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REDIAL PROJECT

National Synthesis Report – Italy

(Draft)

Expulsion from the territory

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1. Introductory remarks

The reception of the Return Directive in Italy has proved to be rather problematic and stimulated extensive reflections.[1] Implemented with delay, the new provisions introduced some correctives, without however substantially altering the previous regulatory framework. The reform was put in place with the Law decree 23 June 2011, No. 89, later converted and further modified by Law 2 August 2011, No. 129, which amended the Consolidated Text on Immigration in order to achieve such adjustment.

As a general remark, this legislative process, although amending relevant provisions (notably articles 13 and 14 of the Consolidated Text on Immigration), did not alter the whole structure of the Italian expulsion system. Doubts and criticism about the compatibility of the provisions in force with the Directive 2008/115/EC still continue to be raised.

2. Article 12. Formal requirements and procedural guarantees

Under article 13 of the Consolidated Text, the expulsion of foreigners is laid out through written decision, which must indicate how the measure will be executed (voluntary departure or accompaniment to the border) and the means of appeal, the ban on re-entry and the consequences for non-compliance with that prohibition.

The expulsion decision must be substantiated: in principle the facts justifying expulsion must be stated as well as legal aspects. It may be recalled that article 13, para. 2, requires the prefect to order expulsion on an individual basis. If the foreigner does not understand Italian, the decision must be accompanied by a summary written in a language he/she understands or, failing that, in English, French or Spanish.

From a legislative perspective, with regard to the formal requirements of the expulsion order, it can be assumed that the Italian legislation faithfully transposes article 12 of the Directive, without making use of the possibilities provided under para. 3 of that provision to minimize such formal requirements. However, the above described provision does not precise how the motivation must be accurate on the facts substantiating the expulsion. In practice, this obligation to provide the reasoning has been

[1] For a more detailed analysis of the reception of the Return Directive in Italy, please refer to the Italian redial report on the first package.

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interpreted by Courts as admitting a standard motivation in cases which do not present peculiarities. As recalled by the Supreme Court (see decision no. 3678/2012 below), since the expulsion grounds are in most cases invariable, courts consider to be legitimate an expulsion that only refers to the norm and the type of expulsion, without mentioning the specific facts ascribed.

It can be observed that under Italian law the translation is always (and not only on request) required in writing, without considering whether entry and residence were irregular since the beginning. A standard is adopted, however, that in most cases can be evaluated corresponding to the (lower-level) requirements set by paragraph 3 of the directive in relation to irregulars.

a. Reasoning

In addition to the requirements specified under article 13 specifically on expulsion, it should be noted that as a general rule within the Italian legal system, the lack of adequate reasons is a general plea in law before the Court of Cassation. Pursuant to art. 360 civil procedure code, in fact a judgment may be challenged before the Supreme Court, in case of violation or misapplication of the rules of law as well as for failing to examine one crucial fact for the trial that has been discussed between the parties.

In practice, the most interesting profiles examined by the Supreme Court relate to the application of Art. 13, para. 2 bis of the Consolidated Text, introduced in 2007 in implementation of Directive 2003/86/EC, on the consideration and protection of the right to family unity in less serious cases of expulsion, i.e. entry and illegal residence (the cases of social danger or reasons of national security or terrorism being excluded). In fact, pursuant to art. 13, para. 2 bis, when adopting an expulsion order in case of irregular entry and stay, against the foreigner who has exercised his/her right to family reunification, under article 29 Consolidated Text, the nature and the effectiveness of family ties of the concerned person, the duration of his/her stay in the country and the existence of family, cultural and social ties with their country of origin must be taken into account. These issues are also relevant in case the concerned person has family ties on the Italian territory (see Constitutional Court, decision no. 202/2013). Therefore, these considerations must be integrated in the written reasons, in fact and in law, of the expulsion order.

These situations raise the issue of the balance between the interest of public policy to the effective management of irregular migration and the individual right to the preservation of family unity and family ties that exist in Italy (as well as the preservation of the conditions of individual life).

The solution given in each case must be properly motivated in light of the various elements to be considered under the law and in concrete situations.

A very recent judgment issued by the Supreme Court has pointed out in net terms the issues pertaining to the reasons for the expulsion orders, in light of the obligations imposed by the Directive. Decision no. 15362/2015 has made use of a broad interpretation of art. 13, para. 2-bis, based on domestic constitutional law, jurisprudence of the ECtHR and the principles and rules of the Return Directive (i.e. the insufficiency for the adoption of the return decision of simple irregularities in the stay; the need for a case-by-case assessment; specific consideration of family life and the principle of *non-refoulement* in accordance with art. 5 of the directive, preference to voluntary return). It follows from this ruling that after the entry into force of the Return Directive, the return decision can not be taken under the simple consideration of illegal residence, but on case by case basis, for which the administration must give due consideration of interests of fundamental rights such as the right to private and family life, but also the interest of the child and the health of the foreigner.

More in details in that decision, art. 13, para. 2 bis, is applied not only to cases related to family reunification (as stated in the provision) but in relation to a broad concept of the right to family unity. The warning contained in the judgment is clear: in both phases of return, at the time of adoption of the measure and of its execution, the Directive requires the public body entrusted with the administrative decision and / or the courts to perform a proper balance between the member State‘s right to the preservation of a system of security and control of migration and the core of human rights related to

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the application of the principle of *non-refoulement*, the right to health and family life. Should this balance has not been adequately carried out and motivated, the measure can be challenged.

And in fact in the relevant case, the expulsion orders were quashed. They had been adopted against two women, mother and daughter, the second one born and raised in Italy until majority, the first one had moved from Kosovo to Italy in 1991 with her husband (since deceased) without ever leaving the country, and for an initial period she had stayed regularly. The appellants had alleged infringement of article 13 para. 2-bis for failure to properly balance the right to private and family life with the public interest to expulsion (and art. 8 ECHR). The appeal was also formulated in terms of the breach of article 360 n. 5 Civil Procedure Code. The Supreme Court thus held that compared to the factual context, the justice of the peace, in addition to omit entirely the examination and evaluation of criteria consisting in family ties in the country and the absence of social and cultural ties with the country of origin, thus fully integrating the violation set under art. 360 n. 5 Civil Procedure Code, had not made any balance between the right of State and the applicants' right to private and family life, failing to perform that evaluation on a case by case directly imposed by art. 13 of the Consolidated Text interpreted in the light of the prohibition of automatic assessment imposed by the Return Directive.[2]

Order no. 1217/2015[3] has concerned a case involving an Albanian citizen. The first instance decision issued by the justice of the peace had considered the administrative expulsion lawful, based decisively on criminal records. The supreme Court (with a reasoning less focused on supranational instruments of interpretation) quashed the decision, since the appellant's current family situation had not been considered with sufficient attention. According to the Court, the justice of the peace had not taken any account of the family situation of the applicant, which was regarded only in theory but not in practice. Therefore, the exploitation of the criminal record of the appellant as an impediment to his stay, despite being in question the issue of family, cultural and social ties pursuant to article 13, para. 2, was deemed incorrect in law.

In two similar cases affecting family unity the Judge emphasized that given the irreproachable conduct of the appellants during their stay in the country and their positive inclusion in the socio-economic context of the country, expulsion can not be considered as a necessary act, falling between those for which the administration has a good margin of discretion. As a consequence it was necessary a well-articulated motivation and not generic as in the cases in question.[4]

As far as the prohibition of *refoulement* is concerned, the requirements are more stringent. The Supreme Court decision no. 4230 of 2013 illustrates the scope of the judge's assessment, in accordance with article 19 of the Consolidated Text. As pointed out according to the consolidated line of decisions of legitimacy, the trial court, with regard to international protection, is required to conduct an extensive and rigorous factual investigation, based on the critical examination of the evidence offered by the party as well as on exercise of investigation powers/duties *ex officio* (Cass. SU 17318 of 2008), such assessment concerning legal claims pertaining to field of human rights (Cass. SU 19393 of 2009); "The prohibition of expulsion or return envisaged by legislative decree no. 286 of 1998, Art. 19, para. 1, falls undoubtedly within the area of international protection (Cass. 10636 of 2010), and as a consequence the Justice of the Peace has an obligation to examine the real danger, claimed by the appellant, of being subjected to persecution or to inhuman or degrading treatment if returned to their country of origin, as such provision sets a humanitarian measure of negative character, which gives the recipient the right not to be sent into a context of high personal risk, if this condition is positively assessed by the court" (Cass. 3898 of 2011).

In light of the above, the Court has noted that the contested measure completely lacked a concrete assessment of the evidence offered by the appellant, and that omission can not be remedied with the mere reference, without any indication of the reasons for the decision, to the circumstance that the

[2] See Supreme Court, Judgement no. 15362 of 22 July 2015.

[3] See Supreme Court, Order no. 1217 of 22 January 2015.

[4] See Justice of the Peace of Turin, Decree 8 July 2013; Court of Turin, Decision of 27 March 2013.

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application for political asylum was rejected by the territorial Commission. So it remained incomprehensible if the rejection was due to the nature of the factual circumstances as they had are already been the subject of the order issued by the Commission or by the lack of evidentiary support. In the latter case in fact, where the facts can support the prohibition of expulsion pursuant to article19, and, consequently, integrate at least the conditions for issuing a permit for humanitarian reasons, the Justice of the Peace has a duty to exercise his/her power of cooperation and investigation.

b. Translation

Pursuant to art. 13, para. 7, of the Consolidated Text on Immigration, the expulsion order and the decision referred to in paragraph 1 of article 14 (pre-removal detention), as well as any other act on the entry, residence and expulsion, are communicated to, together with an indication of the means of appeal and to a translation in a language known to the foreigner, or, if not possible, in French, English or Spanish.

In 2002 the Supreme Court had affirmed that when the foreigner does not understand Italian, the presence of a statement of impossibility of translation is a necessary and sufficient condition for admitting a translation in a "vehicular" language.[5]

Ten years later, starting from decision no. 3676/12, the Supreme Court reviewed its previous orientation. The case involved a Chinese citizen who had been notified the expulsion order in English. The Administrative Authority had certified the unavailability of a Chinese language interpreter. The grounds of the decision concerned standard reasons and were not complex (i.e. illegal entry). Migration flows to Europe from China are now current.

The Court held that, in light of the stabilisation of migration flows and of technical developments (in particular the procedures of computerization), the prior position is no longer maintainable. In fact, in most cases no personalised translation is necessary because the texts are standard forms and it only needs to be indicated the foreigner's personal information, relevant dates and under which of the three hypotheses of expulsion the order falls (as in this case, i.e. illegal entry).

In carrying out this reasoning, the Court referred to the new provision set under Art. 13, para. 5.1 Consolidated Text, added by the legislation transposing the Return Directive in relation to the provision of multilingual information sheets aimed at ensuring adequate information to foreigners on the right to ask for a deadline for voluntary departure. So it is reached a "reasonable compromise" between the need of the administration to the rapid and efficient management of migration issues and foreigners' rights. Given that, according to previous decisions of the Supreme Court, communications of standard models are admitted, the judge is entitled to review the plausibility of the unavailability of a text of the expulsion (having a standard content) in languages representative of current migration flows.

The cases of rare languages or complex situations that require an articulated description and preclude the use of standard modules remain excluded. In these cases, where the Administration attests the unavailability of a translator in the language understood by the recipient, vehicular languages (French, English or Spanish) can be used.

The Supreme Court has thus expressly excluded the right to a "customized" translation in a language known by the foreigner, and not in a vehicular language, for the most complex cases in light of technical reasons or their linguistic content.

On the subject of actual knowledge of the contents of the return order and other related measures and the right to adequate information of the individual's rights, it can be recalled the Supreme Court's decision no. 1809/2014 (see REDIAL first package database). See in particular the passage on the binding nature of adequate information to the concerned person, including through multilingual information sheets, on the right to request a deadline for voluntary departure and the relevance of such

[5] See Supreme Court, Judgment no. 5465/2002.

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violation on the validity of any return decision adopted by the Prefect on the basis of inadequate preparatory activity.

c. Right to be heard

This point has not been the object of merits case-law by lower courts. Instead (as pointed out in the national report for the Contention project) there is a line of jurisprudence which created this right (on the basis of an interpretation based on the Constitution) in case of extension of pre-removal detention (art. 14, para. 6, Single Text). It has already been highlighted in the first research that an important opportunity to clarify these issues was missed at the time of (late) transposition of the Return Directive in 2011. This legislative shortcoming was not rectified at that time. On this consolidated orientation of the Supreme Court, which started with the Supreme Court's decision no. 4544/2010, see more recently Supreme Court no. 15279/2015

The right to be heard must therefore be assessed in relation to the different phases of the decision of expulsion.

- Adoption of the administrative expulsion by the Prefect

The right to be heard is not provided in the preliminary (administrative) phase of the adoption of the expulsion decision. In practice, the foreigner can also be heard by the police, but in the absence of an appropriate rule which provides therefor, this takes place as part of an informal procedure, without the necessary presence of an interpreter, legal assistance or any other guarantee. The right to be heard is guaranteed, albeit deferred, in the subsequent (if any) judicial phase.

In the past it was considered that the right to be heard in the phase of adoption of the measure was not necessary as the measure of administrative expulsion had bound nature, without any discretion, in the presence of the conditions for expulsion. In light of the provisions of the Directive and the principles established by the EU Court of Justice, one may wonder whether at least with reference to the possibility of expulsion to be executed through voluntary departure, for which the judicial authority does not necessarily intervene, the scheme should be revised.

In fact doubts as to compliance with the principles established by the ECJ in the case Buodjlida C-249/13 may arise when the foreigner asks for voluntary departure, since in this case the judicial authority is vested only in relation to ancillary measures. It can be assumed that the ECJ principles would impose that on one hand it is guaranteed the right to ask for the deadline for voluntary departure on the basis of adequate information on the meaning and on the consequences thereof (multilingual sheets are made available, but their content is not specified by any relevant provision). On the other hand the right to be heard and then the relevant interview should allow the concerned person, before a return decision, to clarify his/her position in relation to the grounds for expulsion and removal arrangements.

- Administrative expulsion to be executed through forced removal

The right to be heard is, instead, guaranteed in case the measure must be executed through forced removal. In fact, pursuant to art. 13, para. 5-bis, the enforcement of the decision of forced removal is suspended until it is validated by the justice of the peace. The hearing for the validation takes place in chambers with the participation of a defender. The concerned individual is also promptly informed and conducted to the place where the judge holds the hearing. The court provides validation by reasoned decree within forty-eight hours, after checking whether the time terms and the law requirements have been complied with, and after hearing the person concerned, if appeared.

The right to be heard had been clearly stated by the Constitutional Court in the past, and as a result it was declared constitutionally illegitimate the previous version of article 13, para. 5-bis, in so far as that provision did not provide validation of the expulsion of foreigners were done in cross, with the guarantees of defense.

Decision no. 222 of 2004[6] stated that together with personal freedom it was violated foreigners' right of defense in its incompressible core. The contested provision did not provide, in fact, that foreigners must be heard by the judge, with the assistance of a defender. It is certainly not in question the legislator's discretion in configuring a pattern characterized by procedural celerity. However, whatever the scheme chosen is, the principles of judicial protection must be respected and the effective control over a measure affecting personal freedom cannot be eliminated, nor the applicant can be deprived of any defense guarantee. Neither it can be admitted a "dual track" protection: validation of expulsion only based "on papers" and subsequent appeal of the expulsion order, with appropriate defensive safeguards. It would thus be eluded the prescriptive reach of article 13 of the Constitution, as the appeal of the expulsion order does not guarantee immediately and directly the good of personal freedom which is affected by the escort to the border.

3. Article 13. Means of appeal

3.1. Right to an effective remedy

In relation to the right to an effective remedy, a distinction must be made whether the expulsion must be executed through forced removal or not.

a. Administrative expulsion without forced removal

Under article 18 of Legislative Decree no. 150/2011, the administrative decision of expulsion can be appealed before the justice of the peace of the place where the authority which ordered the expulsion is located. The presentation of the appeal does not have suspensive effect, however, on the execution of the expulsion. The appeal must be filed within thirty days if the alien is in Italy or within 60 days if they are abroad. In this case the appeal can be presented by post or through the diplomatic representation.

The decision must be issued by the court within 20 days. The foreigner has the right to a lawyer and an interpreter, also free of charge. The judge performs a check of the merits, to verify the existence of all the factual legal elements required.

b. Administrative expulsion with escort to the border

As mentioned above the expulsion decision to be executed through forced removal must be validated by the justice of the peace. As mentioned above, a proceedings is initiated. It has to be defined by reasoned decree, within 48 hours, after checking that the requirements set by the law exist and hearing the concerned person, if he/she has appeared. If validation is not granted or the deadline for the decision is not observed, the measure loses all effects.

One issue highlighted by authors regards the provision of art. 13, para. 5-bis, under which the police authority provides the justice of the peace, within the limits of facilities available, with the necessary support and the availability of a suitable place, in order to ensure the timeliness of the process of validation. This aspect, already mentioned in the context of the Contention report, appears critical in order to ensure the independence and impartiality of the justice of the peace with respect to the measure to be adopted.

Pursuant to article 13, para. 5-bis, the foreigner has a right of appeal to the Supreme Court against the decree of validation. This appeal, however, does not suspend the execution of removal from the national territory.

If enforcement relates to an expulsion order adopted following the refusal or withdrawal of a residence permit for family reasons and if, for that fact, an appeal has been filed before the ordinary court, the validation request must be presented to the ordinary court and not to the justice of the peace.

[6] See Consitutional Court, Decision no. 222/2004, of 8-15 July 2004.

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It should finally be noted that beyond the appeal against expulsion decisions, there are other forms of judicial review against this type of act. In particular, the Court of Cassation (30 July 2014, no. 17407) asserted that the justice of the peace, on the occasion of validation of pre-removal detention must first find out whether the expulsion decision does not present serious and manifest irregularities (please refer to the Contention report).

c. Deferred refusal ("respingimento differito")

A legal situation contemplated in the Consolidated Text has raised profiles of serious criticism, which now seems at least partially muted following a judgment of the Supreme Court in 2013, is the institute of deferred refusal, under article 10, para. 2, of the Consolidated Text. Deferred refusal consists in the rejection accompanied to the border towards foreigners: a) entering the state by evading border controls, who are stopped at the entrance or immediately thereafter; b) who present at border crossings in breach of legal requirements and are temporarily admitted on the territory in order to receive assistance.

Article 10 of the Consolidated Text concerns, in fact, primarily the refusal of entry of foreigners, providing in paragraph 2 the special situation of a person who is dismissed after entering the territory.

It should be noted that Italy has exercised the option provided for in art. 2, para. 2, a) of the Directive, not to apply it to third-country nationals subject to a refusal at the border. The question deserves consideration because, especially in the case in which the person is being stopped shortly after their entry or is temporarily admitted in order to receive assistance, the practical difference with respect to the expulsion appears extremely thin, leaving a broad margin of discretion to the administration, which will frame the situation either as expulsion or deferred refusal. Article 13, para. 2, letter. a), provides for, among the various possible types of administrative expulsion, the case that the person entered the state by evading border controls and has not been refused entry pursuant to article 10. However, the qualification of a situation in one way or another implies the application of different rules, especially with regard to the possibility of appeal. In the case of deferred refusal, in fact, art. 10 of the Consolidated Text contains no specification on how to appeal. The situation is all the more serious if the person is in a condition in which article 19 of the Consolidated Text prohibits refusal and expulsion, which can be invoked on appeal against expulsion, while with more uncertainty in the case of deferred refusal.

With the judgment no.15115 of 17 June 2013 the Supreme Court said that the case of "deferred" refusal pursuant to art. 10 paragraph 2 of the Consolidated Text, must be subject to ordinary courts and not the administrative courts. The Court's ruling has thus filled a gap still subsisting at the regulatory level.

The uncertainty about the possibility of appeal in the case of *refoulement* is also coming in relief in the case Hirsi where the European Court found that the lack of an adequate procedure to enforce their findings regarding the possible violation of art. 3 ECHR has made in this case a violation of article 13 ECHR. This seems outdated at the time, as the systematic practice of rejections at sea has ceased after the judgement. The ECtHR has also assimilated the specific practice in expulsion. Should, however, this occur again in the future, it should be considered whether the actual case amounts to a rejection at the border (which, on the basis of Italian law, is not subject to the guarantees contained in the directive) or expulsion, subject to the provisions contained in the Directive.

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3.2. Suspension of the return decision

The national legislation and in particular art. 13 Consolidated Text makes no express reference to art. 13, para. 2, of the Return Directive. This aspect appears therefore contrary to the provision of the directive.

Systematic constructions have been used by judges to affirm the existence of a power of suspension by the court.

Several courts apply the general possibilities of suspension of the decision of expulsion under the provisions relating to special civil procedures (Legislative Decree no. 150/2011)[7] or the principles established by the Constitutional Court in the past (when the appeal against the expulsion decision appears legally founded and there is a real danger for the foreigner during the judgment on appeal).

The fact that the suspension of execution of the expulsion decrees by the court has not been regulated in transposing the directive, makes that possibility rather discretionary. All the doubts raised by this situation are showed in the practice of the justices of the peace, whereas in several judicial offices precautionary protection is never granted because the Consolidated Text does not expressly provide for it, indeed it requires the immediate enforcement of the expulsion.

The practice of asking and granting the suspension, in the presence of the conditions of *a prima facie case* and of urgency, is founded on an old decision of the Constitutional Court (Constitutional Court no. 161/2000). It was stated that "under special and exceptional circumstances, failing the temporal contiguity between the filing of the case and its definition, the precautionary protection would not be superfluous, so the appellate court is not inhibited to identify the most suitable instrument, within the Italian legal system, in order to suspend the effectiveness of the challenged order".

On this basis, the Supreme Court has subsequently clarified that since expulsion does not provide that the opposition has suspensive effect, the conclusion must be that – a part from "special and exceptional" cases – the appellate court does not have precautionary powers and can not therefore suspend the order decree (See Supreme Court decision no. 15414 of I 5/12/2001).

It must be pointed out, however, that in the silence of the Consolidated text, in practice only a few offices of the justice of the peace apply precautionary protection.

This legislative gap raises doubts of unlawfulness in relation to article 24 Constitution, article 13 ECHR, article 13, para. 2 of the directive, according to which the judicial and administrative tribunal has the power to review the decisions of return and to suspend them.

Although it could be argued that the rule in art. 13, para. 2, the Return Directive is worded in sufficiently clear, precise and unconditional terms, there have been no cases of direct application of art. 13, co. 2, of the Directive.

* * *

Suspension is mentioned under the more general aspect of the guarantee of effective legal remedies, in the decision issued by the Aosta Court on 17.10.2012.

It is no coincidence that this is one of the rare decisions that addresses the issue of the power of suspension of expulsion decisions in depth. In fact, it has to be reminded that the opposition against the decisions of administrative expulsion is normally set by Justices of the Peace, that are not

[7] The application of this legislative decree to proceedings of opposition against expulsion regulated by art. 13 of the Single Text is far from obvious. In fact, the report accompanying legislative decree no. 150 of 2011 makes it clear that the suspension measure applies only in cases where it is expressly provided for. And as mentioned, art. 13 does not provides for it. With the transposition of the Return Directive an excellent opportunity to clarify this point was thus missed.

professional judges, whose independence and effectiveness is a debated issue.[8] In this case the ordinary Court (instead of justice of the peace) retained its jurisdiction because the expulsion was connected to another procedure concerning a minor child (procedure for requesting a special permit of stay activated by the father, who was the recipient of the expulsion order, before the Juvenile Court pursuant to art. 31, para. 3, TU because of serious reasons related to the physical and mental development of the minor child).

The Court examined in detail the possible reasons that should have justified the suspension of the expulsion in the case, under the rules of the Consolidated Text that in fact preclude the expulsion in order to protect the family unit. Upon completion of this detailed analysis it concludes that there is no impediment to legitimate the suspension for such purposes, but it anyway grants suspension believing that the request submitted to the Juvenile Court integrates an exceptional hypothesis.

The measure of suspension of expulsion has the peculiarity of having been adopted without hearing the other parties (*inaudita altera parte*).

* * *

The critical consequence of the lack of provisions designed to clearly and precisely, at least in certain circumstances, set the possibility of suspending the execution of the expulsion was taken over by the European Court of Human Rights in the case of *Khlaifia and Others v. Italy*.[9] The case concerned the detention in a reception centre on Lampedusa and subsequently on ships moored in Palermo harbour, as well as the repatriation to Tunisia, of migrants who had landed on the Italian coast in 2011 during the events linked to the "Arab Spring". The Court found several violations to the ECHR. Among these violations, the fact that the expulsion decrees explicitly indicated that any appeal brought before the justice of the peace would have by no means suspensive effect did not satisfy the requirements of article 13 of the Convention, insofar as it did not meet the criterion of suspensive effect enshrined in the *De Souza Ribeiro* case. The Court recalled that the requirement flowing from article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure. Similar concerns had also been expressed in the case *Hirsi Jamaa and Others v. Italy*. As regards the Government's argument that the applicants should have availed themselves of the opportunity of applying to the Italian criminal courts upon their arrival in Libya, the Court had noted that, even if such a remedy were accessible in practice, the requirements of article 13 of the Convention are clearly not met by criminal proceedings brought against military personnel on board the army's ships, in so far as that does not satisfy the criterion of suspensive effect enshrined in the ECtHR.

a. Legal aid

According to article 24 of the Constitution of the Italian Republic, everyone can take legal action to protect their legitimate rights and interests. Defense is inviolable at every stage and level of the proceedings. Indigent are assured, through appropriate institutions, the means for action and defense in each jurisdiction.

Specific rules apply to the benefit of the expelled foreigner. The concerned person is granted legal aid at state expenses and, if he/she is devoid of a defender, is assisted by a lawyer appointed by the court and, if necessary, by an interpreter. In fact not all lawyers are able to defend those who have been admitted to legal aid; only the lawyers registered in the register of legal aid defenders, held by the competent Councils of the Order, can be appointed.

So, while the public defender (*difensore d'ufficio*) has the function of ensuring the right to technical defense to anyone who has not appointed a defense lawyer, legal aid at state expense is applied both to the detainee's trust lawyer and *difensore d'ufficio*.

[8] On these and other critical issues on the jurisdiction of justices of the peace, such as also validation of orders of pre-removal detention, see the Contention report.

[9] Application no. 16483/12

Admission by law to legal aid is provided both in the validation phase, as in that of any appeal against the expulsion order.

It has to be pointed out that expelled foreigners benefit from a special treatment in relation to legal aid. As a general principle under Italian law, only those who find themselves in well-off conditions can be admitted to legal aid (if the applicant lives alone, the amount of his/her income must not exceed 11.528,41 €; this amount is increased in case he/she has family members living with him/her). The requirement must be proven by the applicant with certification or self-declaration. In the case of expelled foreigner however no income requirement is applied, and all foreigners subject to expulsion are entitled to legal aid. This point had been clearly stated by the Constitutional Court in 2004. The relevant rule, which differentiated between the foreigner under an expulsion proceedings and the other situations, had been challenged for breach of the principle of equality and the rule of reason. This objection was, however, rejected by the Court stating that this choice "appears neither unreasonable nor damaging to the principle of equal treatment, given the peculiarities of the process of expulsion of foreigners and the need not to place any obstacle to the pursuit of this goal" (see Constitutional Court, Decision no. 439/2004).

No merit decisions have been found in this regard.

4. Article 14. Safeguards pending return

As mentioned in the first package report, the Consolidated Text does not contain a provision corresponding to article 9 of the Return Directive, however specific precautions (substantially equivalent to those provided for by that provision) can be derived from other provisions contained in the Consolidated Text.

Considering the already mentioned low practical implementation of voluntary return under art. 7 of the Directive, there is no case-law on provisions of art. 14, para. 2, Return Directive concerning written confirmation of the measures to extend the period for voluntary departure.

For cases of suspension of the effects of expulsion (above), the objections raised against the administrative act are examined in writing by judges. The reasons of family unit, such as health or even those concerning the violation of the principle of *non-refoulement*, are examined by national courts in relation to the assessment of the prohibition of expulsion under article 19 Consolidated Text and in any case within the framework of possible annulment of the administrative acts.

In particular, in application of the general principle that the expulsion must be arranged further to a case by case evaluation of the foreigner's personal situation, the execution of the expulsion against vulnerable people (disabled, elderly, children, victims of serious physical, psychological sexual and violence etc.) must be carried out in a manner compatible with the individual circumstances, duly established (art. 19, para. 2bis).

This provision, inserted in the implementation of the Return Directive, however, is deemed unsatisfactory because it only identifies vulnerable groups, without in any way defining the contents of the implementation of expulsions measures, in contrast with the directive that devotes articulated rules to these categories of people. In fact, Italian law only states that the condition of vulnerability must be "duly established", without however guaranteeing the modalities of implementation of expulsion measures not even by referring to further enactment rules to be issued in the future, leaving the application methods to contingencies and arbitrary choices.

Safeguards in favor of foreigners to be expelled are guaranteed by article 35, para. 3, of the consolidated Text as to healthcare. They are entitled to urgent and essential care. Similarly, access to school also for children in an irregular position is guaranteed under article 38 of the Consolidated Text. Article 45 of D.P.R no. 494/1999 states that foreign children present on the territory are entitled to education regardless of the regularity of their stay, in the form and manner provided for Italian citizens.

It can be affirmed that as a general principle theoretical safeguards are set by the law, however the practical modalities of implementation have not been established.

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No specific case-law is available on article 19-bis of the Consolidated Text. Some interesting decisions can be referred in relation to foreigners recipient of expulsion orders, annulled or suspended for health reasons.

In this respect, an interesting case is represented by the Supreme Court's ruling quashing an expulsion order for health reasons.[10]

The case has concerned a Tunisian national, holding a residence permit for work purposes from 1987 to 2000 and then for medical treatment in 2001, being affected by HIV, as well as chronic hepatitis and epilepsy resulting from a head injury in an accident at work. In 2007, he had been denied the renewal of a residence permit on grounds that the treatment could be continued in the country of origin. The Prefect had ordered the expulsion. By decree of 29 December 2009, the Justice of the peace "validated" the expulsion provided that a) a dozen packages of antiretroviral drug not on the market in Tunisia, was made available to the foreigner, and b) the Italian embassy in Tunis had issued to the national Tunisian a special visa to enter Italy for medical treatment, if it has been clinically proven by the Tunisian authorities the need to subject him to medical treatment in Italy. The foreign citizen appealed to the Supreme Court.

The Supreme Court quashed the expulsion decision, considering that the Justice of the peace had made a mistake of interpretation. Article 35, paragraph 3 of the Consolidated Text provides that foreign citizens present in the country, who do not comply with the rules on entry and residence are assured urgent or essential care, even on a continuous basis in case of disease and injury. In particular, they are guaranteed the prevention, diagnosis and treatment of infectious diseases. The jurisprudence of this Court is consistent in saying that the guarantee of the fundamental right to health of the citizen includes not only emergency care and emergency medicine but also all other services essential for life.

The justice of the peace in believing that the mere intake of a retroviral medicine can not be an "essential care" without establishing, however, whether this assumption was likely to eliminate hazards to the life or even greater health damage had thus incurred in an error of interpretation. The judge would have had to ascertain whether the treatment to which the applicant was subjected in Italy were essential in light of the principle that also the simple administration of medication in the case of treatments necessary to eliminate hazards to the life or the occurrence of more damage to health can be as such, in relation to the unavailability of medicines in the country to which the alien should be deported. Moreover, the expert's report submitted by the party and the assessments made by the his physician should have been properly evaluated.

In this case a temporary permit of stay for health reasons can be issued pursuant to art. 36 of the Consolidated Text.

This orientation has found confirmation in a decision issued by the justice of the peace of Turin in 2012.[11]

The justice of the Peace recalled a decision of the Supreme Court (Cass., sez. I civ. 2.9.2006 n. 20561) where it was recognized that a proper reading of article 35 para. 3 of the Consolidated Text temporarily prevents the execution of the expulsion order. On this basis the expulsion measure was deemed contrary to the provisions of article 35 para. 3, in accordance with the interpretation suggested by the ruling of the Constitutional Court of 07/05/2001 n. 252 (see above). In this light, the provisions of Art. 36 of the Consolidated Text must be applied also in favor of foreigners illegally residing in Italy, when the need for essential care for their health arose after their entry into the national territory.

[10] Cass. n. 14500/2013.

[11] Decree of 12.11.2012.