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LEGAL PROTECTION OF MIGRANTS IN ITALY

Summary: 1. Introduction. – 2. The procedural phase. – 3. The judicial phase. – 4. Conclusions.

1. *Introduction*

This article aims to offer some reflections on the concrete methods of protection that the Italian legal system offers to refugees in two fundamental phases of their integration process:

- the procedural phase, that starts when the migrant applies to the competent Italian administrative authorities to obtain the residence permit which allows him to legitimately live in Italy;

- the jurisdictional phase, that takes place if the migrant suffers an injury because of an act carried out by the administrative authority (mostly the denial of the residence permit) and decides to bring an action to the Administrative Italian Courts (TAR in first instance or *Consiglio di Stato* in second instance) to obtain annulment of the denial and, more generally, to get protection from the court.

Data relating to the reception of migrants in Italy show a tendency of weakness in the management of applications for residence permits, that adversely affects overall reception conditions for refugees and, often, represents a guise to sacrifice their human rights.

In the period 2014-2017 – because of the high number of arrivals of migrants – the organization of border control authorities and the verification of the positions of asylum seekers showed their inadequacy.

Since 2018, through *ad hoc* measures and new investments, the Italian Government deployed the resources allocated to the public bodies responsible for granting asylum and other similar protection tools.

In approaching the topic of immigration policies, it is frequent (also in scientific literature) to consider the aspects that concern the difficult and painful human path that migrants are forced to face. It is true that the administrative

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and (if need be) jurisdictional procedures they have to deal with can assume an equally significant importance.

In other terms, if the migrant can rely on efficient and fast administrative and jurisdictional procedures, probably his condition (that *ab origine* is very uncomfortable) should improve.

2. *The procedural phase*

The administrative procedure finalized to achieve the residence permit, asylum or similar measure of international protection is based on Article n. 10, par. 3, of the Italian Constitution that establishes that the right of asylum is recognized to anyone who is prevented from effectively exercising democratic freedoms and human rights in his own country of origin [1].

As clarified by the Italian Supreme Civil Court (*Corte di Cassazione*), "although the notion of the two categories (asylum and refugee status) are ontologically different (especially with respect to the burden of proof[2]), the rules about the procedures for obtaining the status are similar because of the common needs of public order and security, which are constitutionally values" (Cass., 25th August 2006, n. 18549; Cass., SU, 26th May 1997, n. 4674). This jurisprudential orientation means that asylum offers immediate and provisional protection to migrants who, when they arrive on Italian territory, express the need to obtain a form of international protection, up to the verification of their real status and situation.

The procedure begins when the migrant applies to the border office for any form of international protection.

The competent authority examining the application is a special Governmental Unit (*Commissione Governativa Territoriale*) for the recognition of international protection, that is localized at the Government Offices (*Prefetture*). The Unit is made up of a Government representative (such as the president), a State Police commissioner, an official of the State Police, a representative of territorial bodies and a delegate of the United Nations High Commissioner for Refugees (UNHCR).

One of the most relevant issues concerns the identification of the rules that are applicable to these procedures before the Governmental Unit; in fact,

[1] M. Consito, *La tutela amministrativa del migrante involontario. Richiedenti asilo, asilanti e apolidi*, Napoli, 2016.

[2] To obtain asylum status it is not necessary to provide proof of persecution in the state of origin.

the solution of this question significantly affects the configuration of the legal framework of the limits of migrant protection.

First of all, the question arises as to whether the general provisions laid down in Italian Law 25th August 1990, n. 241 apply to these procedures[3]. In particular, Italian legal doctrine is debated between those who believe that the Law 241/1990 is applicable only to Italian or EU citizens and those who, on the contrary, affirm that it is applicable to any private person (including non-EU citizens).

Regarding this issue, we observe that most of the norms of Law 241/1990 use expressions that do not contain any explicit reference to the (EU or Italian) citizenship: in fact, Article n. 3 refers to "the recipient of administrative action" ("*il destinatario*"); Articles n. 7, 9 and 10 use the term "subject" ("soggetto"); Article n. 11 refers to "the interested parties" ("*gli interessati*"); Article n. 22 makes reference to "all private subjects who have a direct, concrete and current interest, corresponding to a protected legal position" ("*tutti i soggetti privati che abbiano un interesse diretto, concreto ed attuale, corrispondente ad una situazione giuridica tutelata*").

The only norms that refer to citizenship as a condition to apply Law 241/1990 are Articles n. 16-17- 18 about the effects of the advisory opinions of the administrative bodies and private declarations released in the procedure.

Rebus sic stantibus, regardless of the textual indications of Law 241/1990, the thesis about the application of this fundamental and general Law (also) to foreign persons is justified by giving relevance to the rationale of the Law, that offers the same protection to all people from the risk of public power abuse. This protection is especially required in the case of non-EU citizens because of their weakness based on their not belonging to the EU and their lack of knowledge of the Italian and EU system.

If we reflect on the particular situation of migrants who arrive in Italy after a desperate and dangerous trip, it is not acceptable that the legal protection

[3] Law n. 241/1990 defines the standards for all administrative procedures in the sense that no procedure may derogate from these minimum standards of protection. It represents a fundamental guarantee for the protection of the rights of private persons who are involved in an administrative procedure. This Law, introduced in 1990, has undergone thirty years of important changes and updates aimed at adapting the rules to the general EU provisions and the decisions of the Italian and European High Courts which frequently interpreted the norms very broadly. In the field of principles and rules of Law 241/1990: A.M. Sandulli, *Il procedimento amministrativo*, 1940; M. Nigro, *Procedimento amministrativo e tutela giurisdizionale contro la pubblica amministrazione (il problema di una legge generale sul procedimento amministrativo)*, in *Scritti giuridici*, Milano, 1996, 1427.

is less than that guaranteed to any citizen[4]. Indeed, the right to a law-abiding procedure is, surely, a fundamental and unalienable human right, as established by Article n. 41 of the Charter of fundamental rights of the European Union (Nice, France, 2000) and Article n. 6 of the European Convention on Human Rights (ECHR, 1950).

Finally, a recent norm introduced by Legislative Decree n. 25/2008 (it is a governmental decree adopted on the basis of a delegation from the Parliament) establishes that most of the rules of Law 241/1990 can be applied to the procedures finalized to decide the applications of residence permits or similar authorizations (Article n. 18).

The fact that Article 18 refers only to some (not all) of the norms of Law 241/90 has led some scholars to affirm that, for example, public administration is not obliged to inform the applicant of the start of the procedure in order to allow him to participate and be heard[5].

This interpretation – in our opinion – is not convincing because of the general principles of Italian, EU and International Public Law above mentioned as well as the decisions of Italian Administrative High Court (*Consiglio di Stato*)[6].

The rights to participate, know and defend oneself are moreover guaranteed and confirmed by the mentioned Decree n. 25/2008 where specific transparency requirements for Administrations are established, such as the obligation of the border authority or the Governmental Unit regarding the procedural rights and duties of the applicants, the timelines of the procedure or, finally, the specific tools available to support the application (Articles n. 6 e 10, first paragraph, Decree n. 25/2008).

Nonetheless the procedure for providing international protection consists of significant elements of specialty. For example, it includes a sub-phase for

[4] L. Gili, *Straniero e partecipazione*, in A. Crosetti, F. Fracchia, *Procedimento amministrativo e partecipazione*, Milano, 2002, p. 56 ss.; S. Castellazzi, *Profili procedimentali*, in V. Gasparini Casari, *Il diritto dell'immigrazione*, Modena, 2010, p. 253 ss.

[5] L. D'Ascia, *Diritto degli stranieri e immigrazione: percorsi giurisprudenziali*, Milano, 2008, p. 261 ss.; about lessening of the information obligation to ensure speed of the procedure: Cass. civ., sez. I, 15.10.2003, n. 15390; Cass. civ., sez. I, 19.10.2001, n. 12803. In a recent decision the Supreme Court (*Corte di Cassazione*) observed that Governmental Unit must inform the migrant about the starting of procedure in accordance to Law 241/1990 (Cass. Civ., sez. VI, 25.6.2012, n. 10546).

[6] Cons. Stato, sez. V, 22.5.2001, n. 2023; sez. IV, 25.9.1998, n. 569. About participation R. Cavallo Perin, *I principi come disciplina giuridica del pubblico servizio tra ordinamento interno e ordinamento europeo*, in *Dir. amm*., 2000, p. 41 ss.; F. De Leonardis, *I principi generali dell'azione amministrativa*, and M.C. Romano, *La partecipazione al procedimento amministrativo*, both in A. Romano*, L'azione amministrativa*, Torino, 2016; S. Cognetti, *Quantità e qualità della partecipazione. Tutela procedimentale e legittimazione processuale*, Milano, 2000.

the personal hearing of the applicant in order to investigate the concrete (and personal) reasons which led him to leave the country of origin and the reasons why it is not possible return and live there[7]. The interview, pursuant to the Decree n. 25/2008, must be videotaped and the applicant in every moment has the right to submit new briefs (statements) and documents (Articles n. 12-14). The National High Court (*Corte di Cassazione*) recently clarified that the personal hearing of the applicant must take place before the Governmental Unit or, only if impossible, before the Court (decision 23/10/2019, n. 27072).

Article n. 27 of Decree n. 25/2008 regulates the power of the Administration to acquire *ex officio* information about the status and the life of the applicant and about his original country; this means that, differently from what usually happens, the authority is not limited in the assessment of the case by the circumstances and the law elements deduced in the application form.

Furthermore, if the authority ascertains a cause of inadmissibility of the application, the applicant must be informed in order to hear his defence. This defence must occur within three days[8]. The application is inadmissible if it re-proposes a request already rejected without adding new elements.

It is interesting to underline the difference between this norm and the analogous one provided by General Law 241/90 (Article 10 bis), that establishes a general duty of public administration to inform the applicants in advance in any case of rejection (not only in case of inadmissibility, but also in the case of groundlessness of the merit), allowing the applicant to defend himself within ten days.

Why, in the context of migrant applications, does the legal system reduce protection so significantly?

In our opinion, this difference in treatment is unjustified and it risks becoming an intolerable infringement of the fundamental rights of defence of foreign persons.

Last but not least, in the field of application of Law 241/90 to the administrative procedure finalized to issue a residence permit, it is important to underline that Legislative Decree n. 286/1998 (known as *Testo Unico Immigrazione*, that contains general norms about migrant acceptance) allows the administration to reject the application with stating the motivation. This rule is blatantly

[7] Analogous tool was recently introduced for all administrative procedures in Sicily by Regional Law 21.5.2019 n. 7, (Article n. 12, comma primo, lett. c).

[8] P. Lazzara, *La comunicazione dei motivi ostativi all'accoglimento dell'istanza*, in A. Romano, *L'azione amministrativa*, cit., p. 393; E. Frediani, *Partecipazione procedimentale, contraddittorio e comunicazione: dal deposito di memorie scritte e documenti al "preavviso di rigetto"*, in *Dir. amm.*, 2005, p. 1003.

contrary to Law 241/1990 that introduced the general obligation to state reasons for all administrative acts.[9]

Although the specialty of the immigration topic justifies some exceptions to the general rules, we believe that in this case the obligation to state reasons – as declared by the Constitutional Court with decision 5.11.2010, n. 310 - is a binding principle in accordance with the Italian Constitution, that prescribes the rules of transparency, open administration and equity (Articles 97 Constitution)[10].

Recently, the Constitutional Court (decision 26.5.2015, n. 92), in accordance with the Administrative High Court (*Consiglio di Stato*, decision 7.4.2014, n. 1629), declared that motivation is the foundation and the real essence of administrative power. According to this interpretation, we believe that the above-mentioned Article 4, second paragraph, of Decree 286/1998, is unconstitutional.

Apart from specific rules, in general we consider the guarantees of defence offered by the law to the refugees and migrants in the procedural phase to be adequate. They are finalized to create a balance between the interest of the applicant to have a fair and thorough evaluation and the interest of the Administration to avoid abuses.

Nevertheless, there is an unsatisfactory and inadequate aspect: it regards the duration of the procedure. Even if the law sets certain time limits for the evaluation of applications, in practice these times are frequently uncertain because of the high level of bureaucracy and difficulties in managing such a large number of applications.

This problem negatively affects the condition of migrants and refugees but represents also a limit for Italy to achieve good administrative efficiency performance as recommended by EU law.

However, in the last two years something has changed and positive signs are being seen:

[9] Recently the Administrative High Court (*Consiglio di Stato*) ascertained the legality of the rejection of residence permit to a migrant who was condemned of sexual assault even if was absent the verification of the applicant's family situation and personality (Cons. Stato, sez. III, 29.11.2019, n. 8175).

[10] G. Miele, *L'obbligo di motivazione degli atti amministrativi*, in *Foro amm.*, 1942, I, p. 126; C. Mortati, *Necessità di motivazione e sufficienza di motivi negli atti amministrativi*, in *Giur. it*., 1943, III, p. 2; L. Vandelli, *Osservazioni sull'obbligo di motivazione degli atti amministrativi*, in *Riv. trim. dir. proc. civ*., 1973, p. 1595; M.S. Giannini, *Motivazione*, in *Enc. dir*., XXVII, Milano, 1977, p. 257; A. Romano Tassone, *Motivazione dei provvedimenti amministrativi e sindacato di legittimità*, Milano, 1987; ID., *Motivazione*, in *Dig. pubbl*., XIII, Torino, 1997, p. 683; G. Corso, *Motivazione dell'atto amministrativo*, in *Enc. dir*., vol. V, *Agg*., Milano, 2001, p. 774.

- the number of migrant entries has progressively and significantly reduced;
- a large part of applications has been settled by the administrations;
- the number of Government Units has been increased and they have gained valid experience which makes the work faster and more precise.

What we can hope for in the future is that the Parliament decides to approach the issue of migration with a different method: in fact, it is deeply unfair that the regulation of procedures to get international protection (whose effects affect the life of persons) is entrusted to rules that are often confused, in disagreement with each other and, even at times, in contrast with the Constitution.

3. *The judicial phase*

If the migrant receives a rejection of the application, the Italian legal system – according to the fundamental right of defence – offers a second chance, that is to ask for a court to review the question[11].

It should be clarified that foreigner persons, even if clandestine or illegal, have the right of defence guaranteed by Article n. 24 of the Constitution as a fundamental right[12]. As laid out in the mentioned Article n. 24 "everyone has the right to act and resist in judgment".

This right is expressly laid out in Article n. 2 of Decree 286/1998 that recognizes that the migrant is entitled to the same treatment as citizens.

It means that migrants can appeal to Italian Courts against administrative acts that infringe their rights.

Also, the Constitutional Court declared that "every foreigner can contest an expulsion measure, with full guarantee of the right of defence even if the foreigner is illegally present on the national territory" (decision 16.6.2000, n. 198).

The judicial protection system for immigrants has some peculiarities that

[11] C. Feliziani, *Giustizia amministrativa ed immigrazione. A proposito di alcuni nodi irrisolti*, in *Riv. it. dir. pubbl. com.*, 2/2019, p. 267 ss.; A. Cassatella, *Il sindacato di legittimità sulle decisioni amministrative in materia migratoria*, in *Dir. proc. amm.*, 2017, 3, p. 816 ss.; F. Cortese, G. Pelacani, *Il diritto in migrazione. Studi sull'integrazione giuridica degli stranieri*, Napoli, 2017, p. 491 ss.; A. Caldarera, *Osservazioni sulla tutela giurisdizionale del migrante*, in *www.giustamm.it*, n. 7, 2017; F. Astone, R. Cavallo Perin, M. Savino, A. Romeo, *Immigrazione e diritti fondamentali*, Torino, 2019; G. Tropea, *Homo sacer? Osservazioni perplesse sulla tutela processuale del migrante,* in *Dir. amm.*, 2008, 4, p. 839 ss.; M. Consito, *La tutela amministrativa del migrante involontario. Richiedenti asilo, asilanti e apolidi,* cit.

[12] M. Immordino, *Pubbliche amministrazioni e tutela dei diritti fondamentali*, in *www.federalismi.it*, 11/2014.

determine several interpretative doubts. These doubts, frequently, may disappoint the expectations of appelants.

The first peculiarity concerns identification of the judge to appeal to.

In fact, trial protection against illegal administrative acts is based on the different roles of administrative judges and civil judges, that have different powers, different rules, different competences.

So, every time a person wants to appeal against a public administration must to understand what kind of protection to ask for and who is the correct judge[13].

In the specific field of migration, Decree n. 285/1998 attributes the appeals against the acts of public authorities (such as the rejection of residence permits, expulsion orders, etc.) to the administrative judges (Article n. 10)[14]. Instead, the civil judge (Tribunal in first instance, Court of Appeal in second instance) has jurisdiction over the disputes about humanitarian protection[15], protection of the family unit[16], refoulment's[17], expulsions[18], discrimination acts (Article 44 Decree n. 285/1998)[19].

Although this division seems to lead back to the general criteria of the nature of the legal position (note n. 13), the variety of the cases considered in

[13] The reasons why this duplicity of judges exists mainly lie in historical reasons related to the moment in which, after the unification of Italy (1861), the organization of the jurisdiction was regulated. The original system has been maintained, albeit with various updates, in the current Constitution (1948) which differentiates protection before the administrative judge from that of the civil judge based on the nature of the legal position of the appellant (*diritto soggettivo* versus *interesse legittimo*).

[14] There were different interpretations and orientations on jurisdiction over expulsions. The Administrative High Court (*Consiglio di Stato*) tried to solve the doubts with the decision n. 571/2001 (in favour of administrative jurisdiction). Nevertheless, the Supreme Civil Court (*Corte di Cassazione*), in 2013, declared that the jurisdiction over expulsions belongs to the civil judge because of the absence of discretion of public administration. About this question, R. Chieppa, *Quale giudice per gli immigrati? Questioni di giurisdizione e di competenza*, in AA.VV., *Frontiere dell'immigrazione o migrazione delle frontiere? Atti del Convegno di Trento*, 25-26 *novembre 2011*, Trento, 2012, p. 171 ss.

[15] On this question the jurisprudential orientation is uniform in the sense that the position of the applicant for humanitarian protection is a human right (i.e. *diritto soggettivo*), not vulnerable by a discretional evaluation of public administration, who can just ascertain the subsistence of the element that the Law recognizes as necessary to get it.

[16] In these cases, the protection is mandatory because of family situation; the public administration does not have any discretion and the position of the applicant is a real right (i.e. *diritto soggettivo*) (Supreme Civil Court, United Sections, Corte di Cassazione a Sezioni Unite, decision 12.1.2005 n. 383).

[17] About jurisdiction over refoulment actions, refer to the previous note n. 13.

[18] About jurisdiction over expulsions, refer to the previous note n. 14.

[19] Article 44 Decree n. 286/1998 devolves jurisdiction to the civil judge recognizing the right not to be discriminated against as a fundamental human right (i.e. *diritto soggettivo*).

the numerous regulations and the frequent interpretative doubts highlight the inadequacy of the protection judicial system characterized by high risks of uncertainty.

Apart from that, the system seems incoherent with respect to the general principle of the concentration of protection instruments under which, recently, the Parliament increased cases where the administrative judge examines all the disputes regarding the same topic (regardless of the specific subject of the trial).

Because of the complex system of protection, it is frequent that the migrant must appeal to two different judges with the paradox of expenditure of money for the appellant and resources for the State. This is what happens, for example, when the migrant receives a rejection of residence permit based on reason of employment (jurisdiction of administrative judge) and after a few days receives also the consequential expulsion order from the State (jurisdiction of civil judge).

These cases are rather frequent and they pose problems regarding the connection between the two trials. In particular: can the civil judge *incidenter tantum* verify the legality of the rejection that is the presupposed act of the expulsion[20]?

Regarding this question, Italian jurisprudence disagrees; three different solutions have been identified.

First solution - In accordance to Article n. 295 of Code of Civil Procedure, the civil judge must suspend the trial until the administrative judge decides on the legality of the rejection. This solution has been followed by the Supreme Civil Court (*Corte di Cassazione*) in several decisions (i.e. decisions 21.6.2000 n. 7867; 20.6.2000, n. 8381). Indeed, it seems very penalizing for the appellant because he risks that, pending the trial before the administrative judge, the expulsion order is executed by the Police, hopelessly frustrating the expectations of the appellant.

Second solution - There is no connection between the two trials; the civil judge should decide about the legality of the expulsion order, which must be known only in the perspective of its specific elements. According to this solution, the civil judge does not verify (even *incidenter tantum*) the rejection of the

[20] G. Tropea, *Homo sacer,* cit., p. 875 ss.; N. Vettori, *Doppia giurisdizione ed (in)effettività della tutela giurisdizionale dello straniero*, in *Dir. imm. citt*., 1/2008; R. Caponigro, *La tutela giurisdizionale dello straniero avverso l'espulsione amministrativa prefettizia*, in *Foro amm. - TAR*, 2004, p. 3563 ss.; A. Scognamiglio, *Corte di cassazione e Corte costituzionale a favore di una pluralità dei giudici compatibile con effettività e certezza della tutela*, in *Dir. proc. amm*., 2007, p. 1112; N. Zorzella, *Giudizio avverso il diniego del titolo di soggiorno e giudizio relativo all'espulsione: due mondi non comunicanti? Spunti di riflessione per una nuova considerazione dello status di migrante in termini di diritto soggettivo*, in *Dir. imm. citt.*, 2006, p. 27 ss.

residence permit. The solution was followed several times by the Supreme Civil Court (decisions nn. 22217/2006 and 22221/ 2006) even if is not convincing as it can hardly be said that there is no connection between the two trials.

Third solution - It is an evolution of the second one, in the sense that the civil judge decides about the legality of the expulsion order but, if necessary, he can *incidenter tantum* know about the validity of the presupposed act (that is the rejection of residence permit) and decide as if it was not adopted (so called de-application of the presupposed act).

This solution, that has been followed by Constitutional Court (decision n. 41/2001) and the Supreme Civil Court (decision n. 20125/2005), seems to be the most reasonable in the perspective of the mentioned rule of concentration of instruments of judicial protection[21].

These reflections on the division of jurisdiction in matters of immigration lead us to believe that the current judicial system is not adequate and, probably, does not respect the fundamental principles of effective and fair judicial protection.

These principles are expressly enshrined in the Constitution, in the Administrative Procedural Code (Legislative Decree 2.7.2010 n. 104, Article 1-2), in the Charter of Fundamental Rights of the European Union (Article n. 47) and in the ECHR (Article n. 6); moreover, they are cited many times in the decision of the EU Court of Justice and the European Court of Human Rights[22].

Apart from the question of the division of jurisdiction, there are two other issues concerning the judicial protection of migrants that deserve to be explored.

[21] S. Gardini, *L'effettività della tutela dello straniero extracomunitario dinnanzi al giudice amministrativo*, in F. Astone, R. Cavallo Perin, M. Savino, A. Romeo, *Immigrazione e diritti fondamentali*, cit., p. 499 ss.

[22] R. Bifulco, M. Cartabia, A. Celotto, *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, 2001, p. 319 ss.; R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini, *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017, p. 862 ss.; C. Salazar, *"Tutto scorre": riflessioni su cittadinanza, identità e diritti alla luce dell'insegnamento di Eraclito*, in *Pol. dir*., 2001, 3, p. 373; F. Manganaro, *Equo processo e diritto a un ricorso effettivo nella recente giurisprudenza della Corte di Strasburgo*, in *Jus Publicum*, 2011; R. Rolli, *Immigrazione e giurisdizione*, in S. Gambino, G. D'Ignazio, *Immigrazione e diritti fondamentali. Fra costituzioni nazionali, Unione Europea e diritto internazionale*, Milano, 2010, p. 553 ss; M. Interlandi, *Alla periferia dei diritti: l'effettività della tutela dei diritti degli immigrati tra i rimedi giurisdizionali interni e le indicazioni ricavabili dal contesto europeo*, in *www.federalismi.it*, 2017, 17, p. 1 ss.

About the relevance of jurisprudence of EU Court of Justice and European Court of Human Rights in the topic of migration, A. Pajno, *Rapporti tra le Corti: diritti fondamentali ed immigrazione*, in *www.federalismi.it*, 2017, 21, p. 1 ss.

The first one regards the possibility of accessing trial if the migrant undergoes a refoulment action from the Police or the Government. The European Court of Human Rights (whose decisions are binding for national system[23]), forbids the refoulment actions on the bases of the Article n. 3 of the ECHR on the prohibition of torture[24]. This case law orientation was developed on the occasion of many refoulment actions at sea: the Court observed they were administrative measures without any judicial protection for the rejected people.

This orientation has been received by Italian courts. In particular, Supreme High Court (*Corte di Cassazione*) recognized as a gap of regulation the absence in the Italian legal system of a norm that affirms the right of the foreign person to participate and, if necessary, appeal. This gap – observed the Supreme Court – can be filled by the direct reference and application the EU and International Law.

Proceeding on this way the Supreme Court concludes that, if the refused migrant did not have the concrete possibility of participation and defence against the refoulment, the relative measure is illegal.

The recent decision adopted by the Italian Administrative Tribunal (decision 14.8.2019, n. 5479) regarding the well-known event of the "Open Arms" ship, that was blocked in the territorial sea by Italian Government should be placed in the same perspective. The Administrative Tribunal decided to suspend the effect of the government measure recognizing it was an abuse contrary to the International Law regarding sea rescue.

The frequent reference to international norms (if necessary, overcoming the different Italian regulations) highlights a lack of the Italian system that deserves to be filled by the Parliament.

The last question regards the limits within which the judges can review the administrative measures.

Although the general rules about jurisdiction do not permit thorough review by the judge, in migration topic the situation is quite different. In fact, because of the uncertainty of the rules and the legal schemes which the Administrations have to follow, the judges tend to go beyond the mere verification of formal regularity of the acts.

[23] C.E. Gallo, *La Convenzione europea dei diritti dell'uomo nella giurisprudenza dei giudici amministrativi italiani*, in *Dir. amm.*, 1996, 3, p. 499 ss.; G. Greco, *La Convenzione europea dei diritti dell'uomo e il diritto amministrativo in Italia*, in *Riv. it. dir. pubbl. com.*, 2000, 1, p. 39.

[24] ECHR, 7 luglio1989, Soering c. Regno Unito, ric. 14038/88; 15.11.1996, Chahal c. Regno Unito, ric. 22414/93; 28.2.2008, Saadi c. Italia, ric. 37201/06, commented by A. Giannelli, *Il carattere assoluto dell'obbligo di non refoulement: la sentenza Saadi della Corte europea dei diritti dell'uomo*, in *Riv. dir. int.,* 2011, 2, p. 449 ss; 19.1.2010, Hussun et a. c. Italia, ric. nn. 10171/05, 10601/05, 11593/05, 17165/05, in *www.asgi.it*, 2010.

Often the examination approaches a profound review on the logic, congruity and reasonableness of the acts. This tendency of the judges is increasing although it is uncertain what will happen in the future.

This last consideration also leads us to believe that the current system of judicial protection of the migrant is not adequate.

4. *Conclusions*

As highlighted in the previous paragraphs, the Italian legal system of protection of refugees (and, in general, of migrants) has many weaknesses, especially in the judicial phases.

In order to suggest some solutions for improvement, we must ask ourselves why the system has these weaknesses, what is the origin and the causes.

The first reason of weakness – in our opinion – is the complexity of the Italian regulations about migration. This complexity derives from the lack of organicity and systematicity of the rules that in the last twenty years like a flood have arrived.

The feature common to all the Italian regulations about migrations is the emergency condition in which they have been adopted. Whenever a rule that was approved to manage an emergency situation becomes an ordinary rule the effects on the system are harmful.

Another objective problem that affects migration rules is the ethic substratum of these rules: in fact, they are destined to manage and heavily affect human values, life projects, and sometimes even the life of migrant persons.

In particular, in these regulations a difficult and delicate synthesis between different interests that are often in conflict is realized: on the one hand there is the need to effectively protect the fundamental human rights recognized by the Constitution and European and International Charts; on the other hand, there is a request for public security demonstrated by a severe management of migration flows toward Italy.

In addition to this objective condition, there is another juncture that affects regulatory development: in Italy and in other EU countries xenophobic tendencies have recently matured. These tendencies are expressed not only by extra parliamentary groups but also by institutional or political actors. This phenomenon determines a real politicization of the management of the migration flows with frequent and incoherent solutions that express nervous populist reactions instead of lucid and organic answers to objective needs.

The described inadequacy of the legal system is partially balanced by the

practice of the different actors of the acceptance procedures (public administrations, public agencies, judges, nongovernmental organizations, etc.), which operate in accordance with the law interpreting the regulations, adapting them to the concrete needs and - where necessary - conforming them in an improving way.

Although this approach is appreciable, we cannot deny that:

- the insufficiency of the general rules constitutes a serious deficit of the system;

- practices are often a source of further confusion because of a lack of interpretative uniformity.

Finally, the Covid pandemic emergency, that from 2019-2020 is affecting all the world, represents another cause of problems in the management of migrations. This pandemic is conditioning our life in all aspects, increasing social and economic disparities and discrimination. People are worried; and the fear - as is presumable - does not help policies of migration acceptance.

Reflecting about what measures can be taken to improve the legal status of migrants and refugees, we believe that a revision of the general discipline (i.e. first level regulation) inspired by the principle of simplification cannot be postponed. In addiction to this it would be very important to use the so-called second level regulation aimed at providing uniform applicative instructions to all public administrations that apply the first level regulation. This would avoid the risks associated with the different interpretation of the law which, due to the relevance of the interests protected, can lead to discrimination that affect the fate of many human lives.

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