

The Application of the OSCE Commitments Relating to Migration and Integration in Italy

Chiara Favilli

Associate Professor at Università degli Studi di Firenze, Italy

chiara.favilli@unifi.it

Abstract

The OSCE commitments agreed during several meetings held in the past years address economic, political and social aspects of migration. As far as Italy, while the national legal framework is almost in line with international standards, the adoption of practical measures, their implementation and the promotion of projects prove difficult. Moreover, the increased exposure that Italy faces as a country lying on the external maritime border of the European Union makes it more difficult to manage migration flows via the sea.

Keywords

migration – asylum – integration – OSCE Commitments – Italy

1 Introduction

Italy has been experiencing great difficulties in managing migration and asylum flows. The structural weaknesses of Italian migration policy are underlined by the undeniable complexity of managing migration flows via the sea and by the increased exposure that Italy faces as a country lying on the external maritime border of the European Union (EU). The existence of an area of free movement within the Union, in fact, means that landing on the Italian coast affords easy entry into, and then across, the entire EU.¹

¹ Since 2015 a rising number of migrants, mostly refugees, began arriving to Europe, triggering the so-called 'EU migrants' crisis. The estimated figure of migrants who have arrived to Italy in 2015 is 153,842, in 2016 is 181,436 and in 2017 is 119,369. *Crusotto statistico*, www.interno.gov.it,

While on the one hand it is possible to move freely within the EU by crossing borders between Member States without being subject to controls, on the other hand regulations regarding the entry and residence of foreigners – citizens of third countries – are largely the responsibility of individual Member States. Moreover, those who enter an EU Member State legally can move freely for up to three months including into another Member State, although not for longer periods and not for taking permanent residence in another Member State.

These structural problems have been compounded by the damage caused as political forces have resorted to the use of migration as an electoral lever, fanning the flames of the local populations' understandable fears. These have been deluded into the belief that the huge flood of migrants fleeing conflicts and extreme poverty or moving for economic reasons, and that the increasing adverse effects of globalization, can all be halted with simplistic solutions and unrealistic strong-arm tactics.

Against this framework, the Italian Government has not adopted plans and programs in order to manage migration flows and to pave the way to integration into the Italian society of those arriving and staying within the country. The same also concerns Organization for Security and Co-operation in Europe (OSCE) Commitments that have not been taken into account properly during the past decades. The analysis of the relevant Italian legal framework shows that Italian law is in line with international human rights standards, as required by OSCE commitments, while practical implementation is often lacking. In particular, Italian management of migration flows and development of strategies of integration – that are among the main points of OSCE Commitments – are very weak.

After a short review of the relevant OSCE Commitments in the field of migration and asylum, the Italian legal framework is taken into account in order to assess if it is in line or not with those commitments, despite the lack of procedures and systems to ensure full compliance with those rules.

2 The OSCE Commitments in the Field of Migration and Asylum

The OSCE Commitments agreed to during several meetings held in the past years address economic, political and social aspects of migration. While not legally binding, they are all adopted by consensus and they are of immediate effect and are immediately applicable and can be invoked by any citizen or OSCE government directly vis-à-vis any government of a participating State. Moreover, OSCE Commitments strengthen obligations stemming from international law and conventions, as they contain a commitment to implement those.

International movements of people were already addressed in the 1975 Helsinki Final Act. According to the principles enshrined in this basic document, specific OSCE commitments that refer to migration governance in a comprehensive way have been adopted. At first, OSCE Commitments have been framed in the economic dimension, focusing on the connections between migration and economic growth.

The most relevant decisions in this regard are Ministerial Council (MC) Decision No. 2/05 on Migration² and MC Decision No. 5/09 on Migration Management.³ Key aspects of good migration governance are taken into account, recalling the international legal framework, such as legal and orderly migration, protection of migrants' personal and social welfare, attention to recruitment practices, equality of treatment of migrants' workers and nationals regarding employment and social security. Simplification of migration procedures, such as visa policies and documents related to the legal presence in the host country is particularly underlined as a technical but very effective tool in order to have an efficient migration policy.

More recently the issue of refugees and displaced persons has emerged as a priority, together with the topic of minors and integration of migrants. A report "Towards Comprehensive Governance of Migration and Refugee Flows" – was issued in July 2016 by the Swiss Chair of the OSCE's Informal Working Group on the Issue of Migration and Refugee Flows. Two ministerial decisions have since then been adopted.⁴

The OSCE Commitments reflect the need for a multi-layered approach to migration, entailing specific actions to address large movements of persons, as well as long-term approaches taking into account the needs and the reality of increasingly interconnected labour markets.⁵ Particular attention is given

2 OSCE (2005), Decision No. 2/05 on Migration, adopted during the Ministerial Council meeting held in Ljubljana, 6 December 2005. Available at: <https://www.osce.org/mc/17339?download=true>.

3 OSCE (2009), Decision No. 5/09 on Migration Management, adopted during the Ministerial Council meeting held in Athens, 2 December 2009, available at: <https://www.osce.org/cio/40711?download=true>.

4 OSCE (2016), *Decision No. 3/2016 on OSCE's Role in the Governance of Large Movements of Migrants and Refugees*, adopted during the Ministerial Council meeting held in Hamburg, 9 December 2016, available at: <https://www.osce.org/cio/289491?download=true>; OSCE (2016), *Ministerial Council Decision No. 4/16 on Strengthening Good Governance and Promoting Connectivity*, adopted during the Ministerial Council meeting held in Hamburg, 9 December 2016, available at: <https://www.osce.org/cio/289316?download=true>.

5 See also *OSCE Commitments relating to Migration and Integration. A Guide Prepared for the OSCE Human Dimension Seminar on "Migration and Integration"*, Warsaw, 11–13 May 2005, available at: <https://www.osce.org/odhr/14634?download=true>.

to the promotion of international dialogue and cooperation⁶ as well as to the adherence to international standards.⁷

Regarding management of migration flows, OSCE Commitments argue for simplifying administrative procedures for exit and entry;⁸ lowering the costs of permits of stay and visa;⁹ issuing multiple entry visa;¹⁰ facilitating labour mobility for development;¹¹ enabling reintegration and employment in origin countries.¹²

Increasing attention has been given to the protection of refugees with reference to the 1951 Convention Relating to the Status of Refugees¹³ and, more recently, to the prevention of mass flows of refugees and displaced persons.¹⁴

OSCE commitments also take into account the issue of integration, requiring the protection of fundamental human rights, including freedom of religion;¹⁵ equality of rights for migrant workers regarding conditions of work and to social security;¹⁶ combating discrimination, intolerance and xenophobia towards migrants and their families;¹⁷ participation in life of the society of the participating State;¹⁸ providing language and vocational training for migrant workers;¹⁹ promote projects in order to incorporate gender aspects, with particular attention to women, in migration policies; supporting family reunification, marriage and family unity;²⁰ granting the right to freedom of movement

6 *Concluding Document of Madrid – The Second Follow-up Meeting, 1983, Co-operation in the Field of Economics, of Science and Technology and of the Environment, Economic and Social Aspects of Migration*, para. 6.

7 OSCE (2005), *Decision No. 2/05 on Migration, adopted during the Ministerial Council meeting held in Ljubljana*, 6 December 2005. Available at: <https://www.osce.org/mc/17339?download=true>.

8 *Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975*, par. d.

9 *Concluding Document of Madrid*, cit., par. 27 and 28.

10 *Ibidem*.

11 *Concluding Document of Madrid*, cit., para 6.

12 *Ibidem*.

13 *Concluding Document of Helsinki – The Fourth Follow-up Meeting, 1992, Decisions*, chapter VI, par. 36 to 45.

14 *Ibidem*.

15 *Concluding Document of Madrid*, cit., paras. 27 and 28.

16 *Ibidem*.

17 *Concluding Document of Budapest, 1994, Decisions*, chapter VIII, par. 28 to 32, 40.

18 *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 1991, Par. 33, 38 to 38.4*.

19 *Ibidem*.

20 *Concluding Document of Madrid*, cit., paras. 27 and 28.

and residence within the country and the right to leave any country, including his own;²¹ satisfactory living conditions; same opportunities for migrants as nationals in the event of unemployment;²² access to education for migrant children;²³ protecting migrant workers, their families and in particular minor children;²⁴ access to education for migrant children.²⁵

3 Relevant Obligations Stemming from International Treaties and EU Law

Italy is part of many international treaties, either adopted at international or regional level, either general or devoted to a specific sector, either multilateral or bilateral. In this regard, Italy is in line with OSCE Commitments requiring adherence to international conventions and implementing them into national law. In particular, Italy is part to all the relevant conventions agreed within the International Labour Organization (ILO). According to Article 10, para. 2, of the Italian Constitution, laws related to the status of aliens shall be in accordance with all the relevant international provisions binding Italy; moreover, Article 2 of the Aliens Act states that aliens on Italian soil are guaranteed fundamental rights according to international law.

At a regional level, primary role is played by the *European Convention on Human Rights and Fundamental Freedoms* ratified in 1955 (ECHR), including Protocols 1, 4, 6 and 7 and many other conventions among which it is worthwhile to mention the *European Social Charter* (revised in 1996). At international level, Italy is part of almost all in the United Nations (UN) family of conventions such as the *Convention Relating to the Status of Refugees* (1951 Geneva Convention) and the related *Protocol* (1967); the *Convention on the Elimination of all Forms of Racial Discrimination* (1965); the 1966 *Covenants*, recognising the jurisdiction of the Human rights committee under the International Covenant on Civil and Political Rights (ICCPR) in relation to individual complaints and

21 Concluding Document of Vienna, cit., paras. 13.7, 13.8, 20 to 22.

22 Final Act of the Conference on Security and Co-operation in Europe, "Economic and social aspects of migrant labour", Helsinki, 1975.

23 Concluding Document of Vienna, cit., paras. 40 to 44.

24 Concluding Document of Vienna – The Third Follow-up Meeting, 1989, "Co-operation in other areas", "Human Contacts"; Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990, Par. 5.9, 9.5, 19, 19.1 to 19.3, 22 to 22.4; Charter of Paris for a New Europe, 1990, "Human Rights, Democracy and Rule of Law" (...) "Migrant Workers".

25 Concluding Document of Vienna, cit., paras. 40 to 44.

the *Second Optional Protocol to the Civil and Political Rights Aiming at the Abolition of the Death Penalty* (1989). Moreover, Italy is part of several ILO²⁶ and UNESCO²⁷ Conventions.

Entry, treatment and expulsion of aliens as well as measures to counter illegal migration are contained in the Aliens Act No. 286/1998 and the implementing regulation No. 394/1999.²⁸ This law is still in effect although it has been modified by subsequent legislation, at times adopted in order to implement EU Directives or judgements of the EU Court of Justice European Union. Since 1999, the role and impact of policy developments and legislative measures taken by the EU have had an increasing impact at national level, changing not only the laws in force but also national policies and practices.

4 Migrants

4.1 *National Legal Framework Relating Applications for Entry of Migrants*

Since 1986, in order to enter Italy for employment from outside the EU area, it is first of all necessary to be sponsored by an employer who is already resident in Italy; entering Italy to find a job is excluded. The possibility to enter Italy for other reasons and then staying for work, even when there is a concrete offer of a job, is limited to certain residence permits, excluding those issued with a short stay visa (e.g., tourism, business, religion). The stay is in fact limited to the purpose for which the visa was issued and, in order to stay for a different purpose it is necessary to return to the country of origin and apply for a new visa for employment purpose. In particular, the law excludes the possibility of converting a residence permit for reasons of tourism into one for employment purposes. Should a tourist find work while in Italy it will, in any case, be necessary

26 ILO Convention (no. 29) on Forced Labour (1930); ILO Convention (no. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951); ILO Convention (no. 111) concerning discrimination in respect of Employment and Occupation (1958); ILO Convention (no. 143) on Rights of Migrant Workers (1975).

27 UNESCO Convention against Discrimination in Education (1960).

28 The Aliens Act has been adopted on 1998 by Law No. 40 of 6 March 1998, on 'Provisions governing immigration and regulations concerning the status of aliens', then merged into the Legislative decree 25 July 1998, no. 286 'Consolidation Act of Provisions concerning Immigration and the Rules on the Condition of Aliens'. Presidential Decree 394 of 31 August 1999, 'Regulations for the Implementation of the Aliens Act concerning Immigration and the Rules on the Condition of Aliens, in accordance with Article 1, paragraph 6, of the Legislative Decree of 25 July 1998, No. 286, OJIR 3 Nov. 1999, No. 258, S.O.

to return to the country of origin and follow the specific procedure for entry for employment purposes.

This also applies to domestic workers, such as *caregivers* or *maids*, despite the fact that employers only hire workers for housework or as caregivers if the employee is already known to them. It should be noted that in Italy the demand for this type of work covers a large proportion of the total jobs done by third country nationals in the country.

Anyone remaining in Italy after the expiry date specified on the visa without compelling reason will be considered irregularly resident and will be punishable by removal with a ban on return to other Schengen countries. However, the practices of the past twenty years have been quite the opposite, with many aliens entering on a short stay visa (especially for tourism) and then remaining irregularly and working without a contract while awaiting regularization of their situation by means of the amnesties that have been periodically approved.²⁹

The most recent regularization was provided for by Legislative Decree No. 109/2012.³⁰ The regularization was limited to the workers already staying in Italy at 31 December 2011 and employed at least for three months since 9 May 2012, plus other conditions to be fulfilled. The lack of more recent regularization has direct effects on the increased number of irregular migrants staying in Italy.

Moreover, except for some special categories of workers, entry for work is based on the quota system: Italy sets the maximum number of workers who may enter each year. This maximum number is then further broken down by country of origin (special quotas are reserved for those countries with which Italy has concluded special agreements on migration and readmission of illegal immigrants) or by type of work: subordinate, self-employed or seasonal. It is only possible to enter if the maximum quota has not been reached, otherwise it is necessary to await entry the following year. Residual quotas can be used in the following calendar year, unless the Ministry responsible, usually the Ministry of Labour, decides otherwise. There are jobs for which entry remains outside the annual quotas. These are generally job positions for which there is a shortage of workers in Italy, like nurses or highly skilled workers

29 M. Barbagli, A. Colombo, G. Sciortino (Eds.), *I sommersi e i sanati. Le regolarizzazioni degli immigrati in Italia*, Bologna, 2004, p. 51.

30 Legislative Decree 16 Jul. 2012, No. 109, *Attuazione della direttiva 2009/52/CE che introduce norme minime relative a sanzioni e provvedimenti nei confronti di datori di lavoro che impiegano cittadini di Paesi terzi il cui soggiorno è irregolare*, in OJIR 25 Jul. 2012 No. 172, p. 1 ff.

(so-called out of quota entry). The visa can thus be requested at any time of year and there is no ceiling on entries.

According to Article 3, para. 1, of the Aliens Act the Government must draw up a three-year policy planning paper on the basis of which the decree of the President of the Council of Ministers will be issued by each 30 November setting the annual quotas for entry of aliens for employment purposes for the calendar year following the one in which the decree was adopted.

However, the last three-year policy planning paper dates back to 2005 (Decree of the President of the Republic of 13 May 2005, Approval of the policy paper on immigration policy and aliens in the territory of the State, for 2004–2006). This evident deficiency on the part of the Italian Government, which continues to use the transitional annual program was justified on the basis of the national economic situation that makes it impossible to programme flows over a three-year period given the general reduction of labour demand.

Administrative procedures for entry and stay in Italy are complex, although some improvements have been introduced thanks to online applications. In case of an application of entry on ground of labour, the Immigration Office will verify the unavailability of Italian workers.³¹ Where required, aliens must also have an entry visa. A visa is always required if the proposed stay exceeds 90 days, from whatever non-EU country the alien comes.³² Visas up to 90 days are Uniform Schengen Visa (USV) and issued according to the Visa Code.³³ USV are the easiest to obtain and enable free movement within the Schengen area up to a maximum of 90 days. Applications for USV may be made at any time throughout the year. Obtaining a national long-term visa is complex and conditional to the presentation of many documents to be submitted to the Italian Consulate or Embassy in the alien's country of residence.³⁴

31 Verification is made via Internet and relates to national, EU or third-country nationals who are enrolled with the Job Centre as unemployed and must be completed within twenty days.

32 In Italy, the competent office is the Visa Office of the Ministry of Foreign Affairs which has a database that enables you to check whether or not a visa is required: <http://www.esteri.it/visti/home.asp>. An administrative fee is always charged; this is currently EUR 60.

33 EC Regulation No. 810/2009 of 13 Jul. 2009, *establishing a Community Code on Visas (Visa code)*. For detailed and updated information see the webpage ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm. A consolidated version has been published on 18 Oct. 2013.

34 It is possible to consult a database of the Ministry of Foreign Affairs, <http://vistoperitalia.esteri.it/home.aspx>, which indicates the relevant offices, locations and contact addresses and from which you can download the relevant form. In addition, each office usually has its own website where you can find a summary of the rules in force.

After entry to Italy, the alien must report to the Immigration Office located in the area of employment within eight working days. The application procedure for a residence permit for employment purposes will then start. Once the application has been lodged the worker may start work and the receipt of the permit application will be sufficient to demonstrate that he/she is legally resident.

As far as seasonal work, Italian law establishes which activities may be carried out as seasonal work, from a minimum of 20 days to a maximum of nine months per year. Foreign workers who respect the duty to leave Italy on expiry of the residence permit will have precedence over other foreign workers who will apply for entry for seasonal employment for the following year with the same employer. In addition, from the second consecutive year of entry for seasonal work, aliens will be able to convert their residence permit for seasonal employment into a permit for employment purposes if they are offered a temporary or permanent work contract, provided it falls within the annual quotas and the other normal requirements are met. Moreover, the so-called multi-year application (up to three years) is also envisaged for foreign workers who can demonstrate that they have worked repeatedly in seasonal jobs for two years running.

4.2 *Assessment of OSCE Commitments Related to Migrants*

A general feature of migration law is the lack of a general plan on migration, although the Aliens Act requires the Government to adopt it every three years. Rules and procedures on entry and stay of migrants are still highly complex to apply, although in the most recent years computerized procedures have been introduced, speeding up certain steps of the procedures.

Visa applications require payment of administrative fees for each applicant, to be paid before a positive decision has been issued. Once in Italy additional administrative fees have to be paid in order to get the permit of stay and at each renewal.

One of the most critical points in the management of migration flows to Italy is the practical lack of legal channels for economic migrants, with the system still based on the previous agreement on an employment contract, theoretically to be signed even before employer and employees have met.

5 Refugees

5.1 *The Individual Right to International Protection According to EU Law and the Italian Constitution*

Asylum seekers enjoy a right to entry and to access asylum procedures according to the general prohibition of *non-refoulement*. Since the legal status of

asylum seekers involves a right of entry and residence, the crime of illegal entry and stay of foreign nationals will not be applicable. Access to asylum maybe sometimes hindered by international agreements aiming to prevent people leaving their country of origin or transit.³⁵

According to Article 10, para. 3, of the Italian Constitution, ‘the foreigner who is denied in his own country the real exercise of the democratic liberties guaranteed by the Italian Constitution has the right of asylum in the territory of the Republic, in accordance with the conditions established by law’. Thus the Italian Constitution grants the right of asylum not only to those who are persecuted individually, that is, the refugees under the 1951 Geneva Convention, but also to those foreigners who flee their country to save their lives, or protect their own safety from dangers resulting from serious and current situations of war, civil war, generalized civil unrest or even more simply, those who are prevented from the exercise of the democratic freedoms recognized by the Constitution itself.³⁶

The constitutional right to asylum is granted under the conditions provided for by national law. However, a national law on asylum has never been enacted.³⁷ The legal framework has now changed due to the implementation of EU directives regarding asylum that forced Italy to set up an organic system of asylum, adopting legislations on refugee status and subsidiary protection, reception conditions and procedures for granting international protection.³⁸ An external agency was set up and based in Malta, the European Asylum Support Office (EASO), which is supporting Italy, like other Member States, in the implementation of EU asylum measures.³⁹

35 For a compilation of readmission treaties signed by Italy see the 2016 issues of the Journal *Diritto, Immigrazione e cittadinanza*.

36 On the notion of democratic liberties as a prerequisite for the acknowledgment of right to asylum see: P. Bonetti, *Il diritto di asilo nella Costituzione italiana*, in C. Favilli, (ed.), *Procedure e garanzie del diritto di asilo*, Padova, 2011, p. 37; M. Benevenuti., *Il diritto di asilo nell'ordinamento costituzionale italiano*, Padova, 2007.

37 Thus, for many years the right of asylum was only recognized in its more limited form as envisaged by the Geneva Convention. It was not until 1997 that the Supreme Court (Corte di Cassazione), made a landmark ruling that recognized the direct application of the subjective right to asylum enshrined in the Constitution, despite the absence of an ordinary law of implementation; Judgement No. 4674/97, in *Rivista di diritto internazionale*, 1997, p. 845.

38 L. Azoulay, K. de Vries (eds.), *EU Migration Law, Legal Complexities and Political Rationales, Collected Courses of the Academy of European Law*, Oxford, 2014.

39 EU Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ 2010, at 11–28.

According to EU Law the notion of international protection applies, encompassing the different sorts of protection granted to a person: refugee status under the 1951 Geneva Convention, subsidiary protection and temporary protection. The relationship between recognition of the right to asylum in the Italian Constitution and international protection as provided for in EU law has been defined as similar to that between genus and species. The constitutional right of asylum establishes the general category into which all forms of international protection are placed. Moreover, it is necessary to include a residual form of protection, left to national legislation, defined as humanitarian protection.

5.2 *Procedure for Granting International Protection*

5.2.1 Dublin Regulation

The very first step of the procedure is the assessment of the country competent to examine the application, the so-called *Dublin Procedure*. The transferal of asylum seekers from one country to another is based on the assumption that all European countries can be considered 'safe' for asylum seekers; however, this is in contrast with the reality, as the asylum systems vary significantly, even between EU countries. Moreover, every Member State has different welfare systems and different labour markets so that one Member State may be far more attractive than another one.

The result is that the Dublin Procedure has proven ineffective as evidenced by data on actual transfers between Member States of asylum seekers and beneficiaries of international protection.⁴⁰ One of the reasons is the unavailability of asylum seekers after notification of the transfer decision and difficulties underlying practical cooperation between the administrations of the Member States. Difficulties in implementing transfers are exacerbated by the numerous attempts to circumvent identification upon arrival in some Member States, for instance in Italy, which impede the application of the core criterion set out in the Dublin Regulation. Without proper identification of applicants upon their arrival, it is almost impossible to prove which is the State of first entry, where the asylum seeker should be sent back to, if detected in another EU Member State.⁴¹

40 European Commission, *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system*, COM(2007)299 of 6 June 2007, at 4; *Evaluation of the Implementation of the Dublin III Regulation. Final report*, 18 March 2016, available at: www.ec.europa.eu.

41 Another reason of the Dublin crisis is the so called 'Dublin Saga', between the two European Courts. See the factsheet on the "Dublin Cases" edited by the Press Unit of the ECtHR,

For this reason, so-called ‘hotspot’ centres were opened in Italy and Greece, under pressure by the EU institutions. In particular, EU Decisions No. 2015/1523 and 2015/1601 on relocation have also provided in Article 7 operational support measures for Italy and Greece, to improve identification procedures and the initiation of procedures for granting international protection, by sending experts coordinated by the EASO and other relevant agencies. More analytical measures were envisaged in the Roadmap agreed by the Italian Government with the Commission. Within the “hotspot” centres, Italian authorities should make the distinction between asylum seekers and irregular migrants and identify all the migrants by means of registration and digital fingerprinting according to EU Regulation No. 603/2013, establishing Eurodac.

Being closed centres, compliance with Article 13 of the Italian Constitution and Article 5 of the ECHR is required. However, the Government, while implementing the EU decisions and the Roadmap did not provide for a specific legal provision on “hotspots” and treatment of aliens therein. In particular, there is no provision applying in cases where the length of detention is prolonged for a time not compatible with the nature of a custody or of first aid assistance, as stated by the European Court of Human Rights (ECtHR) in the case of *Khlaifia* of 15 December 2016. There Italy was found to have violated Article 5, para. 1(f), ECHR, having failed to provide for a legal basis to the deprivation of liberties connected to the procedures of identification immediately after the arrival of migrants.⁴²

5.2.2 The Administrative Procedure

Where Italy is the competent Member State according to the Dublin Regulation, the procedure for granting international protection applies. That procedure is laid down by the so-called Procedures Decree, implementing Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, now recasted by Directive 2013/32/EU.⁴³

http://www.echr.coe.int/documents/fs_dublin_eng.pdf. ECtHR, *T.I. v The United Kingdom*, No. 43844/08, 2008; *K.R.S v The United Kingdom*, Appl. No. 32733/08; ECtHR, *M.S.S. v Belgium and Greece*, No. 30696/09; *Sharifi and Others v Italy and Greece*, No. 16643/09, 2014. CJEU, *N.S.*, C-411/10, 2011, para. 83; *Tarakhel v Switzerland*, No 29217/12.

42 See also the Committee of Ministers resolution of 15 March 2018: CM/Notes/1310/H46-9, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680792629. See also Oxfam paper “Hotspot. Rights denied (<https://www.oxfam.org/en/research/hotspot-rights-denied>) and AIDA updated to 2018 national report (<http://www.asylumineurope.org/reports/country/italy>).

43 Legislative Decree 28 Jan. 2008 No. 25, *on implementation of 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status as*

There is a single procedure, the same for the assessment of applications of asylum, subsidiary or humanitarian protection. Besides the regular procedure, prioritised and the accelerated procedures apply when the request is deemed manifestly well-founded; the asylum claim is lodged by an applicant considered vulnerable; the applicant is placed in an administrative detention centre; the applicant had previously been subject of an expulsion order and there is a risk of absconding; if he/she is deemed as a threat to public order or national security; if he/she is suspected of being affiliated to a mafia-related organization or has conducted or financed terrorist activities per when an exclusion clause applies (Article 27 and 28-*bis* of Legislative decree No. 25/2008).

There are 30 Territorial Commissions for international protection plus a National Commission, all belonging to the Home Office of the Government.⁴⁴ One of the key steps in the examination of the application is the interview with the person seeking asylum. The interview is, in fact, essential for the Commission to acquire the information necessary to reach a sound decision, especially in cases where there is not written evidence and the personal statement of the applicant is the unique piece of evidence. The burden of proof is not only borne by the applicants but is shared between the applicants themselves and the Commission. Applicants must be assisted by an interpreter in their language or in a language they understand. Moreover, where necessary, the documents produced by the applicant shall be translated. However, translation services may not be always available depending on the language spoken by asylum seekers. In addition to the hearing, the Commission shall assess the application by acquiring information about countries of origin (COI – Country Origin Information). Stronger support has been given in recent years by the European Asylum Support Office.

Pursuant to Article 32, para. 1, the Commission may grant international protection, and thus recognize the refugee status or the subsidiary protection, or may decide to reject the application if the conditions for the recognition of international protection are not met or if there is a ground of exclusion. According to Article 32, para. 3, of the 'Procedures Decree' in cases where the application for international protection is rejected, the Territorial Commission

amended by Legislative Decree 18 August 2015 No. 142, implementing Directive 2013/32/EU and Directive 2013/33/EU.

44 The Commissions are appointed by the President of the Council of Ministers, upon proposal of the Ministry of Interior and are made up of two representatives of the Home Office (one is a senior civil servant who will act as chairman), a representative of UNHCR and a representative designated by the national associations of Italian municipalities (ANCI).

considers if there are serious humanitarian reasons. If so, it will send the documents to the Police Authorities for the issuance of a two-year residence permit for humanitarian reasons under Article 5, para. 6, of the Aliens Act.⁴⁵

5.2.3 Access to Justice and the Right to an Effective Remedy against the Denial of International Protection

The Territorial Commission's decision may be appealed to the competent Civil Tribunal. The applicant may obtain legal protection both against a decision of rejection, revocation or ending of international protection.⁴⁶ Moreover, even the asylum seeker who is not fully satisfied by its provisions, for example, if granted subsidiary protection rather than refugee status, has the right to judicial appeal against that decision.

Thus, once the administrative procedure is over the judicial phase may start. The responsible court is then entirely responsible for assessing the right to international protection and to control the compliance of the asylum procedure with the relevant requirements. The appeal shall result in the automatic suspension of the contested decision. According to Legislative Decree No. 142/2015 accommodation is ensured until a final judgement is given.

The assistance of a lawyer is required to lodge an appeal, and if the asylum seeker does not have the economic resources to pay legal costs, he/she can apply for free state-funded legal aid.

In order to tackle the exponential rise of applications for international protection and of appeals recorded since 2014, Law Decree No. 13/2017 was adopted, converted into Law No. 46/2017. The law provides for the abolition of the second appeal on the merits. This means that decisions issued by Tribunals can no longer be appealed before the Court of Appeal: they may be appealed only before the Supreme Court on points of law. Another relevant provision of Law No. 46/2017 is the establishment of 26 specialized chambers devoted to international protection, immigration and free movement of EU citizens. While it is appropriate and reasonable that all matters relating to asylum and foreigners are attracted to the full jurisdiction of ordinary courts, even with the establishment of specialized chambers, the reality is a diversification of competence regarding migration and asylum, with different judges competent on different issues. Actually, justices of the peace (*giudici di pace*), ordinary

45 Supreme Court, Judgment 19 May 2009, No. 11535 in www.asgi.it.

46 The Supreme Court (*Corte di Cassazione*) affirmed the exclusive jurisdiction of the ordinary court: judgment No. 11535/2009, *Diritto immigrazione e cittadinanza*, 2009, 3, pp. 140–144.

judges and administrative courts are all competent for different issues related to removal, stay or citizenship.

Law No. 46/2017 also introduces changes to the appeal procedure before Tribunals. A chamber should decide the action based on the videos of the interviews of applicants, made and recorded by the Territorial Commissions. The use of video-recording of applicants' hearings, instead of their presence before the Tribunals, raises serious doubts of compatibility with fundamental rights as protected both at national and European levels.

An appeal before the Supreme Court (*Corte di Cassazione*) may be lodged within 60 days of notification of the judgment. The appeal to the Supreme Court does not automatically suspend the effect of the judgment under appeal.

5.2.4 Reception of Asylum Seekers

As far as reception, applicants for international protection who do not have sufficient financial means for the health and support of themselves and their families, are placed in one of the local reception centres, set up by the local authorities using funding from the Ministry of Interior.

Upon arrival, asylum seekers may be placed in the governmental accommodation centres (CARA) in order to carry out the necessary operations to define the legal position of the foreigner concerned. The first reception centres (CARA/CDA and CPSA) have been turned into regional hubs, which are reception structures where the applicants will formalise their asylum requests. Generally, asylum seekers can stay in these centres for a period ranging from 7 to 30 days and thus ensure a fast turnover of guests.

Second-line reception is provided under either the System for the Protection of Asylum Seekers and Refugees (SPRAR) or the Centres of reception of Asylum Seekers (CAS). The SPRAR, established in 2002 by Law No. 189/2002, is a publicly funded network of local authorities and non-governmental organizations (NGOs) which accommodate asylum seekers and beneficiaries of international protection. It is formed by small reception structures where assistance and integration services are provided. In contrast to CAS, large-scale facilities, SPRAR is composed of smaller-scale decentralised projects and is much more successful in terms of integration of beneficiaries of international protection.⁴⁷ The reception facilities must provide minimum services, namely facilitating access to services provided in the territory, health care with a compulsory medical examination upon entry, compulsory school attendance for minors, enrolment in educational courses for adults (Italian language courses,

47 See ANCI *et al.*, *Rapporto sulla protezione internazionale in Italia*, 2017, available at: https://www.unhcr.it/wp-content/uploads/2017/10/Rapporto_2017_web.pdf.

in particular) and subsequent monitoring of attendance, assistance in obtaining knowledge of the local area (transport, post offices, chemists, associations, etc.), linguistic and cultural mediation intended to remove difficulties connected with bureaucracy, language and society. Applicants for international protection are guaranteed meals (where possible in respect of the cultural and religious traditions of those admitted), clothing, bedding, personal hygiene products and minimum financial resources for modest daily expenses.

Where 60 days have already elapsed from the submission of the application for asylum, the applicant is allowed to work, due to the new provisions set forth by Legislative Decree No. 142/2015. Reception should match the needs of asylum seekers and their families, especially vulnerable people such as children, persons with disability, elderly, pregnant women, single parents with minor children, people that have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Throughout the length of the procedure, the asylum seeker is enrolled in the national health system, with equal rights and duties as an Italian citizen (Article 34, para. 1(b)), of the Aliens Act).

The Home Office adopted a National Integration Plan for beneficiaries of international protection, that should be implemented by national, regional and local authorities together with NGOs. According to the Plan, integration is a bi-univocal relationship, where the migrant makes an effort to integrate himself/herself by learning Italian, share the values embedded in the Italian Constitution, respect laws and participate in the economic, social and cultural life. National bodies grant equality of treatment, respect human dignity, freedom of religion, access to education and projects aiming to foster social inclusion and full sharing of national common values.⁴⁸

5.2.5 Refugees and Displaced Persons

In Italy, in cases of mass influx, temporary protection status maybe issued according to Article 20 of the Aliens Act, which complements and completes the protection offered by refugee status, subsidiary protection and humanitarian protection. It is a residual measure that may be used exceptionally and if needed by means of a general provision adopted in accordance with decisions of the Italian government. The President of the Council of Ministers may issue a decree that introduces temporary protection measures on grounds of serious humanitarian needs during conflicts, natural disasters or other particularly serious events occurring in non-EU countries.

⁴⁸ <http://www.interno.gov.it/it/notizie/bilanciare-diritti-e-doveri-sfida-primo-piano-nazionale-integrazione>.

A temporary protection regime was granted in the past to provide protection for refugees fleeing the conflict in Kosovo.⁴⁹ More recently, this regime was applied during the period of extraordinary influx from North Africa to persons who arrived in Italy between 1 January and 5 April 2011.⁵⁰ These non-EU nationals were granted a residence permit on humanitarian grounds for a period of six months, then renewed until the end of 2013.

A residence permit issued on grounds of temporary protection generally allows the holder to move within the Schengen up to 90 days; however, the other requirements envisaged by the Schengen Borders Code must be met, that is, a document valid for travel abroad, sufficient resources for staying and for returning to the country of origin; no alert issued for the purpose of refusing entry to the Schengen area.⁵¹

Temporary protection may also be ordered pursuant to a European Council decision in the event of a mass influx of displaced persons, according to Directive 2001/55/EC on the granting of temporary protection in situations of mass influx of displaced persons, implemented in Italy thanks to Legislative Decree 85/2003. To date, the European Council has never applied this Directive, neither during the inflows of migrants from North Africa to Italy that occurred in the first half of 2011, and which were regulated by Italy according to national law, namely Article 20 of the Aliens Act, nor after the much larger influx of migrants and asylum seekers started since 2014. Not surprisingly, the Commission has envisaged its withdrawal.⁵²

5.3 *Assessment of the OSCE Commitments Related to Refugees and Displaced Persons*

The Italian asylum system has been shaped according to the Common European Asylum System. Therefore, the legislative framework is now well structured with different forms of protection to be granted to asylum applicants. However, the Common European Asylum System faces a serious crisis mainly due to the application of the Dublin Regulation, i.e. the determination of which State has the obligation to evaluate the asylum claims lodged by people who arrive in Europe. The opening of hotspots centres, the lack of coordination and solidarity between Member States in both search and rescue operations and

49 Prime Ministerial Decree; DPCM 30 Dec. 1999.

50 Prime Ministerial Decree 5 Apr. 2011.

51 C. Favilli, *L'attuazione della direttiva rimpatri in Italia: dall'inerzia all'urgenza con scarsa leale cooperazione*, in *Rivista di diritto internazionale*, 2011, 3, 693 ff.

52 Commission Communication COM(2016) 197 of 6 April 2016, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, p. 7.

relocation of migrants, are some of the key reasons for the so-called migrants crisis, affecting the European Union as a whole.

Looking at Italian law, one of the most critical points is the reception system, where an emergency approach still prevails and there is a lack of clear and effective pathways to integration of asylum seekers. Asylum procedures, both administrative and jurisdictional, show a lack of human resources; additionally, the most recent reforms aim to lower the jurisdictional rights of asylum seekers in order to speed up the proceedings. Moreover, the hotspot approach adopted since the application of the EU Decisions on relocation of 2015 lacks a legal basis as required by the ECHR.

6 Integration

6.1 *Right to Family Reunification and to Equality of Treatment*

Family reunification is one of the main tools to foster integration of migrants as underlined by OSCE Commitments. In Italy, entry for family reasons is allowed if there is already a family member that is legally resident with a long-term permit. Family members shall individually meet the conditions for short stay. There are no annual quotas which set a maximum inflow for family reasons and the application may be submitted at any time of the year.

Family members that may be reunited are: live-in spouses, minor children, even of only one of the two spouses, parents of 65 years and over who are disabled or are dependents of aliens resident in Italy and without other children in their country of origin.

Even if same-sex marriages are not allowed in Italy, after the approval of Law 76/2016 on Civil Unions, the right to family reunification is even extended to same-sex couples.⁵³

An alien who applies for family reunification must give proof of adequate resources to support all family members; this sum may also include the income of the spouse or other family members in the same household. It is also necessary to have accommodation that is suitable to lodge the family members,

53 Law 20 May 2016, No. 76, *Rules on civil unions between same-sex partners and of de facto relationships (Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze)*, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2016-05-20;76!vig=>. See also the administrative circular adopted by the Home Office: http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/circ._prot._nr._3511_del_05.08.2016.pdf.

demonstrated by presenting a certificate to that effect issued by the authorities of the municipality of residence.

Proof of kinship may prove to be particularly complex. Should it be impossible to fulfil this requirement if, for example, there is no organized system of registry, then kinship may be proven through DNA testing performed at the expense of the applicants. It is also permissible to adopt alternative means to prove family ties, such as the presentation of documents issued by international bodies deemed suitable by the Ministry of Foreign Affairs. Moreover, suitable translated and legally certified documentation is also required to attest the state of health, 'dependency' status and lack of adequate family support for parents.

Further difficulty may arise in determining the age of minor dependent children, especially when the documentation submitted is not sufficiently reliable. In this case the documentation may be replaced by a certification issued by the Italian embassy or consulate drawn up on the basis of tests such as that of bone densitometry.

The residence permit for family reasons enables the holder to carry out subordinate or self-employed work or study, without requiring that the permit be converted to a work permit or study permit. However, it is possible to convert the permit for family reasons to a permit for specific purposes at expiry and renewal.

As far as the right to equal treatment, the condition of reciprocity does not apply when dealing with fundamental rights of any person, including aliens, based on the several articles of the Constitution or on international law. Conventions based on the reciprocity clause and having a limited scope of application (economic, commercial, political, etc.) are, however, considered compatible with the Constitution, as a special type of treaty with a specific content. The Constitutional Court has also stated that all the rights granted to persons should be granted also to aliens, even though the Constitution only makes specific reference to citizens.⁵⁴ Thus the principle of equality is recognized to aliens, according to Article 3 of the Constitution: they cannot be discriminated on the basis of race, language or religion as expressly stated in the text, nor suffer unreasonable differences in treatment based solely on the requirement of citizenship.

Legally staying foreign workers and their families are guaranteed equal rights with respect to Italian workers except in the case of activities which are specifically reserved for Italian citizens. This equal treatment is expressly

54 Judgments of the Constitutional Court, 23 Nov. 1967 No. 120; 20 Jan. 1977 No. 46, www.cortecostituzionale.it.

stated by Article 2, para. 1, Aliens Act, and by ILO Convention No. 143/1975, ratified in Italy by Law No. 158/81.

In addition, fundamental rights are also guaranteed to workers not legally staying in the Italian territory, just as they apply to any person on Italian territory. Equal treatment with Italian citizens is limited by the existence of activities reserved for Italian citizens, and specifically, activities involving the exercise of official authority or connected with the protection of national interests.

Additional prohibitions of discrimination are provided for by the Aliens Act and the non-discrimination laws enacted in 2003 to implement EU Directives.⁵⁵ In particular, national legislation prohibits discrimination with regard to social advantages, as formulated in the Racial Equality Directive.⁵⁶ On the contrary, a distinction based on the length of residency in the municipality or in the region is acceptable, whether or not it is proportional and only in cases where the benefit granted goes beyond the basic needs of persons.⁵⁷

Certain jobs are entirely closed to foreigners. These are activities that involve the exercise of official authority or pertaining to the protection of national interests. These include the posts of senior level officials in government departments and those of other relevant public authorities, magistrates and lawyers or public prosecutors, employees of the Presidency of the Council of Ministers, the Ministries of Foreign Affairs, Interior, Justice, Defence, Finance, and the State Forestry Corps, except those which can be accessed without competitive examination. Over the last few years, there has been lively litigation against those public authorities concerning these limitations that have been interpreted extensively to limit access by aliens to certain jobs in the public administration. The combined application of Article 2, para. 3, of the Aliens Act which enshrines equality of treatment between citizens and legally resident foreign nationals in conjunction with Articles 10 and 14 of ILO Convention No. 143/1975 on equal treatment of migrant workers has been applied to support an extensive interpretation of these rules.⁵⁸

According to the general right to equal treatment, in principle migrants are entitled to participate in the public life of the society, for instance by becoming a member of a political party, trade union or any public or private association. However, also due to the cuts in public spending, concrete actions to

55 Legislative decree 9 July 2003 No. 215, implementing EU Directive 2000/78/EC, available at: www.normattiva.it.

56 CJEU, *Martinez Silva*, C-449/16, 21 June 2017.

57 Italian Constitutional Court no. 141/2014, available at www.cortecostituzionale.it.

58 Ordinance of the Constitutional Court, No. 139/2011; in www.cortecostituzionale.it.

support and promote integration have not been put in place in the last few years.⁵⁹ Therefore, legally staying foreigners, even long-term ones, may participate in consultative committees set up by local municipalities on a voluntary basis; however, they are not entitled to vote in any political elections, both at national or regional/local level. Only EU citizens staying in another EU country have the right to vote and to stand as candidate to the municipal election (Article 20, Treaty on the Functioning of the EU).

6.2 *Unaccompanied Minors*

Foreign minors are considered unaccompanied if they are on Italian territory without the assistance or legal representation of their parents or other legally responsible adults under Italian law (Regulation of the Committee for foreign minors, Prime Ministerial Decree No. 535/99). More specifically, as stated in the 2003 guidelines of the Committee for Foreign Minors, minors are to be considered 'accompanied' if they have been legally entrusted to relatives within the third degree, while in all other cases they are considered 'unaccompanied'.

Any person who becomes aware of the presence of unaccompanied minors in Italy must notify the Public Prosecutor at the Juvenile Court. This obligation applies also to persons who legitimately provide a permanent home to a child that has been abandoned (Article 9, para. 4, of Law No. 184/1983) when the period of hospitality exceeds six months and the person is not a relative of the child within the fourth degree.

Unaccompanied minors will be placed in a safe place under the care of the local authorities, that is, the municipality where the child's presence is notified. The minor will be guaranteed those rights relating to temporary residence, health care, schooling and other welfare guaranteed by law (Prime Ministerial Decree No. 535/99). There are a number of projects in operation to ensure that unaccompanied minors have an appropriate reception which actively involve activities by the National Association of Italian Municipalities (ANCI), and NGOs, that are frequently brought into play through agreements funded by central Government.

The probate judge at the District Court of the location where the minor's main interests are present is the competent authority for enacting measures for the child's welfare, with the intervention of the social care services. Specifically, the judge will appoint a guardian. Pending this appointment, guardianship is exercised by the public service institution or by the legal representatives of the

59 Italy is part to the Convention on the Participation of Foreigners in Public Life at Local Level, 5 February 1992, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144>.

family-type community or institutional community where the child has been placed. These representatives must request the appointment of an external guardian within thirty days. Where possible the minor is entrusted to a family, preferably with other minor children, but should such a solution be impossible they will be entrusted to a single person. Alternatively, the minor may be fostered in a family-type community or an institution of public or private welfare.

Another institution that is competent is the Committee for Foreign Minors (Prime Ministerial Decree No. 535/99) which works to protect unaccompanied foreign minors and minors received in Italian territory in accordance with the 1989 UN Convention on the Rights of the Child. One of the most important responsibilities of this Committee is the promotion of inquiries to trace the families of unaccompanied minors, including through agreements with other bodies. The Committee for Foreign Minors must, in fact, make inquiries to determine whether it is possible to repatriate the child to his/her own country, given that repatriation is considered in the child's best interests when it is possible to trace parents or other relatives. Where repatriation is not appropriate, the Committee declares there will be no repatriation and informs the court to assess the state of abandonment (and subsequent action to be taken) and the social services to provide suitable foster care as well as calling on the public and private bodies responsible for the child's reception to draw up a project of social and civil integration that will last no less than two years.

Particular safeguards are put in place to protect unaccompanied minor asylum seekers. Anyone who becomes aware of the presence of an unaccompanied minor is required to inform them of the possibility of applying for asylum, where necessary with the help of a mediator and an interpreter, and to invite them to express their own opinion on this opportunity.

6.3 *Assessment of the OSCE Commitments Related to Integration of Migrants*

From a legal point of view Italian law is in line with the OSCE commitments on integration of migrants and their family. A general principle of equality of treatment between aliens and citizens apply and where differences of treatment have been made, Courts have quashed the potential discriminatory measures. The right to family unification is granted in more open terms than in other EU Member States: in particular, no prerequisite of language knowledge is required before entering as a family member. The right to education to migrant's children is fully recognized.

Critical points are the potential differences between different regions, since social inclusion and integration are a regional competence. In particular, the lack of resources devoted to social policies in general, reflects also in the lack of projects and measures to facilitate the integration of migrants.

7 Concluding Remarks

The assessment made with this analysis does in fact show a satisfactory level of conformity of legislations in force in Italy with the OSCE commitments on migration. However, the practical implementation of laws appears weaker, both at national and local level. Lacking a National Plan on Migration, despite its requirement by the Aliens Act, the Italian migration policy seems to be managed without a long-term approach, and only with measures adopted to solve specific and current issues. The adoption of a National Plan on Migration is recommended and should be considered a key component of the National Migration Policy to be updated each year. In this context, compliance with OSCE commitments should also be taken into account in order to plan practical measures or to propose legislative amendments.

Another field where there should be more concrete actions is that of enhancement of skills of migrants, including the promotion of projects to grant informal recognition of skills and qualifications; despite a right to equal treatment granted to migrants in the field of employment, a set of practical measures is lacking while this is one key issue to foster social inclusion of migrants. In general, more actions to simplify administrative procedures relating to entry and stay should be enacted.

A similar situation of practical absence of concrete measures concerns measures related to participation in the society of the hosting State. In particular, Italy should ratify Chapter C of the Strasbourg Convention on the Participation of Foreigners to the Public Life at Local Level of 1992. Moreover, more actions and projects should be funded and promoted in order to ease the participation of migrants into the hosting society. In this regard, priority should be given to promote projects in order to raise awareness about the effective contribution of migrants to society, and provide for language and vocational training for migrant workers. In addition, more projects should be funded to incorporate gender aspects, with particular attention to women, in migration policies.

It has proven difficult in the Italian asylum system to perform efficient procedures for examining applications for international protection, while granting individual fundamental rights and an adequate standard of reception. In this regard, the ordinary system of reception of asylum seekers should be strengthened, using the extraordinary system of reception only as a last resort measure. Moreover, integration projects should start at the beginning of the reception procedure, providing for effective language and professional trainings.