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VULNERABILITY OF UNACCOMPANIED FOREIGN MINORS AND LIMITS OF EXISTING PROTECTIONS

SUMMARY: 1.Introduction. – 2.Who is unaccompanied foreign minor? – 3. The recognized rights by the Italian law 47/2017. – 4. The problems of unaccompanied foreign minors between “Immigration and Security” Italian decree legislative 113/2018 and the Covid-19 pandemic. – 5. Conclusions. – 6. Bibliography.

The essay analyzes the Italian law 47 / 2017 about the protections of unaccompanied foreign minors. The goal of the Italian legislator was to recognize the same rights as Italian or European Union children: the right to listening, to health, to education, and in particular, the right to grow and be educated within a family, possibly his own.

But the Covid-19 pandemic has further accentuated the numerous problems affecting unaccompanied foreign minors. In the lockdown period, young people, mostly adolescents who must be able to learn a new language, train themselves, become independent from a working and housing point of view, once they come of age, have witnessed helplessly the sudden interruption of their inclusion.

From the analysis emerges that it is necessary an European approach that overcomes the differences between the reception regulations existing in the various Member States to achieve the best interests of the child, a fundamental principle of the international legal system.

1. *Introduction.*

In Italy the need to guarantee the best interests of the minor has extended to unaccompanied foreign minors, with law 47/2017¹. The Convention on the Rights of

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¹ L.7 april 2017, n. 47 *Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati*: in doctrine F. DI LELLA, *Minori stranieri non accompagnati: strumenti privatistici per la tutela delle identità culturali*, in *Dir. e relig.*, 2, 2018, p.209 ss.; A. THIENE, *Minori stranieri non accompagnati. Compiti e responsabilità del tutore volontario entro e oltre la scuola*, in *www.annali online della didattica e formazione del docente unife.it*, 10, 2018, p. 111 ss.; G. CARAPEZZA FIGLIA, *Tutela del minore migrante ed ermeneutica del controllo*, in *Dir. fam. pers.*, 2018, p. 223;

the Child was thus implemented, which placed the interest of the minor at the center. It also recognizes itself the Nice Charter which, in addition to the general principle of equality, pursuant to art. 21, prohibits any form of discrimination based on birth, in art. 24 indicates, in par.1, among the rights of the child that to receive care and protection, functional to his well-being and in par. 2 states that in all acts, which concern minors, whether they are carried out by public authorities or private institutions, the best interest of the same must be considered paramount².

The legal recognition reserved for minors, and not all migrants, is based on the condition of their greater vulnerability³. The Italian law 47/2017 attributes a series of rights to minors, for the obvious purpose of achieving effective integration of the same, through a strengthening of the existing protections, and the guarantee of uniform application of the rules for reception throughout the national territory. The art. 1, par.1, recognizes, "on equal terms with minors of Italian or European Union citizenship".

This legislation implements the principles established by the UN Convention which in art. 3, par. 1, substantially reproduced by Article 24 of the Nice Charter, has sanctioned that in all decisions taken by public and private institutions, the interest of the minor must be considered paramount. In art 10, par. 1, states that any request, presented by a child or his parents, in order to enter a State Party or to leave it for the purpose of family reunification, must be considered "with a positive spirit, with humanity and diligence", specifying, in par. 2, the right to leave your country and to return to it, committing the acceding States, pursuant to art. 11, to take measures to prevent illegal movements.

C. I. MARTINI, *La protezione del minore straniero non accompagnato tra accoglienza e misure di integrazione*, in *Nuove leggi civ. com.*, 2018, p. 385 ss.; A. ANNONI (edited by), *La protezione dei minori non accompagnati al centro del dibattito europeo e italiano*, Naples, 2018; generally A. CORDIANO, *Prime riflessioni sulle nuove disposizioni in materia di misure di protezione dei minori stranieri non accompagnati*, in *Nuova giur. civ. comm.*, 2017, p. 1299 ss.; R. SENIGAGLIA, *Considerazioni critico-ricostruttive Su alcune applicazioni civilistiche della disciplina sulla protezione dei minori stranieri non accompagnati*, in *www.juscivile.it*, 2017, p. 710 ss.; M. CONSITO, *I procedimenti amministrativi sul riconoscimento allo straniero degli status di protezione internazionale*, in *Dir. amm.*, 2017, p. 393 ss. For the previous system: R. CARDIN, L. MANCA, V. R. PELLEGRINI (edited by), *I minori stranieri in Italia*, Roma, 2014; P. MOROZZO DELLA ROCCA, *I minori non accompagnati*, in *Trattato di diritto di famiglia* directed by P. ZATTI, VI, in L. LENTI (edited by), *Tutela civile del minore e diritto sociale della famiglia*, Milan, II, 2002, p. 1301 ss..

² S. BESSON, *The principle of non discrimination in the convention on the rights of the child*, in *The international journal of children's right*, 2005, p.433 ss.

³ H. HAKER, M. GREENING (edited by), *Unaccompanied Migrant Children. Social, Legal, and Ethical Perspectives*, Lanham-Boulder-New York-London, Lexington Books, 2019, p. 1ss.

2. *Who is unaccompanied foreign minor?*

The legal recognition reserved for minors, as such and not for all migrants, generally considered, is obviously based on the condition of their greatest vulnerability⁴.

The expression “unaccompanied minor”, pursuant to art. 2, Legislative Decree no. 142/2015, c.d. *welcome decree* and art. 2, l. 47/2017, indicates the citizen of States, not belonging to the European Union or stateless, under the age of eighteen, who is for any reason, in the national territory, without assistance and legal representation.

The Supreme court⁵ has sanctioned how, based on art. 2 of the l. n. 47/2017, the unaccompanied foreign minor must be without assistance and representation, by parents and other legally responsible adults, in accordance with the laws of the Italian legal system. The use of the conjunction “and” - observes the Court - indicates the necessary competition of both conditions: the first, relating to the profile of material assistance, understood as the absence of subjects who have care, custody and ensure well-being of the minor; the second, relating to the profile of legal representation, understood as the absence of subjects representing the minor and for this reason they are formally responsible.

A fundamental step is the identification of the minor: art. 5 of Law 47/2017, introduced a homogeneous procedure in the national territory, suitable to overcome the differences of territorial practices, previously existing. This represents a fundamental step, since the possibility of applying protection measures depends on the assessment of the minor age. The assessment is necessary where it is not possible to identify the parents, also through the documentation existing in the country of origin or in the presence of reticent behavior by adults linked, in various capacities, with the minor. There is a tendency for many young foreigners to declare an age less than eighteen. This is because the protections provided by the legislator stop at the age of majority. This is an aspect that reveals a limitation of the existing legislation, since many young people who, despite having passed the age of majority, are still in an uncomfortable situation, are excluded from the application. It cannot fail to be highlighted, in fact, just as a series of rights and protections provided for by law 47/2017, are not reserved for adults, there is a tendency for many young foreigners to declare an age lower than that of eighteen and this further accentuates the difficulties of assessment. This is a datum that reveals a limit of

⁴ K.DE GRAEVE, *Classed landscapes of care and belonging: Guardianships of unaccompanied minors*, in *Journal of Refugee Studies*, 30(1), 2017, p.71 ss.

⁵ Sup. Court, sez. VI, 5 march 2019, n. 9199.

the existing legislation, as many young people who, despite having passed the age of majority, are still in an uncomfortable situation, despite being over the age, are excluded from the application.

In the presence of a minor, it is necessary to evaluate which solution is most appropriate to his interest: ex art. 403 of the Italian Civil Code, in fact, public intervention is mandatory, aimed at placing it in a “safe place”. Significant rules, introduced from a procedural point of view, which aim to implement the Dublin regulation⁶: pursuant to art. 11, at each Juvenile Court, the institution by the regional guarantors for children and the adolescence of a list of voluntary guardians, who are willing to assume the protection of an unaccompanied foreign minor.

The voluntary guardian is an important support figure in the process of reception and progressive integration of the minor, as he is assigned, according to the case, the task of assisting or replacing the minor in all those activities aimed at making full exercise effective of rights. The dialogue between the minor and institutions, put in place by the guardian, allows, for example, to facilitate the activation of family investigations, without prejudice to the recognition of the right to the possible appointment of a trusted lawyer, making use of free legal aid at the expense of the State, in each state and degree of the procedure, pursuant to art. 16, l. 47 / 2017.

3. *The recognized rights by the Italian law 47/2017*

In addition to the attribution of a series of procedural guarantees, the legislative process, starting from the initial discipline of forms of reception⁷, has

⁶ J.P. BREKKE, G. BROCHMANN, *Stuck in transit: secondary migration of asylum seekers in Europe, national differences, and the Dublin regulation*, in *Refug. Stud.*, 2015, 28, p. 145 ss..

⁷ The reception structure must meet minimum standards of services and assistance, functional to the needs of the minor and be authorized or accredited, in accordance with national and regional legislation: v. CGUE, Gr. Ch., 8 May 2018, C 82/16, in www.curia.europa.eu; ECHR, sez. V, 29 May 2019, *Khan c. France*, c. 12267/16; EU Court.H.R., sez. I, 13 June 2019, *Sh.d. and others c. Grèce, Austria, Croatia, Hungary, Macédoine, Serbia and Slovaquie*, c. 14165/16, in relation to the case of Afghan citizens, who entered in Greece in 2016, as unaccompanied migrant minors. The judges of Strasbourg have declared Greece's violation of art. 3 EU Convention of H.R. (prohibition of inhuman or degrading treatment) for conditions of detention in various police stations, as well as in relation to the permanence in an absolutely unsuitable field, without sanitation. The Court found that all that could reasonably be expected to fulfill the child protection obligation had not been done. Protection obligation was incumbent on the state, above all, in relation to persons particularly vulnerable for young age such as the applicants. The ECHR also recognized the violation of art. 5, which protects the right to freedom and security, to the detriment of the then migrant minors, since their placement at police stations meant an illegitimate deprivation of liberty.

been directed towards integration policies that are expressed in the recognition of a series of rights to the minor. The right to health care, education and listening, recognized to unaccompanied foreign minors constitute tangible proof of the integration process started in Italy.

The right to health care is achieved through the extension of the registration to the National Health Service, which the previous legislation considered mandatory only for minors with a residence permit, also pending the issue of this permit.

The right to education is incentivized through the adoption of specific measures by educational institutions and training institutions, suitable to facilitate the fulfillment of compulsory education by minors.

The right to listen, in the administrative and judicial procedures involving the minor, even in the absence of the guardian, however, is not always fully realized, and yet nevertheless performs a basic function for understanding the effective needs of the minor and activating the consequent protections. In this regard, one cannot fail to underline how, for the accomplished exercise, the role of the guardian or the manager of the reception center is central, which must have the sensitivity to understand precisely by listening, if the minor needs a possible emotional and psychological assistance to which, also entitled, pursuant to art. 15 l. 47/2017.

But among the rights guaranteed also to the foreign minor, on an equal footing with the Italian minor, is to be mentioned, above all, that of growing up and being educated within a family and, possibly, their own.

Although, as previously pointed out, there is an objective divergence between the notion of “state of abandonment” and the situation of “unaccompanied” foreign minor, also in this case the legislator expresses a preference, compared to being placed in a host community (art 6), towards custody within a family or in a family type community⁸.

Based on the objective data, according to which the family environment constitutes a privileged location for a balanced and harmonious psychophysical development of the minor, art. 7 of Law 47/2017, modifying art. 2 of L. May 4, 1983, n. 184, which provides for family custody for the minor temporarily without an autonomous family custody, provides that, without further burdens for public finance, local authorities can “promote the awareness and training of carers to encourage the family custody of unaccompanied foreign minors, as a priority compared to being admitted to a reception facility “. In this sense, in implementation of the directive on reception conditions, as far as possible,

⁸ A. SIRRIYEH, *Hosting strangers: Hospitality and family practices in fostering unaccompanied refugee young people*, in *Child & Family Social Work*, 2013, 18(1), p.5ss.

we tend to keep the brothers together, limiting changes of residence to the indispensable. These provisions are inserted in the furrow of the l. October 19, 2015, n. 173 that, also modifying art. 44, l. May 4, 1983, n. 184, provides for the right to the “affective continuity” of children and, therefore, the possible transition to adoption in the presence of a minor orphan of the parents by persons joined to the minor by kinship up to the sixth degree or by a pre-existing stable relationship and lasting also accrued in the context of assignment procedures.

Similarly to the Italian minor, placed in a custody situation, the optimal solution could be that of an adoption by the foster children, if the needs, which led to the separation from the biological family, even if not in a completely radical way, subsequently they may cease to be temporary. A possible interruption of the educational and emotional relationship with the carers, may not be responsive to the actual interest of the minor.

4. *The problems of unaccompanied foreign minors between “Immigration and Security” decree legislative 113/2018 and the Covid-19 pandemic .*

The implementation of these principles, with L. 47/2017, has thus allowed the European Commission to affirm that “Italy guarantees unaccompanied foreign minors adequate legal protection both at an organizational-administrative level and on the legislative level “ , and to file an infringement procedure against Italy, launched by UE in 2013.

The Italian law, 47/2017 had the merit of introducing integration measures, in a long-term perspective for the new adult, in order to guarantee him support in view of achieving autonomy. The benefits, which derive from the provisions contained therein, currently do not seem to risk undergoing a turnaround, despite the addition of a broader context of reform, aimed at preventing or limiting the reception of migrants.

The c.d. immigration and security decree legislative 113/2018, which was partly repealed with the Immigration decree passed by the Council of Ministers on 5 October 2020, has canceled protection for humanitarian reasons, of which a great use has been made in recent years, but has kept the protections reserved for minors in consideration of their vulnerability⁹.

⁹ D.L. 4 october 2018 n. 113, converted, with modifications, with the law december ,1, 2018 n. 132, it introduced a form of protection, limited to “special cases”, lasting one year, which cannot be converted into a residence permit, in the absence of stable accommodation. Further limitations have been made to the right to asylum and the links of the SPRAR, the system for the reception of asylum seekers and refugees, renamed SIPROIMI . Access, previously granted to asylum seekers

In the so-called “Special protection”, which replaces humanitarian protection, in addition to minors, it is not so obvious that new adults and families with vulnerabilities are included, for example because they are victims of trauma and violence and in need of support¹⁰.

The Covid-19 pandemic has further accentuated the numerous problems affecting unaccompanied foreign minors. In the lockdown period, young people, mostly adolescents who must be able to learn a new language, train themselves, become independent from a working and housing point of view, once they come of age, have witnessed helplessly the sudden interruption of their inclusion with the suspension of work or training placements, finding themselves without financial resources and with difficulties in renewing or converting residence permits.

A setback that occurred in an already very difficult period, due to an ever greater closure of borders and European and national policies ranging from push-backs along the Eastern European border to the closure of Mediterranean ports.

5. Conclusions

It is necessary that the migration phenomenon be addressed through a political direction that, regardless of the specificities of the individual European countries, translates into organic legislation¹¹. In fact, in the resolution of 12

and to those who have been granted an application for international protection, refugee status or subsidiary protection, will now cover holders of international protection or “special” residence permits and foreign minors not accompanied. Among the “special cases”: medical treatment, domestic or work-related violence, provided that the worker has made a report, situations of “contingent and exceptional calamity”, which do not allow the person to return to and stay in the country of origin in conditions of security, acts of “particular civil value”, cases in which expulsion or rejection to a State is not possible, where the applicant may be subject to persecution for reasons of race, sex, language, nationality, religion, political opinions, personal or social conditions or where he may be subjected to torture. A doubling of the period of detention, in detention centers has been foreseen, the funds for repatriation have increased, the possibility of providing detention at the border or, in any case, the extension of the crimes that preclude the possibility of obtaining asylum in Italy.

¹⁰ But the Italian Court of Cassation, section II Civil, with ordinance n. 19253/20, filed on September 16, 2020, established that “for the purposes of granting a residence permit for humanitarian reasons, a situation of typical vulnerability of European origin and implemented by the Italian legislation currently in force is also that of single parents with minor children

¹¹ UNICEF, *Uprooted. The Growing Crisis for Refugee and Migrant Children*, 2016, New York.; B. PARUSEL, *Unaccompanied Minors in Europe: Between immigration control and the need for protection. In Security, Insecurity and Migration in Europe*; Lazaridis, G., Ed.; Ashgate: Farnham, UK, 2011 p. 139 ss..

J.M. LÓPEZ, *La necesidad de un protocolo común en Europa sobre la detención de menores extranjeros no acompañados*, in *Rev. de Derecho Comunitario Europeo*, 17, 2013, 1061ss.; J. BHABHA, *Child migration and human rights in a global age*, 22, 2014., Princeton University Press.

April 2016, on the situation in the Mediterranean, the need for a common approach by EU migration policy emerges.

If, from a market point of view and, therefore, depending on the achievement of substantially economic interests, the Union has managed to adopt homogeneous legislation, which guarantees, on the one hand, the free movement of goods, services, capital and on the other hand, the protection of weak contractors such as consumers, savers, when there are interests at stake, which pertain to an exquisitely non-patrimony sphere, as emerges for the phenomenon of migrants, on the other hand, exists an objective difficulty in finding an overall picture that allows effective policies to be implemented.

Furthermore, it is also necessary to stem the migration phenomenon through policies to support the poorest countries. The European Union has committed itself to the “2030 Agenda for Sustainable Development”, a program aimed at providing support to migrants’ countries of origin and transit, to strengthen regional cooperation on the protection of minors, with support activities of the West African Network, for the protection of minors. A series of funding has been provided for the education of refugee children, with the creation of special funds for refugees in Turkey, or the “European Union Trust Fund in response to the Syrian crisis”¹².

But, in Italy, worrying signs derive from the failure to join the Global Compact for Migration, a negotiated convention at intergovernmental level promoted by the ONU. The inversion of political direction which, on the other hand, took place in Italy and which is aimed, formally, to guarantee security needs, in concrete terms, appears contrary to those principles of solidarity and respect for the value of human dignity which constitutes an innate right to each person.

In this sense, the text of Law 130/2020, which presents a series of important innovations, including the repeal of the security decrees, should be considered an important step forward in terms of immigration¹³.

¹² Cfr. Communication of Commissione to Council and Parliament of 12 April 2017 “*Protection of migrant minors*” and the recommendations provided by the European Union Agency for Fundamental Rights and, in particular, the Guardianship systems for children deprived of parental care in the European union, www.ec.europa.eu/com-2017-211-f1.it www.europarl.europa.eu.it.

¹³ Law n.173 / 2020 (in the O.G. 314 , 19 December 2020), which converted with amendments the decree-law n.130 / 2020 on immigration and security.

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