. Short description of EU law on access to the employment in the public sector and on recognition of diplomas).

## Chapter IV: Equality of treatment on the basis of nationality

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

The labour legislation protects workers from discriminatory behaviours of the employer (see articles 15 and 16 of Law 1970 no. 300 the so called *Statuto dei lavoratori*).

Discriminations on the ground of nationality are also prohibited by Article 43 of Legislative Decree no. 286 of 1998 (consolidated legislation on immigration). Trade unions can challenge collective discrimination carried out by employers, in their name for the general interest (Article 44 para. 10).

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. A key role is attributed to the collective agreements as to establishment of working conditions (Article 24 of Legislative Decree no. 165 of 2001): economic treatment of employees in the public sector (both fundamental and accessory economic treatment), career advances and professional development in general, and determination of the tasks of the employees related to every kind of office in the Public Administration.

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>15</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.

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15 See Legislative Decree no. 109 of 1998.

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

As already pointed out in last-year report, in general terms, Italian legislation seems to be in line with EU law since the principle of non-discrimination for workers is well established. No case law is reported on Art. 7 (2) of Regulation 1612/68.

### ***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.

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

While nationality is seldom a condition for obtaining social benefits, residence is more and more employed, especially by local and regional authorities.

Sometimes, a long term residence is considered as a discrimination on the basis of nationality, because Italians can satisfy it more easily than foreigners. A series of benefits provided for local authorities have been successfully challenged for breach of the anti-discriminatory legislation. The judges declared as discriminatory and therefore illegal:

- the 10-year residence in Italy, of which five in the Region of Friuli-Venezia-Giulia, for receiving a one-off payment for any newborn baby or adopted child (Tribunale di Udine, order 29-6-2010 no. 530. The appeal of the Municipality of Latisana was rejected by order 15-11-2010);
- the 10-year residence in Italy and 1-year residence in the Region of Friuli-Venezia-Giulia, for applying for a financial contribution intended to compensate part of the rent due by the applicant (Tribunale di Udine, order 17-11-2010. The appeal of the Region of Friuli-Venezia-Giulia and by the Municipality of Majano was rejected by order 7-3-2011 n. 6344).

The Government has brought an action before the Constitutional Court against the Region of Friuli-Venezia-Giulia, because it passed a legislation requiring for a 36-month residence as a condition for access to social assistance benefits for persons in need of assistance. The Constitutional Court declared the requirement to be in breach of the Constitution (judgment of 7-2-2011 no. 40). It said that establishing objective requirements for the grant of benefits is necessary for the best allotment of limited resources. But excluding categories of people only taking the length of residence into account is not justified by the aim of the provision, which is to come to the relief of people in need of assistance.

On the contrary, the administrative tribunal of first instance considered a 5-year residence for access to social housing as justified (TAR Lombardia, chamber III, judgment of 15-9-2010 no. 5988). After having recalled EU law and ECJ case-law on residence as an obstacle to free movement, the judge held that the provision under review was not a measure that hindered the freedom of movement, but was justified according to the principles established by the Court of Justice. In fact, the requirement, which is applied in a non-discriminatory manner, is justified by imperative requirements in the general interest (to provide housing to household in need established in Lombardia); is suitable for securing the attainment of the objective which it pursues (avoiding abuses and leaving the Region adequate time to verify that the applications are well-founded); and does not go beyond what is necessary in order to attain it (since the Region can plan the allotment of its limited resources in advance and on long term basis). In any case, the judge added, a five-year period is not a long time, and even beforehand other social assistance measures are available to help release the economic needs.

INPS, Messaggio 30-4-2010 no. 11662: the National Social Welfare Institution – INPS – points out that the registration into the population registry is not a condition for payment of unemployment benefits to EU workers who satisfy the requirements laid down by the law.

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Submitting the payment to the registration into the population registry – INPS says – would be contrary to the free movement of workers and to Regulation 883/2004.

By this decision, INPS detached itself from the Ministry of the Interior, who in 2008 stated that the registration into the population registry was necessary for both non-contributory and contributory benefits. Unemployment benefits are contributory benefits.

INPS also asks local offices to reconsider of their own motion any requests for payment they dismissed because the applicant was not registered into the population registry.

## Chapter VI: Specific Issues

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

As already stated in last year Report, Italian law provides for maternity benefits, set in Articles 74 (*Assegno di maternità di base*) and 75 (*Assegno di maternità per lavori atipici e discontinui*) of Legislative Decree no. 151 of 2001 (*Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità*). These benefits are granted to women, who have their place of residence in Italy, for every child born or adopted.

In last year Report, we gave notice of the supposed obligation for a frontier worker to declare to the Revenue Authority any current account of more than €10.000 opened in a bank in the place of work. The frontier worker has subsequently been exempted from the obligation (Decree-Law 31-5-2010 no. 78, turned into Law 30-7-2010 no. 122). By resolution 128/E of 2010, the Revenue Authority made it clear that a frontier worker, for the purpose of the law, is a person who has worked abroad for more than 183 days per year, and is still employed abroad at December the 31 of the reference year.

### 2. SPORTSMEN/SPORTSWOMEN

#### Football

According to Article 40.6 of the Internal Regulation of the Italian Football Federation (*Federazione Italiana Giuoco Calcio – FIGC*) Italian football clubs can affiliate players who are resident in Italy and have never been affiliated to a foreign Federation, and, after approval of the Federal President, players coming from a foreign Federation, provided that the Federation of origin released an ‘international transfer’ indicating the professional or amateur qualification of the player in question. According to Article 40.7, clubs taking part in football championships, organized by the National Professionals’ League and by the Third Division (Serie C) National Professionals’ League, can affiliate players coming from a foreign Federation without limitations, provided that they are citizens of EU or EEA Member States. Clubs which are members of the Amateur National League can affiliate and field only one foreign non-professional player coming from a foreign Federation (irrespective of whether s/he holds EU or non-EU nationality). Italian non-professional players who are resident in Italy are treated as Italian players even if they come from a foreign Federation, and can be affiliated and field without restrictions.

The *Olympique Lyonnais* case (case C-325/08 [2009]) attracted much attention from legal scholars, even if the implications of the judgment for the Italian legal system have rarely been discussed.

S. Bastianon, ‘Da *Bosman* a *Bernard*: note sulla libera circolazione dei calciatori nell’Unione europea’, *Diritto dell’Unione europea*, 2010, p. 707-725.

M.T. Crotti, ‘Indennità di formazione e libera circolazione dei giovani calciatori professionisti’, *Diritto delle relazioni industriali*, 2010, p. 890-894.

- V. Capuano, 'La libera circolazione dei calciatori nell'Unione europea tra vecchie questioni e nuovi scenari: il caso *Bernard*', *Rivista italiana di diritto del lavoro*, 2011, II, p. 189-196.
- F. Siotto, 'Giocatori "promessa" e libera circolazione dei calciatori professionisti: la Corte di giustizia europea riconosce un indennizzo per la formazioni', *Rivista italiana di diritto del lavoro*, 2011, II, p. 197-201.

In connection with the *Olympique Lyonnais* case, the President of the Italian Football Federation rendered a press release, stating that the Federation will do its best to protect training colts.

### **Basketball**

Limitations apply on the foreign players that can be included in the referee's report (Article 51 of the FIP Regulation on competitions). Players which are qualified as players trained in Italy (*giocatori di formazione italiana*) can be included without limitation. This notion is not based on nationality considerations. To the contrary, the qualification of '*giocatore di formazione italiana*' is acquired by a player after having played for at least four successive seasons in the Italian Youth Championships, irrespective of her/his nationality. In general, EU athletes can be affiliated without restrictions, but there are some rules that apply only to EU players. Players affiliated to clubs taking part in the women's A1 championship can be transferred only to other clubs taking part in same championship and can not be lent to other clubs (Article 22 of the FIP Regulation on affiliation). Players affiliated to clubs taking part in the women's A2 championship can neither be transferred nor lent (Article 24 of the FIP Regulation on affiliation).

### **Volleyball**

The affiliation to the Italian Volleyball Federation (FIPAV) is open to athletes irrespective of their nationality, but the Affiliation's Regulation distinguishes between 'Italian athletes' and 'foreign athletes', and laid down rules that differ in some respects. Among Italian athletes are also foreigners as explained by Article 43. For instance, Italian athletes can be field by clubs without numerical restrictions, while athletes qualified as 'foreign athletes' can take part to Italian National A Championships only (Article 20.2).

### **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 2011/2012*: for instance, clubs taking part in the men's A 'Elite' Championship can include in the referee's report only two (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**

EU players can be affiliated (art. 41) but the Federal Council can set limitations to the number of foreign players that can be field, with the purpose of protecting national training colt (art. 42). In fact, clubs taking part in the National Championships have to include in the referee's report at least 50% of players coming from the national training colt (Regolamento organico, 2008).

## **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.

According to the Annual Federal Rules on Italian Ice-Hockey men's A Championship of the 2011-2012 season, every club taking part in the men's A Championship has to fill out the referee's report so as to include no less than 12 players of A category and no more than 10 players of B category. In any case, clubs must field 2 players belonging to B category point 3) and maximum 6 players belonging to B category point 2).

According to the Federal Annual Rules for the 2011/2012 season, clubs taking part in the Italian A2 Championship can field 19 players belonging to A category and 3 players belonging to B category maximum

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

The present writer could not find any useful information on the subject. The collective bargain agreement for the sector applies to all workers, irrespective of nationality.

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

The employment relationship in the cultural sector is not specifically regulated under the Italian legal system and the employment status of artists is not specifically defined. Therefore it is subject to the ordinary rules of the Italian Civil Code. An artist who works in Italy is qualified as a self-employed worker or as an employee depending on her/his individual situation. It does not seem that the legal status of an artist varies depending on her/his (Italian or EU) nationality and no case-law points to the contrary.

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

The new legislation on University education (Law 30-12-2010 no. 240) establishes a fund that will finance study grants according to merit. The rules shall be laid down by the Ministry for Education, University and Research, taking into account a number of parameters among which that 10% of the resources shall be reserved to students that are enrolled at a University sited in the Region of residence. Therefore, a residence criterion will be established in the future, as a prerequisite for benefitting of this particular kind of study grant.

#### **6. YOUNG WORKERS**

The new collective bargain for the services-producing sector establishes that apprentice's indentures can last 12 months more when the worker is a non EU national, providing that the employer offers him/her special opportunities to learn or improve the knowledge of the Italian language. This provision could conceal a discrimination at the detriment of non-EU family members of the EU citizen, because apprentices are paid less than the other worker and can be made redundant more easily.

## **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 is still in force. From a procedural point of view, the first decision lasted one year, but has been renewed four times since then, by decisions of the Ministries of the Interior and for Social Solidarity issued at the beginning of each year. The wording of the first decision is identical to that of the next ones.

The transitional period for 2010 has been established by the circular no. 2 of 20-1-2010, and for 2011 by the circular no. 707 of 23-1-2011.

Therefore, the entry for work reasons is not subject to any condition in the following areas: agriculture, tourism and hotel business; construction; domestic work and personal assistance; mechanical engineering; management and highly skilled work; seasonal work. The employment of Bulgarian or Romanian citizens in other areas is conditional upon a no objection certificate (*'nulla osta'*) issued by the one-stop-shops for immigration. The prospective employer shall submit a request for the authorization, attaching the conditions of work s/he is going to apply to the worker. Before deciding, the one-stop-shops for immigration shall ask the Provincial Labour Administration for its opinion on the contractual conditions applied to the contract of employment in the area in question. The worker provided with the *'nulla osta'* is not required to ask for a visa to enter Italy.

A Bulgarian or Romanian worker entering Italy during 2010 or 2011 who applies for registration of his/her residence with the municipal authorities has to prove that s/he is a worker and show the *'nulla osta'* when required. This requirement has been criticised, because the documents upon which the registration into the population registry is conditional are only those provided for by Directive 2004/38/EC, and for the purpose of the registration of residence, the work contract should be enough (question no. 1206, *Lo stato civile italiano*, 2010, 11, 33).

Romanian citizens have grown from 342.200 at 1-1-2007 to 887.763 at 1-1-2010; Bulgarian citizens from 17.461 at 1-1-2007 to 40.026 at 1-1-2010.

No case-law to report.

## **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. The Government has brought the Regional law of Toscana on this subject to the Constitutional Court, arguing that the subject matter was within the competence of the State and the laws were therefore against the Constitution. The Constitutional Court dismissed the claim (judgment of 7-7-2010 no. 269).

#### ***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 2010, the following quotas are allowed: 80.000 entries of seasonal workers, 4.000 entries of self-employed workers, 2.000 entries of foreigners who attended an education and training program organized by Italy in their country of origin (Decree 1-4-2010), and 98.080 entries for non-seasonal workers (Decree 30-11-2010). For the year 2011: 60.000 entries for seasonal workers (Decree 17-2-2011).

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

As of 1-1-2010 ISTAT (the Italian Statistical Institute)<sup>16</sup> reckoned 4.235.095 foreigners (+ 343.764 compared to 2009) legally residing in Italy. Among them, 1.241.348 (+ 109.581 compared to 2009) are citizens of the Union. The largest group are Romanians (887.763, + 91.286 compared to 2009). The second group among EU26 are Polish nationals (105.608, + 6.219 compared to 2009). On the contrary, EU14 nationals are only 169.147 (+4.451 compared to 2009).

All the first 21 national groups have grown, and Moldova nationals have grown more than the others (+18% compared to 2009).

On the contrary, ISTAT estimated that illegal foreigners who have a job in the black market have decreased (they were 377.000 in 2009, 30% less than the previous year).

The number of foreigners is still growing, but at a lower pace. There is no significant evidence that EU nationals are returning to their country.

There is evidence of financial incentives given to Roma people to come back voluntary to their country. Catholic ONG and some Regions are involved, but precise data are lacking.

## **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. In its 2010 Report, UNAR points out that complaints about racial discrimination of foreigners are growing.

As already stated in Chapter V, associations or bodies entered in a specific registry kept by the Ministries of Labour and of Equal Opportunities, can bring to courts discriminatory behaviors of public or private bodies in their name, when the victims can not be directly and immediately identified. Some associations like ASGI or Avvocati per niente which deal with immigration issues, have successfully undertaken such kind of *actio popularis*, from which citizens of the Union have benefitted, even though they were not the main concern of the associations.

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<sup>16</sup> See Istat, La popolazione straniera residente in Italia al 1° gennaio 2010, Roma 12-10-2010

## 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-Legge 23 giugno 2011, n. 89*<sup>17</sup>

Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari.

#### IL PRESIDENTE DELLA REPUBBLICA

Visti gli articoli 77, 87 e 117 della Costituzione;

Ritenuta la straordinaria necessità ed urgenza di emanare ulteriori disposizioni per completare l'attuazione della direttiva 2004/38/CE del Parlamento europeo e del Consiglio, del 29 aprile 2004, relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri, e di procedere al recepimento della direttiva 2008/115/CE del Parlamento europeo e del Consiglio, del 16 dicembre 2008, recante norme e procedure comuni applicabili negli Stati membri al rimpatrio dei cittadini di Paesi terzi il cui soggiorno è irregolare, al fine di scongiurare l'avvio di procedure d'infrazione nei confronti dello Stato italiano;

Vista la deliberazione del Consiglio dei Ministri, adottata nella riunione del 16 giugno 2011;

Sulla proposta del Presidente del Consiglio dei Ministri e del Ministro dell'interno, di concerto con i Ministri della giustizia, degli affari esteri, dell'economia e delle finanze e del lavoro e delle politiche sociali;

Emana

il seguente decreto-legge:

Art. 1 – Modifiche al decreto legislativo 6 febbraio 2007, n. 30, in materia di permanenza dei cittadini comunitari e dei loro familiari

1. Al decreto legislativo 6 febbraio 2007, n. 30, e successive modificazioni, sono apportate le seguenti modifiche:

a) all'articolo 3, comma 2, lettera b), le parole: «debitamente attestata dallo Stato del cittadino dell'Unione» sono sostituite dalle seguenti: «ufficialmente attestata»;

b) all'articolo 6, comma 2, le parole: «, che hanno fatto ingresso nel territorio nazionale ai sensi dell'articolo 5, comma 2» sono soppresse;

c) all'articolo 9:

1) dopo il comma 3, è inserito il seguente:

«3-bis. Ai fini della verifica della sussistenza del requisito della disponibilità delle risorse economiche sufficienti al soggiorno, di cui al comma 3, lettere b) e c), deve, in ogni caso, essere valutata la situazione complessiva personale dell'interessato.»;

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17 GU n. 144 del 23-6-2011, p. 1 ss., in vigore dal 24-6-2011.

## ITALY

2) al comma 5:

a) alla lettera a), le parole: «, nonché il visto d'ingresso quando richiesto» sono soppresse;

b) la lettera b) è sostituita dalla seguente: «b) un documento rilasciato dall'autorità competente del Paese di origine o provenienza che attesti la qualità di familiare e, qualora richiesto, di familiare a carico ovvero di membro del nucleo familiare ovvero familiare affetto da gravi problemi di salute, che richiedono l'assistenza personale del cittadino dell'Unione, titolare di un autonomo diritto di soggiorno;»;

d) all'articolo 10, comma 3:

1) alla lettera a), le parole: «, nonché del visto d'ingresso, qualora richiesto» sono soppresse;

2) la lettera b) è sostituita dalla seguente: «b) di un documento rilasciato dall'autorità competente del Paese di origine o provenienza che attesti la qualità di familiare e, qualora richiesto, di familiare a carico ovvero di membro del nucleo familiare ovvero del familiare affetto da gravi problemi di salute, che richiedono l'assistenza personale del cittadino dell'Unione, titolare di un autonomo diritto di soggiorno;»;

e) all'articolo 13, comma 2, è aggiunto, in fine, il seguente periodo: «La verifica della sussistenza di tali condizioni non può essere effettuata se non in presenza di ragionevoli dubbi in ordine alla persistenza delle condizioni medesime.»;

f) all'articolo 19, comma 4, dopo le parole: «previsto dalla normativa vigente» sono aggiunte, in fine, le seguenti: «, fermo restando che il possesso del relativo documento non costituisce condizione per l'esercizio di un diritto»;

g) all'articolo 20:

1) il comma 2 è sostituito dal seguente: «2. I motivi di sicurezza dello Stato sussistono quando la persona da allontanare appartiene ad una delle categorie di cui all'articolo 18 della legge 22 maggio 1975, n. 152, e successive modificazioni, ovvero vi sono fondati motivi di ritenere che la sua permanenza nel territorio dello Stato possa, in qualsiasi modo, agevolare organizzazioni o attività terroristiche, anche internazionali. Ai fini dell'adozione del provvedimento di cui al comma 1, si tiene conto anche di eventuali condanne pronunciate da un giudice italiano per uno o più delitti riconducibili a quelli indicati nel libro secondo, titolo primo del codice penale.»;

2) il comma 3 è sostituito dal seguente: «3. I motivi imperativi di pubblica sicurezza sussistono quando la persona da allontanare abbia tenuto comportamenti che costituiscono una minaccia concreta, effettiva e sufficientemente grave ai diritti fondamentali della persona ovvero all'incolumità pubblica. Ai fini dell'adozione del provvedimento, si tiene conto, quando ricorrono i comportamenti di cui al primo periodo del presente comma, anche di eventuali condanne, pronunciate da un giudice italiano o straniero, per uno o più delitti non colposi, consumati o tentati, contro la vita o l'incolumità della persona, ovvero di eventuali condanne per uno o più delitti corrispondenti alle fattispecie indicate nell'articolo 8 della legge 22 aprile 2005, n. 69, o di eventuali ipotesi di applicazione della pena su richiesta a norma dell'articolo 444 del codice di procedura penale per i medesimi delitti o dell'appartenenza a taluna delle categorie di cui all'articolo 1 della legge 27 dicembre 1956, n. 1423, e successive modificazioni, o di cui all'articolo 1 della legge 31 maggio 1965, n. 575, e successive modificazioni, nonché di misure di prevenzione o di provvedimenti di allontanamento disposti da autorità straniera.»;

3) al comma 4, primo periodo, le parole: «una minaccia concreta e attuale» sono sostituite dalle seguenti: «una minaccia concreta, effettiva e sufficientemente grave»;

4) al comma 9, primo periodo, le parole: «di ordine pubblico o» sono soppresse;

5) il comma 11 è sostituito dal seguente: «11. Il provvedimento di allontanamento per i motivi di cui al comma 1 è immediatamente eseguito dal questore qualora si ravvisi, caso per caso, l'urgenza dell'allontanamento perché l'ulteriore permanenza sul territorio è incompatibile con la civile e sicura convivenza. Si applicano le disposizioni di cui all'articolo 13, comma 5-bis, del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286.»;

h) all'articolo 21:

1) al comma 1 è aggiunto, in fine, il seguente periodo: «L'eventuale ricorso da parte di un cittadino dell'Unione o dei suoi familiari al sistema di assistenza sociale non costituisce automaticamente causa di allontanamento, ma deve essere valutato caso per caso.»;

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2) il comma 4 è sostituito dal seguente: «4. Nei confronti dei soggetti di cui al comma 1, che non hanno ottemperato al provvedimento di allontanamento di cui al comma 2 e sono stati individuati sul territorio dello Stato oltre il termine fissato, senza aver provveduto alla presentazione dell'attestazione di cui al comma 3, il prefetto può adottare un provvedimento di allontanamento coattivo per motivi di ordine pubblico, ai sensi dell'articolo 20, immediatamente eseguito dal questore.»;

i) dopo l'articolo 23 è inserito il seguente: «Art. 23-bis. (Consultazione tra gli Stati membri). - 1. Quando uno Stato membro chiede informazioni ai sensi dell'articolo 27, paragrafo 3, della direttiva 2004/38/CE del Parlamento europeo e del Consiglio, del 29 aprile 2004, il Ministero dell'interno - Dipartimento della pubblica sicurezza, attraverso i propri canali di scambio informativo, provvede a fornire gli elementi entro il termine di due mesi dalla data di ricezione della richiesta. La consultazione può avvenire solo per casi specifici e per esigenze concrete.».

Art. 2 – Modifiche all'articolo 183 - ter delle norme di attuazione, di coordinamento e transitorie del codice di procedura penale

1. L'articolo 183-ter delle norme di attuazione, di coordinamento e transitorie del codice di procedura penale, di cui al decreto legislativo 28 luglio 1989, n. 271, è sostituito dal seguente: «Articolo 183-ter. (Esecuzione della misura di sicurezza dell'allontanamento del cittadino di uno Stato membro dell'Unione europea e di un suo familiare). - 1. L'allontanamento del cittadino di uno Stato membro dell'Unione europea o di un suo familiare, di cui agli articoli 2, comma 1, lettera b), e 3, comma 2, lettera a), del decreto legislativo 6 febbraio 2007, n. 30, è disposto in conformità ai criteri ed alle modalità fissati dall'articolo 20 del medesimo decreto legislativo.».

*Omissis*

### ***Court rulings***

Cassazione, Civil Branch, judgment 23-7-2010 no. 17346

#### *Svolgimento del processo*

Con decreto depositato in data 6.5.2009 la Corte di Appello di Bologna, esaminando il reclamo proposto dal cittadino del (OMISSIS) E.H.M. contro il decreto con il quale il Tribunale di Ravenna aveva rigettato la sua opposizione al diniego frapposto dal Questore di Ravenna alla sua richiesta di rilascio di permesso di soggiorno per coesione familiare D.Lgs. n. 286 del 1998, ex art. 19, comma 2, lett. c) e D.P.R. n. 94 del 1999, art. 24 ha rigettato il reclamo. La Corte di merito ha, da un canto, rilevato che non emergeva alcuna prova della convivenza dello straniero con il coniuge L.B. cittadina (OMISSIS) ed anzi emergevano elementi per far ritenere tale convivenza affatto inesistente ed ha, dall'altro canto, affermato che l'invocato D.Lgs. n. 30 del 2007 (alla stregua del quale la convivenza non era più considerata requisito fondante il diritto del familiare straniero) non trovava applicazione al reclamante, cittadino del (OMISSIS). Per la cassazione di tale decreto lo straniero ha proposto ricorso del 6.7.2009, resistito dalle Amministrazioni intimato con controricorso, nel quale ha censurato sia la carenza di motivazione nell'aver affermato la mancanza di alcuna convivenza tra i coniugi sia nell'aver indebitamente escluso l'applicazione al 'familiare' del cittadino (OMISSIS) (e quindi dell'Unione Europea) dei diritti di ingresso e circolazione di cui al decreto del 2007 attuativo della direttiva 38/2004/CE, sia, infine, la sommarietà con la quale era stata liquidata la questione di legittimità costituzionale.

#### *Motivi della decisione*

Ritiene il Collegio che il ricorso debba essere rigettato se pur la motivazione in diritto della esatta decisione della Corte di Bologna necessita di correzioni.

In ordine alla prima questione, a carattere preliminare, posta dal ricorso, è immediato il rilievo che essa è stata disattesa dal decreto impugnato con l'incongruo asserto per il quale il decreto del 2007 si applicherebbe ai cittadini dell'Unione Europea e non al reclamante, cittadino del (OMISSIS): il giudice del

reclamo si è con tal proposizione del tutto sottratto dal considerare che la nuova normativa, dettata in attuazione della direttiva 2004/38/CE regola l'ingresso, la circolazione ed il soggiorno nel territorio dell'Unione non solo dei cittadini (non italiano) della stessa ma anche dei cittadini italiani e dei loro familiari, questi ultimi quali definiti all'art. 2.

Non è dunque irrilevante il problema posto in ricorso, e perverso non ignorato in alcune delle recenti statuizioni di questa Corte, nascente dalla constatazione per la quale tra detti familiari essendo compreso il coniuge e nessun ulteriore requisito essendo previsto, men che meno quello della contestuale- effettiva convivenza con il cittadino italiano (e quindi dell'U.E.), non è irrilevante chiedersi se dall'applicazione del D.Lgs. n. 30 del 2007 sia derivata la implicita abrogazione del disposto delle norme del T.U. (art. 19, comma 2, lett. C e art. 30, comma 1 bis introdotto dalla L. n. 189 del 2002, art. 29) che alla esistenza e permanenza di detta convivenza collegano il rilascio ed il mantenimento del titolo di soggiorno.

Ad avviso del Collegio certamente non è predicabile l'applicazione del D.Lgs. del 2007 le volte in cui venga chiesto, rifiutato ed impugnato, come nella specie, un permesso per coesione familiare (art. 19, comma 2, lett. C, T.U. e D.P.R. n. 394 del 1999, art. 28), posto che il diritto all'ingresso, alla circolazione ed al soggiorno per i familiari dei cittadini comunitari si pone, in termini certamente derogatori rispetto alla disciplina del T.U., le sole volte in cui l'extra comunitario familiare del cittadino (alla stregua delle 'definizioni' di cui al D.Lgs. n. 30 del 2007, non modificato per quel che qui rileva dal D.Lgs. n. 32 del 2008) abbia ottenuto i titoli che lo abilitano al soggiorno ed alla circolazione in Italia come in tutti i Paesi membri dell'Unione, e cioè, alla stregua del disposto degli artt. 10 e 17 del decreto del 2007, la Carta di soggiorno e la Carta di soggiorno permanente, titoli aventi valore costitutivo per l'esercizio dei diritti in tutta l'Unione (come già notato in Cass. 4868/2010 ed in Cass. pen. 16446/2010).

Anteriormente al rilascio del predetto titolo, il familiare extracomunitario del cittadino italiano (o di altro paese dell'Unione) ha diritto di ingresso per raggiungere il cittadino italiano, ove munito di passaporto e visto di ingresso, e di soggiornare per mesi tre (D.Lgs. n. 30 del 2007, art. 5, comma 2 e art. 6, comma 2), munito non già di 'titolo' (art. 6 commi 1 e 2: 'senza alcuna condizione o formalità') ma soltanto in forza del visto di ingresso autorizzante l'entrata nel territorio nazionale.

Non è data al familiare del cittadino alcuna possibilità di chiedere soggiorno superiore ai mesi tre (art. 7), facoltà riservata ai cittadini comunitari, al predetto familiare incombendo '...trascorsi tre mesi dall'ingresso nel territorio nazionale....' (art. 10, comma 1) richiedere la Carta di soggiorno anzidetta, e restando fermo che, sino alla data di entrata in vigore del D.M. disciplinante le modalità del rilascio, il titolo di soggiorno spettante allo straniero familiare è quello previsto dalla normativa vigente alla data di entrata in vigore del D.Lgs. n. 30 del 2007 ((art. 10, comma 1, ult. parte).

Certamente non è dunque sostenibile che le norme del T.U. del 1998 sul permesso per coesione o sulla revoca del p.d.s. familiare per sopravvenuta carenza di convivenza (art. 30 bis del T.U. aggiunto dalla L. n. 189 del 2002, art. 29) siano state abrogate dalla normativa del 2007, stante la totale diversità dei presupposti e degli ambiti di esse con l'applicazione di tal normativa risultando soltanto delimitato l'ambito applicativo. Del resto è significativo che nel 2009 con la L. n. 94 (art. 1, comma 22, lett. P) il legislatore sia intervenuto proprio sull'art. 19, comma 2, lett. C, non abrogandolo o modificandolo nella parte in cui postulava la convivenza (in conformità al D.Lgs. del 2007) ma soltanto restringendo il requisito di grado parentale.

E' dunque da affermare che per il 'familiare' - coniuge del cittadino italiano (o di altro Stato comunitario), entrato nello Stato accompagnando il cittadino ovvero che abbia raggiunto il medesimo con regolare visto di ingresso, trascorsi i primi tre mesi di soggiorno 'informale', è dato richiedere la Carta di soggiorno, concedibile ove sussistano i requisiti di cui all'art. 10, comma 3 del D.Lgs. del 2007, fermo restando che la sua condizione di regolare soggiornante resta interamente disciplinata, in attesa della Carta o anche in assenza della richiesta al Questore, dalla legislazione nazionale (perverso fatta salva anche dal comma 1 del ridetto art. 10).

Detta legislazione, come noto, impone per il rilascio del permesso per coesione familiare (situazione di inespellibilità immediata) e per il mantenimento di qualsivoglia permesso rilasciato per coniugio con

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cittadino italiano, il requisito della convivenza effettiva: siffatto requisito, collegato all'accertamento di fatto demandato all'Amministrazione e soggetto al controllo del Giudice, non può ovviamente predicarsi come dato omogeneo estensibile a tutte le relazioni familiari di cittadini dell'Unione (ed è razionalmente assente nella elencazione definitoria dell'art. 2 del decreto del 2007, attuativo della Direttiva CE già richiamata), posto che la Direttiva Europea muoveva da proposizioni definitorie uniformi ed affatto estranee ai contesti nazionali (sol che si pensi all'inclusione necessaria, tra i familiari, del partner effettuata dall'art. 2, comma 1-B-2 del decreto attuativo) sì da far ritenere impensabile considerare la convivenza coniugale quale requisito per la concessione del titolo europeo generale di soggiorno e circolazione (la Carta più volte richiamata).

Esso nondimeno conserva la sua evidente razionalità - quale requisito diretto a scoraggiare la celebrazione di matrimoni strumentali o di comodo - nel ridotto quadro temporale e procedimentale della concessione o della revoca del titolo di soggiorno nazionale (il permesso concedibile ai soli coniugi extracomunitari di cittadini italiani), un requisito i cui profili di fatto sono stati da questa Corte più volte definiti (da ultimo in Cass. 23598.06) e dei quali la Corte di merito ha fatto puntuale applicazione.

Nella specie, dunque, appare fuor di luogo il richiamo che lo stesso ricorso opera nei riguardi dei diritti nascenti dalla Carta di soggiorno, e della assenza, per il suo ottenimento, del requisito della convivenza, considerando che E.H.M. chiese in data 27.11.2007 permesso di soggiorno per coesione familiare (e non chiese nè poteva chiedere la Carta di Soggiorno), l'unico titolo nazionale che la stessa previsione transitoria del D.Lgs. n. 30 del 2007, art. 10, comma 1, u.p. lo autorizzava a richiedere, e per il cui ottenimento doveva sussistere il requisito della effettiva convivenza con il coniuge (OMISSIS).

Poiché dunque la Corte di merito ha, con motivazione congrua e logica, fatta segno in ricorso a mere proposte di rivalutazione dei fatti, escluso detta convivenza, e poiché il rapporto tra la norma del T.U. sull'immigrazione e quella del decreto delegato del 2007 è stato ricostruito in termini di integrazione di ambiti immuni da alcun sospetto di incostituzionalità, ne consegue il rigetto del ricorso.

La novità della questione induce a compensare le spese tra le parti.

P.Q.M.

Rigetta il ricorso e compensa per intero tra le parti le spese del giudizio di legittimità.