

# Chapter 16

## Migrants' Access to Social Protection in Italy



William Chiaromonte

### 16.1 Overview of the Welfare System and Main Migration Features in Italy

#### 16.1.1 *Main Characteristics of the National Social Security System*

The Italian welfare state started to develop only by the end of the nineteenth century. The social insurance has been a fundamental element for accessing social benefits since the post-war period, especially after the 1948 Italian Constitution that has defined social protection as an essential function of the State, thus creating a consistent catalogue of fundamental social redistribution rights (Articles 2, 3, 32, 38 and 117) (Ascoli 2011; Ferrera et al. 2012; Chiaromonte and Giubboni 2016). The situation began to change during the 1970s, with the fiscal crisis having a gradual impact on social benefits and welfare structure (Ferrera and Hemerijck 2003). The welfare state has become the main subject of programs designed to restore the public budget (Greve 2012), although this development has not occurred through an appropriate and comprehensive recalibration of the overall system (Palier 2010; Ascoli and Pavolini 2012). This has led to a situation in which the number of beneficiaries of certain social benefits has been substantially reduced, causing an infringement of the principle of equality enshrined in Art. 3 of the Constitution as it triggered manifest disparities in treatment based on citizenship or residence (Chiaromonte 2013).

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Between the 1980s and 1990s, the process of transformation and restoration of the social state has continued through the progressive transfer of powers and financial budgets from the central bodies to the local ones. This has led to a significant fragmentation of the social services and benefits offered on the national territory. The efforts to rationalize the social protection made since the mid-1990s have not overcome, at least not completely, the fragmentation and categorization of the instruments that historically characterize the structure of the Italian welfare state; nor they have been able to mitigate the inhomogeneity of the provision of social benefits. The largest part of social spending is still absorbed by the pension system at the expense of policies to support families, children, unemployed people, etc. Furthermore, a clear gap in the protection of the different occupational categories exists in terms of access to social benefits. The outcome is a sharp segmentation between insiders (those who are covered, mainly employees of the public administrations and large companies) and outsiders (those who are not covered, mainly workers in the informal economy).

Currently, the Italian welfare state is characterized by the co-existence of three main schemes (see also Pessi 2016; Ferrante and Tranquillo 2019; Persiani and D’Onghia 2019; Cinelli 2020; Giubboni and Cinelli 2020):

- a social security scheme strongly based on employment and on a contributory pension system organized around compulsory social insurance, which still represents the core and fundamental feature of the Italian welfare state. Only workers can benefit from measures aimed to integrate and/or replace their income in case of senility, illness, injury, unemployment, etc. Those social benefits based on contribution (old-age pensions, unemployment benefits, maternity/paternity benefits, etc.) are provided according to formulas that establish a correspondence between contributions paid and insurance claim (Art. 38(2) Constitution);
- a universal scheme, mainly organized around the healthcare sector, in which benefits are guaranteed to all individuals regardless of their active participation in the labour market, and independently from a direct contribution to the service, insofar as these services burden on the general taxation system;
- a social assistance scheme for individuals in need (Art. 38(1) Constitution) and social benefits (maternity allowance, earning-related benefits for the family, inclusion income, etc.) financed by the general taxation.

### ***16.1.2 Migration History and Key Policy Developments***

The transformation of Italy from an emigration country to a country of immigration has started at the beginning of the 1970s (for an analysis of national migration policies, see Colucci 2018; for an in-depth contextualisation of the Italian emigration, including statistics on nationals residing abroad, see Caldarini 2020). In particular, arrivals in Italy have begun to overtake departures in 1971. Since then, the number of foreigners in Italy has been increasing exponentially, from little less than 122.000

(1971 census) to 211.000 (1981 census), 356.000 (1991 census), 1.3 million (2001 census), reaching nearly 4 million (2011 census). Since 2013, the number is stable at around 5 million people.

On the basis of the data available, the foreign population in Italy was estimated at 5,8 million, of which around 5,2 million have a regular residential status (around 8,7% on the population) and nearly 600.000 are undocumented (IDOS 2019).<sup>1</sup> Around 3.7 million foreigners originate from non-EU countries. This number has been substantially stable over the last 3 years, also due to a significant decrease in the arrivals by sea since 2017 (following the so-called “migrant crisis” which has led to a significant increase in the arrivals by sea in Italy and a parallel surge of requests for international protection). According to UNHCR estimates, there are around 354.000 beneficiaries of international protection currently residing in Italy, accounting for 0,6% of the total population.

By the end of 2019, there were approximately 2.5 million workers with foreign citizenship in Italy, thus accounting for 10,7% on the overall employed population. One-third were performing low-skilled jobs mainly in the service sector (where foreign workers represent more than two-thirds – 65,9% – of all workers), or in the industrial or agricultural sector (where foreigners account for 27,7% and 6,4% of all workers).

Half of all foreigners residing in Italy (50,2%) are citizens of a European country. One fifth of all foreign residents (21,7%) originates from Africa and a slightly lower quota from Asia (20,8%). There are around 370.000 foreigners from the Americas, mostly Latin-Americans (7% of all foreign residents). Romanians represent the largest foreign group (23% of all foreigners), followed by Albanians (8,4%), Moroccans (8%), Chinese (5,7%) and Ukrainians (4,6%). These first five nationalities cover half of the entire foreign presence in Italy, while the first 10 (which include, in order, Philippines, India, Bangladesh, Moldova and Egypt) reach a little less than two-thirds (63,5%).

Regarding the management of the migration phenomenon, a medium and long-term, effective and uniform strategy on migration policies has never been adopted in Italy. The frequent legislative actions (often with emergency character, and mainly aiming to regulate economic migration) have proved unsuccessful. Also because of the complexity and intricacy of the procedure provided for by the applicable norms, enshrined in the *Testo unico sull'immigrazione*,<sup>2</sup> the entry and residence for working purposes of third-country nationals is difficult (Chiaromonte 2013). In particular, *Testo unico sull'immigrazione* provides a two-tier articulation of migration policies for economic reasons. The first level is represented by the three year policy paper on immigration policy (Art. 3(1)-3(3)), which aims to define the general features of each annual determination of entrance flows, and measures for the integration of foreigners (the last document approved refers to 2004–2006). The second level of intervention, known as “*decreto flussi*” (Art. 3(4)), establishes

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<sup>1</sup>All the data mentioned in this chapter have been extrapolated from the *Centro Studi e Ricerche IDOS*, 2019.

<sup>2</sup>Decreto legislativo 25 luglio 1998, n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Consolidated Law on Immigration).

annual maximum quotas of foreigners who are allowed to enter for working purposes, based on which entry visas and residence permits for working purposes are issued. In most recent years, the quotas for “*decreti flussi*” have been drastically reduced: the number of work permits dropped from 250.000 in 2007 to 30.850 in 2019. Such a nearly absolute closure of the legal entry channels for working purposes has determined a permanent violation of the norms that regulate entry and residence and, therefore, an increase in the number of foreigners irregularly residing in Italy, also considering the structural requests for foreign workers (especially seasonal) from the Italian labour market. Consequently, in recent years, migration inflows have leaned mainly towards international protection that has been used also by migrants motivated by economic reasons, even if it is not designed to regulate economic migration flows (Chiaromonte 2019).

Additionally, regularisation schemes for undocumented foreigners have also been established. They represent a para-ordinary management tool of the migration phenomenon. Since 1986, eight regularization schemes have been implemented, the latest in 2020.

## 16.2 Migration and Social Protection in Italy

For a long time, the Italian social security protection has been guaranteed solely to workers employed in the Italian territory, independently of their nationality, and to Italian workers employed abroad by Italian companies (in derogation from the territorial principle of social law, according to which workers are subject to the social security framework of their country of employment). Only since the mid-1990s the protection has been progressively extended to cover also self-employed workers. The European social security coordination (Regulation 883/2004) and the CJEU case law have further contributed to widen the concept of employment relationship (Chiaromonte and Giubboni 2014; Fuchs and Cornelissen 2015; Pennings 2020).

In order to qualify for social security protection in Italy, workers do not have to meet specific subjective requirements. Regarding age, for instance, the minimum working age is sufficient, normally set at 16 years old. Sex, instead, has no relevance at all for identifying the beneficiaries (for example, regarding pension benefits). Not even citizenship, usually, affects the social security protection, in view of the general principle according to which the non-contractual obligations are regulated by the law of the place where the respective factual situation has occurred (Art. 25 *disposizioni preliminari c.c.*). Therefore, the work performed by foreigners in Italy entails the right to social security protection according to the national legal framework. Notwithstanding that, in certain cases, a specific regulation may be required, as explained below for non-EU foreigners.

With regard to residence, the EU rule applies. Hence, the residence requirement, which may be one of the conditions to access social security benefits according to an EU member state national law, is not relevant. However, certain social security benefits cannot be accessed outside the state of residence, e.g. the “*assegno sociale*” (social allowance, as explained below).

Regarding the specific case of non-EU foreigners' access to social security, the Italian system is characterised by some peculiarities depending on the type of benefits (Chiaromonte 2013; D'Onghia 2017). For social security benefits, equal treatment between national citizens and non-EU foreigners is generally ensured.<sup>3</sup> Non-EU foreigners working in Italy are entitled to the same benefits recognised to Italian workers (including retirement and disability benefits, among others) upon payment of contributions to the National Institute for Social Security (INPS).<sup>4</sup> However, there are two exceptions: one concerning the case of the pension scheme for seasonal non-EU foreign workers (which are excluded from protection against unemployment and family benefits) and a second one regarding the failure to return the social security contributions paid in Italy by non-EU foreign workers, in case of repatriation.

In light of the principle of territoriality, non-EU foreigners are also subject to the social security framework of the country of employment, unless bilateral agreements concluded between Italy and third countries provide otherwise (Chiaromonte 2012). In that case, the foreign worker that has not accrued enough pension rights in Italy can integrate them by adding the contributions paid to the other signatory State. A further exception to the principle of territoriality is allowed if the presence of the foreign workers on the Italian territory is due to a transnational provision of services of short duration. In these cases, the social security framework of the hosting state is not relevant.

When it comes to the right of non-EU foreigners to access social assistance benefits, in the past, national legislation and local norms imposed restrictions based on the nationality or the residence permits of the applicants. These restrictions have raised several criticisms regarding their incompatibility with international law, EU law, and the Italian Constitution (Corsi 2017; Ferrara 2017; Orlandini and Chiaromonte 2017; Sciarra 2017; Bologna 2018; Chiaromonte and Guariso 2019). The Constitutional Court intervened to censure national and regional norms that

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<sup>3</sup>The principle of equal treatment between national citizens and non-EU foreigners in terms of access to social security systems is protected both at international level (see ILO Conventions No. 97/1949, Art. 6, and 143/1975, Art. 10, on the protection of migrant workers; Convention No. 102/1952, Art. 68, and 118/1962, Art. 4, on social security; the ECHR norms that protect the social security benefits, Art. 14 and Art. 1 of the first Protocol attached to the Convention; and the provisions enshrined in the bilateral conventions on social security for migrant workers concluded with non-EU countries) and at EU level (especially, Art. 21 and 34 of the Nice Charter, but also the already mentioned measures aimed to coordinate the national social security systems, extended to non-EU foreigners by Regulation 1231/2010). At the national level, the principle of equality between nationals and non-EU foreign residents has been consistently recognized by the Constitutional Court in reference to fundamental and inviolable constitutional rights (*Corte costituzionale* nn. 120/1967 and 62/1994) which include social security rights (Art. 2, 3, 10(2), 38 Constitution) (*Corte costituzionale* nn. 80/1971 and 160/1974). Beyond the Constitutional norms, it is worth mentioning the Consolidated Law on Immigration, which is a collection of ordinary norms that guarantee to all foreign workers legally residing in Italy, and their family members, «equal treatment and full equality of rights as Italian workers» (Art. 2(3)). The relevant laws are available at: <http://www.normattiva.it>. Accessed 23 January 2019.

<sup>4</sup>*Istituto Nazionale della Previdenza Sociale*, <https://www.inps.it/>. Accessed 23 January 2019.

provided for the Italian citizenship as a mandatory requirement in order to qualify for the guaranteed minimum resource scheme and the non-contributory pension.<sup>5</sup> As a result of the Constitutional Court's decisions, the legal amendments imposed by the EU law and the judgments of ordinary courts, there are no longer social benefits reserved only to nationals.

The issue of the extended residence and/or the residence permit required to have access to certain social benefits is more complex. This requirement could potentially represent a form of indirect discrimination of foreigners inasmuch as the measures adopted, although apparently neutral, could jeopardize the interests of the individuals belonging to a given group. Originally, Art. 41 of the *Testo unico sull'immigrazione* did not make any distinction as to the access to social assistance between foreigners with a residence permit of at least one year (and their families) and Italian nationals. However, Law 388/2000<sup>6</sup> (Art. 80(19)) has restricted the access to various social assistance benefits only for third-country nationals who are long-term residents (in practice, foreigners who earn a certain income level and legally reside in Italy for at least 5 years). Since 2008, the Constitutional Court intervened in several occasions on the issue by emphasizing the unreasonableness of including the long-term residence status among the requirements for claiming social assistance benefits (e.g. incapacity pension, invalidity allowance, etc.).<sup>7</sup> The Court has declared the unconstitutionality of such legal provisions. Hence, when it comes to social assistance benefits aimed at supporting individuals who are in need, any distinction between nationals and legally residing foreigners is in conflict with the principles of equality (Art. 3 Constitution) and solidarity (Art. 2 Constitution).

### 16.2.1 Unemployment

The Italian unemployment scheme only provides unemployment insurance benefits (there is no unemployment assistance scheme). The compulsory social insurance scheme for employees and assimilated, who involuntarily lost their jobs, is financed partly through contributions from employers, partly through general taxation, and providing earnings-related benefits. The main unemployment benefit is the so-called NASpI ("*nuova assicurazione sociale per l'impiego*").<sup>8</sup> In order to access the

<sup>5</sup>For instance, *Corte costituzionale* nn. 432/2005 and 40/2011.

<sup>6</sup>Legge 23 dicembre 2000, n. 388, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2001).

<sup>7</sup>For instance, *Corte costituzionale* nn. 306/2008, 11/2009, 187/2010, 239/2011, 40/2013, 22/2015 and 230/2015.

<sup>8</sup>Decreto legislativo 4 marzo 2015, n. 22, Disposizioni per il riordino della normativa in materia di ammortizzatori sociali in caso di disoccupazione involontaria e di ricollocazione dei lavoratori disoccupati, in attuazione della legge 10 dicembre 2014, n. 183. This section does not refer to Dis-Coll (unemployment benefit for para-subordinate workers assimilated to employees and "new" self-employed).

NASpI, resident nationals and (EU and non-EU) foreign residents must be involuntarily unemployed for more than 6 months, able to work, available for the employment office, not benefit from any other pension nor receive any salary higher than the personal annual taxable ceiling and apply within 68 days (98 days in case of lawful dismissal for misconduct). The qualifying period of contribution for accessing unemployment benefits is at least 13 weeks of work insurance during the 4 years prior to the job loss and at least 30 days of work insurance during the last 12 months prior to dismissal. The benefit amounts to 75% of the monthly reference earnings with a monthly ceiling of € 1195 plus 25% of worker's actual monthly pay exceeding this ceiling. The maximum payable amount is equal to € 1300 (gross) per month. From the fourth month of receipt of the benefit, the amount is reduced by 3% every following month. The statutory duration of the benefit is equal to half the number of weekly contributions paid during the last four years prior to dismissal.

With particular reference to seasonal non-EU foreign workers, Art. 25 of the *Testo unico sull'immigrazione* provides that they cannot accede to NASpI, albeit their contributions – anyway due by the employer – are paid to INPS, and they are expressly intended to support social care services in favour of foreign workers. National citizens residing abroad in the service of an Italian employer (either in EU or non-EU countries) can access NASpI from Italy under the same eligibility conditions as those applied for resident nationals; in addition to NASpI benefits, they may be entitled to a special unemployment benefit for repatriated workers.<sup>9</sup>

## 16.2.2 Health Care

The Italian National Health Service (SSN) was established by Law n. 833/1978<sup>10</sup> and it covers all inhabitants (based on residence). The SSN generally provides services in kind and its financing mainly occurs through the National Health Fund entirely supported by appropriations received by the State budget and proportionally distributed among all Regions. The main funding source is the IRAP (Regional tax on productive activities, a tax-financed scheme). Another funding source is the joint participation of citizens to the expenditure for the services received (the so-called “ticket”).

Regarding benefits in kind in case of sickness, the health insurance card (for national citizens and EU citizens) and the residence permit issued for one of the reasons stipulated in the frame of the compulsory registration at the National Health Service (for non-EU foreigners) are sufficient to qualify for such benefits. Art. 35 of the *Testo unico sull'immigrazione* recognises to undocumented migrants essential medical and hospital care in case of illness or injury, programs of preventive medicine for the safeguard of individual and collective health, pregnancy protection and maternity, protection of children's health, vaccination and prophylaxis, without

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<sup>9</sup> Legge 25 luglio 1975, n. 402, Trattamento di disoccupazione in favore dei lavoratori rimpatriati.

<sup>10</sup> Legge 23 dicembre 1978, n. 833, Istituzione del servizio sanitario nazionale.

putting any burden on them if they do not have sufficient economic resources. In short, while non-EU foreigners legally residing in Italy have equal access to health benefits in kind with resident nationals, undocumented foreigners can only enjoy the core content of the healthcare protection (Corsi 2019).<sup>11</sup> However, as the recent Constitutional Court's case law demonstrates, the Regions have, in some cases, extended the personal scope of their healthcare legislation to non-EU foreign residents. This has led to a broadening of the principle of equal treatment in medical care to the benefit of undocumented foreigners, compared to what is provided for by the *Testo unico sull'immigrazione*.<sup>12</sup>

With the exception of national workers posted in Italy, Italian citizens residing abroad in other EU Member States or in non-EU countries with which no agreement with Italy is in force lose their right to healthcare in Italy and abroad upon cancellation from the municipal registry and registration to the AIRE (registry of Italians residing abroad). However, Italian citizens residing abroad and temporarily returning to Italy are entitled to free urgent hospital services for a maximum period of 90 days per year if they do not have any public or private insurance coverage for health services. Italian citizens registered to the AIRE and residing in other EU countries, temporarily staying in Italy for reasons other than work or study, must submit the European Insurance Health Card (EIHC) issued by the foreign institution with which they are insured. If they do not have the EIHC, they can obtain the reimbursement of the health costs incurred in Italy by the health institution of their country of residence.

In order to claim cash benefits in case of sickness, resident nationals, non-resident nationals and resident EU foreigners have to send to INPS a medical certificate attesting their incapacity to work (there is no qualifying period of contribution, and the granting period is established by the applicable collective agreement). Non-residents nationals who work in the service of an employer based in Italy can access these cash benefits under the same conditions as national residents. Additionally, non-EU foreigners have to hold a residence permit for work purposes to access sickness benefits in Italy. Earnings-related benefits are generally provided by the employer at the expense of INPS.

Regarding invalidity benefits, an insured person whose working ability is permanently reduced to at least two thirds as a result of sickness or infirmity, documented by a medical certificate, is considered invalid for the purpose of invalidity allowance ("*assegno ordinario d'invalidità*"). The incapacity pension ("*pensione di inabilità*") is payable to the insured person or beneficiary of the invalidity allowance who is absolutely and permanently incapable of any occupational activity.<sup>13</sup> It is a compulsory social insurance scheme for all private sector employees, financed by contributions covering employees with earnings-related pensions depending on contributions and duration of affiliation.

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<sup>11</sup> Corte costituzionale n. 252/2001.

<sup>12</sup> Cfr., for instance, *Corte costituzionale* nn. 269/2010, 299/2010, 61/2011.

<sup>13</sup> Legge 12 giugno 1984, n. 222, Revisione della disciplina della invalidità pensionabile.



### 16.2.3 Pensions

The work insurance general compulsory scheme for old age (“*assicurazione generale obbligatoria per la vecchiaia*”) covers private sector employees by providing benefits calculated according to two determining factors: age and accrued contributions. Other compulsory schemes are provided for self-employed and a certain number of specific categories of workers, such as civil servants, professionals, atypical workers. The pension system is based on national defined-contributions scheme for those who entered the labour market after 1st January 1996 (for those who entered the labour market before that date, the system is “hybrid”). Contributions are paid by workers and employers to INPS. Those contributions are used to provide pensions received by those who are entitled in the same year (the so-called “*sistema a ripartizione*”, pay-as-you-go system).

The public contributory old age pension is called “*pensione di vecchiaia*”. Since 2019, those who entered the labour market before 1st January 1996 are entitled to this pension when reaching 67 years old and a minimum qualifying period of 20 years of paid and/or deemed contributions. For those who entered the labour market after 1st January 1996, in addition to the mentioned requirements, the amount of their pension must be equal to 1.5 times the amount of the social allowance (“*assegno sociale*”).<sup>14</sup> Otherwise, they can access the pension benefits at 71 years old with at least 5 years of effective contribution, independently from the benefit's amount. These conditions apply equally to resident nationals, EU foreigners, non-EU foreigners (who also have to hold the residence permit for work purposes), and national citizens residing abroad. Non-EU foreigners cannot repay the pension contributions paid in Italy by the foreign worker in case of his/her repatriation.<sup>15</sup>

The public non-contributory pension (“*assegno sociale*”, social allowance) is addressed to Italian citizens residing in Italy for at least 10 years; EU citizens residing in Italy for at least 10 years; non-EU citizens residing in Italy for at least 10 years<sup>16</sup> and with an EU residence permit for long-term residents; refugees and holders of international protection. Beneficiaries must be at least 67 years old and their income must be below the legally established thresholds. The social allowance is temporary and the verification of the possession of the income requirements and actual residence takes place annually.

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<sup>14</sup> Legge 8 agosto 1995, n. 335, Riforma del sistema pensionistico obbligatorio e complementare; Legge 22 dicembre 2011, n. 214, Conversione in legge, con modificazioni del decreto-legge 6 dicembre 2011, n. 201, recante disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici.

<sup>15</sup> Legislative Decree 286/1998, Art. 22(13).

<sup>16</sup> The 10-years residence requirement for non-EU foreigners has been deemed discriminatory, among other, by the *Tribunale* of Brescia 14.10.2015, and *Tribunale* of Vicenza, 2.8.2016.

### 16.2.4 Family Benefits

There are several types of maternity allowances in Italy. The maternity benefit (“*congedo di maternità*”) and paid nursing leave (“*permesso per allattamento*”) are granted to insured employees and assimilated groups (also self-employed) in case of childbirth and adoption. The benefit can be granted for 5 months, out of which 0, 1 or 2 months prior to confinement. The amount is 80% of earnings for the compulsory period (no ceiling). The duration of paid nursing leave is 1- to 2-hour daily nursing leave for the child’s mother or father: in case of part-time or full-time work, respectively, until the first birthday of the child. The amount is 100% of earnings (no ceiling). These conditions apply to national citizens, EU foreigners, non-EU foreigners having a residence permit for work purposes and national citizens who work abroad in the service of an Italian employers.

The state financed maternity allowance (“*assegno di maternità dello Stato*”) is granted to working mothers with low income or temporary unemployed mothers, including EU mothers and non-EU mothers who are long-stay permit holders.<sup>17</sup> In order to qualify for this benefit, mothers are required to prove 3 monthly contributions completed within 9 months prior to beginning of pregnancy or, in case of adoption, within the period from 18 to 9 months prior to the adoption. These conditions apply also to national citizens working abroad in the service of an Italian employer. Also, the maternity allowance (“*assegno di maternità dei comuni*”) is an economic compensation paid for 5 months by the municipality of residence to non-working mothers with low household income, including EU foreigners and third-country nationals who are long-term residents.<sup>18</sup> INPS extended the benefit also to non-EU citizens who are family members of EU citizens and to holders of refugee and international protection status.

Paternity benefit (“*congedo di paternità*”) is granted to insured employees and assimilated groups (also self-employed).<sup>19</sup> There are no qualifying conditions and the benefit is granted, in 2020, for 7 days (plus one day extra if the mother agrees to transfer from her maternity leave). The amount is 100% of earnings. The father may also claim for a paid maternity leave of up to 3 months after the child’s birth in case the mother does not claim for it, or if he has the sole charge of the child.<sup>20</sup> These conditions apply to national citizens, EU foreigners, non-EU foreigners having a residence permit for work purposes and national citizens who work abroad in the service of an Italian employers.

An optional supplementary parental leave (“*congedo parentale facoltativo*”) can be granted to insured employees and assimilated groups (self-employed excluded).<sup>21</sup>

<sup>17</sup> Decreto legislativo 26 marzo 2001, n. 151.

<sup>18</sup> Decreto legislativo 26 marzo 2001, n. 151.

<sup>19</sup> Legge 28 giugno 2012, n. 92, Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita.

<sup>20</sup> Decreto legislativo 26 marzo 2001, n. 151.

<sup>21</sup> Decreto legislativo 26 marzo 2001, n. 151.

After expiry of the compulsory maternity/paternity leave, a reduced paid leave (30% of salary) may be claimed by either parent for a 6-month period until the child reaches the age of 3. This benefit can be claimed for further 5 months, at most, until the child is 12 years old if the claimant parent's salary does not exceed twice and a half times the minimum pension. The amount is 30% of earnings if the child is under 3 years old, unpaid if the child is 3–12 years old (with some exceptions). These conditions apply to national citizens, EU foreigners, non-EU foreigners having a residence permit for work purposes and national citizens who work abroad in the service of an Italian employers.

The earnings-related benefits for the family ("*assegno per il nucleo familiare*") is a special measure for the families with more than 3 minor children (residing in Italy, in another EU country or in a third country having concluded a social security agreement with Italy) and who dispose of limited assets and incomes.<sup>22</sup> Originally it was only envisaged for Italian nationals, and later it has been extended to EU nationals and third-country nationals who are long-term residents.

With particular reference to non-EU foreigners, the most recent legislation has been directed to ensure non-contributory social benefits (i.e. the maternity allowance and the earnings-related benefits for the family) to third-country nationals who are long-term residents (as well as to those foreigners who enjoy equality of treatment, established by EU norms, as for instance beneficiaries of international protection). This normative framework raises serious doubts regarding its reasonableness and legitimacy in light of European norms. Indeed, to make certain benefits (especially those against poverty) contingent upon a minimum income – as for the permit of third-country nationals who are long-term residents – seems to be in contradiction with the aim of the social assistance benefit at stake. In light of these arguments, ordinary judges have developed various interpretative solutions aimed to limit the scope of the measures that make the long-term residence as a condition for some non-contributory benefits, by disapplying the national norm on the grounds of its inconsistency with supranational norms.<sup>23</sup> The Constitutional Court has repeatedly declared analogous norms as illegitimate.<sup>24</sup>

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<sup>22</sup> Legge 13 maggio 1988, n. 153, Conversione in legge, con modificazioni, del decreto-legge 13 marzo 1988, n. 69, recante norme in materia previdenziale, per il miglioramento delle gestioni degli enti portuali ed altre disposizioni urgenti.

<sup>23</sup> The judges, for instance, have argued that the limitation to third-country nationals who are long-term residents constitutes a discrimination that violates the principle of equal treatment on social security, as provided by Art. 12, Directive 2011/98. Therefore, they have imposed the disapplication of the national norm inconsistent with the European legislation (e.g. *Tribunale* of Milano, 2.12.2016; *Tribunale* of Modena, 30.9.2016; *Tribunale* of Bari, 20.12.2016; *Tribunale* of Brescia, 23.8.2016). Also the Constitutional Court has affirmed that, under these circumstances, the ordinary judge has to apply directly the principle of equal treatment, *ex* Art. 12 Directive 2011/98 (Judgment n. 95/2017).

<sup>24</sup> *Inter alia*, *Corte costituzionale* nn. 2/2013, 4/2013, 172/2013 and 222/2013. Cfr. Biondi Dal Monte 2013.

### 16.2.5 *Guaranteed Minimum Resources*

Until 2019, the REI (“*reddito di inclusione*”, inclusion income) was a general scheme created in 2017 aiming to provide a minimum income for those who do not have sufficient resources to support themselves.<sup>25</sup> The scheme was organized both centrally and locally (shared responsibility): the request to obtain the REI was submitted to the municipality of residence (“*comune di residenza*”), but the benefit was granted by INPS. The REI consisted of two parts: an economic benefit, paid monthly through an electronic payment card (REI Card), and a personalized project of activation and social and labour inclusion, aimed at overcoming the poverty condition.

National residents were eligible to claim the REI. To be eligible for this benefit, EU foreigners were required to have the right of residence or the right of permanent residence and reside in Italy for a consecutive period of at least 2 years. Non-EU foreigners were required to be long-term residents and reside in Italy for a consecutive period of at least 2 years (the benefit was also granted to beneficiaries of international protection). National citizens residing abroad could not claim the REI.

The “*reddito di cittadinanza*” (citizenship income) has been introduced in 2019.<sup>26</sup> It aims to provide economic support and foster the social inclusion, being addressed to those who do not reach a given income threshold. The benefit is reserved to (beyond the Italian and EU citizens and their family members) foreigners who are long-term residents, who have to add to the EU long-term residence permit the further requirements asked to the Italian citizens as well: at least 10 years of residence in Italy (the last 2 years continuously), as well as the residence on the national territory for the length of the benefit. In other words, as far as concerns general benefits aimed to combat poverty, these are generally reserved for third-country nationals who have the EU long-term residence permit.

The Bergamo Tribunal has raised question of constitutional legitimacy of the norms for the part that provides for the requirement of the EU long-term residence permit.<sup>27</sup> Even if the question refers the *reddito di inclusione* (inclusion income), an institute which has been replaced by the *reddito di cittadinanza*, the Court’s decision will have an impact also on the latest institute, given the similarities between the two and the identity of the requirement prescribed.

This normative framework raises serious doubts of legitimacy as regards both EU law and the reasonableness principle. Indeed, according to Art. 9 of the *Testo unico sull’immigrazione*, the EU long-term residence permit is subject to income

<sup>25</sup>Decreto legislativo 15 settembre 2017, n. 147, Disposizioni per l’introduzione di una misura nazionale di contrasto alla povertà. To benefit from REI, the entire family was requested to have a valid ISEE (indicator of the family economic situation) not exceeding 6.000 euros; a valid ISRE (indicator of the ISEE related income) not exceeding 20.000 euros; real estate (deposit, current accounts) not exceeding 10.000 euros (lowered at 8.000 euros for a couple and 6.000 euros for a single person).

<sup>26</sup>Legge 28 marzo 2019, n. 26, Conversione in legge, con modificazioni, del decreto-legge 28 gennaio 2019, n. 4, recante disposizioni urgenti in materia di reddito di cittadinanza e di pensioni.

<sup>27</sup>*Tribunale* of Bergamo, 1.8.2019.

requirements (an appropriate accommodation and an income as high as the social allowance). Therefore, the fact that the benefits, especially those to combat poverty, are subject to a minimum income seems in contradiction with their very aim.

The State also provides for a social allowance (*“assegno sociale”*)<sup>28</sup> and other non-contributory benefits such as the social card (an income support measure). On the basis of Article 132 of Law 112 of 1998, the State has transferred to the Regions legislative functions and administrative competences in the field of social services for disabled persons, minors, youngsters, elderly people, poor families, etc. Some of these competences have been delegated to municipalities which implement their own policies of social intervention. The law does not provide for general conditions or requirements for entitlement to municipal support (cash benefits or intervention by social workers).

Summing up, the main obstacles to access social security benefits in Italy are connected to the extended residence requirement and mostly concern non-EU foreigners. In fact, the national and regional legislator often makes the residence requirement a condition of the status of beneficiaries of social assistance benefits. As observed above, since these requirements can constitute forms of indirect discrimination to the detriment of non-EU nationals, they have been often “neutralized” by the ordinary and constitutional case law.

With reference to bilateral social security agreements, it is also worth mentioning that Italy has not signed agreements with those countries whose nationals represent the three largest groups of non-EU foreigners residing in Italy (Albania, Morocco and China), but only with non-EU countries that represent the three largest destinations of national citizens of Italy (USA, Canada and Australia). As far as the latter are concerned, it is provided for an easier access to social benefits only in relation to health care (in particular, invalidity benefits) and public contributory pensions, while nothing is planned for unemployment, family benefits and guaranteed minimum resources.

### 16.3 Conclusions

The most problematic aspect regarding migrants' access to social protection in Italy concerns the case of non-EU foreigners. However, this doesn't apply for the social security system where the principle of equal treatment between national citizens and non-EU foreigners is generally enforced (with the exception of the two cases mentioned above on the exclusion of the seasonal non-EU foreign workers from the protection against dismissal and the family allowance, on the one hand, and the missed repayment of the contributions paid in Italy by the non-EU foreign workers in case of his/her repatriation, on the other hand).

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<sup>28</sup> Legge 8 agosto 1995, n. 335.

Regarding access to the single social assistance benefits, the principle of equal treatment clashes with numerous national and regional legal provisions that differentiate the possibility to be entitled to these benefits on the grounds of the residence permit held by the applicant and/or of given residence requirements (on the national or regional territory). As discussed, these requirements are potential forms of indirect discrimination to the detriment of foreign nationals, considering that the measures adopted, although apparently neutral, are able to jeopardise the non-EU foreigners' interests the most. Notwithstanding that, in the Italian legal framework, we can also find requirements of this kind, for instance with regard to some family benefits and the benefits to combat poverty, the judges – ordinary and constitutional – in their judgments have mostly removed these requirements, thus reaffirming, via case law, the full equality of treatment between Italian and foreign nationals legally residing in Italy, as to the access to the single social assistance benefits.

Finally, with particular reference to the case of nationals residing abroad, access to social benefits from Italy is granted, in many cases – as we have seen – to those working abroad in the service of Italian employers. Yet, the large majority of Italian emigrants – who are not working in the service of Italian employers – are excluded, and this aspect certainly represents a critical point.

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