

# **MIGRANTS' RIGHTS**

## **1. Focus on facts**

Cristian is a young man born in Rome from Colombian parents. When he came of age, meeting all the requirements envisaged by Law No. 91/1992, he applied for the Italian citizenship. Nevertheless, his request was rejected in January 2013 as he was considered unable to make an oath and therefore prove his conscious willingness to become an Italian citizen - due to his Down syndrome condition.

As a matter of fact, Cristian is fully entitled to apply for the Italian citizenship, especially because with Law No 18/2009, Italy ratified the UN Convention on the rights of persons with disabilities, which requires the signatory States to afford the right to acquire and change nationality to persons with disabilities. However, as is often the case with non-nationals, due to a lack of coordination between the aforementioned laws, a more restrictive interpretation is given top priority - especially whenever the law affording more substantial safeguards results from the ratification of an international convention or a European directive.

Nonetheless many associations (in particular the Italian Association of Down Persons) with a collection of signatures, questions in Parliament and appeals even to the President of the Republic and the Minister of Home Affairs, mobilized against the measure that had rejected Cristian's application for Italian citizenship.

Therefore, Cristian's became a national case, typical under many respects of the paradoxical provisions and discretionary powers set forth in Law No. 91/1992. However, rather than proceeding with a change in the regulation, Cristian was asked to reapply. His new application was then accepted, just to make people believe that the previous refusal depended upon a simple matter of form.

Finally on June 19th, Cristian took the oath and Italian citizenship was bestowed on him.

However, as of today no procedure has been adopted to prevent this from happening again to other youths affected with Down's syndrome born in Italy from non-national parents - in fact, already in 2009 it was estimated that over 10,500 foreign students affected by intellectual disabilities were attending Italian schools.

There are innumerable reasons behind this story. One thing is for sure, it is also the result of a clear gap between the reality of migration and the rules regulating it, which are all too often ambiguous and inconsistent.

Indeed, in the two- year period taken into consideration (2012-2013), there has been a statistical strengthening of the "migratory" component that may claim additional rights as a result of an almost structural presence in our territory – as is the case for the "second generations", the "EU nationals" and the "long-term residents"; however, the legislation has remained focused on a mainly dual (two-fold) integration model: the integration of "host workers" and the public order approach, which too often have ended up fostering the adoption of discriminatory measures by the institutions themselves.

This strenuous defence of the status quo has prevented up to now making any changes to the citizenship law, thus denying greater flexibility to the children born in Italy (the so called *ius soli*) - numbering at least five hundred thousand. Only a cross-sectoral campaign ("L'Italia sono anch'io" – I am Italy, too) and some judicial decisions led to including Section 33 in Law No. 98/2013 ("Disposizioni urgenti per il rilancio dell'economia/Urgent measures to relaunch economy"), which envisaged a simplification of the citizenship acquisition process for aliens born in Italy.

In particular, it is recognized that the applicants cannot be considered responsible for their parents' failures to fulfil obligations (e.g. in case of a belated inclusion in the official population registers)

or for shortcomings of public administrative bodies such as to prevent meeting the requirement of uninterrupted lawful residence throughout the underage period – which now may be proved via “whatever suitable documents”. Furthermore, the Civil Status Offices are obliged (even though it would have been more adequate to involve the Registry Office) to notify the non-national having recently come of age, at the residence address resulting from their official records, of the possibility to apply for the Italian citizenship by the 19<sup>th</sup> anniversary if all the relevant preconditions are met. Failing such notification, the application may also be submitted after the 19<sup>th</sup> birthday.

It will be imperative to assess the enforcement of such a regulation in the next few months.

Conversely, there are many cases where the application for Italian citizenship by non-nationals who have been residing in Italy for more than 10 years has been rejected owing to a set of questionable reasons. To name a few: too long a name, causing the “identification not to be certain<sup>1</sup>”; poor command of the Italian language, insufficient to read the oath formula of loyalty to the Republic and compliance with the Constitution and the laws of the State <sup>2</sup>; participation in protests, interpreted by the Ministry of Home Affairs as activities “aimed at purposes not in line with the safety of the Republic” <sup>3</sup>. In other cases, the new Italian citizen was required to change his surname<sup>4</sup>, or to have a single surname in violation of the fundamental right to personal identity <sup>5</sup>.

Among other things, even today, well before submitting an application for citizenship, the integration process seems full of hindrances also due to some cases of institutional discrimination - primarily in the three following areas: work, housing and welfare.

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1 Regional Administrative Court Piedmont, January 20th 2013

2 Municipality of Vignovo (Vigevano), January 2013

3 Appeal of May 2nd, 2013 promoted by Melting Pot against the denial of the Italian citizenship to an activist of the No Dal Molin movement, with which she had participated in mobilizations and protests which did neither entail any criminal punishment nor notification of social dangerousness.

4 Court of Reggio Emilia, decree of 29 August, 2012

5 Cassation sect. 1 civil, judgement of 18 July 2013

It is not probably by chance that, according to latest annual report by Censis Foundation (Center for Social Studies and Policies) on Italy's social situation, more than half of the population (55.3%) believe that, in allocating council houses and given the same requirements, Italians should be ranked before immigrants, whereas almost half (48.7%) believe that given the poor working conditions, Italians should have priority when seeking employment. In addition, it should be noted that, according to Censis' Report, only 17.2% of Italians show understanding and a friendly approach towards immigrants; 4 Italians out of 5 instead, are mistrustful (60.1%), indifferent (15.8%) and openly hostile (6.9%), whereas two out of three (65.2%) believe Italy is full of immigrants.

There is no doubt that these concerns are related to the economic crisis that is affecting the country. However, this goes to show how deeply rooted the idea is that a migrant is a B class citizen, for whom solidarity can be expressed, but rights cannot be recognized. It is therefore vital that, given this delicate situation, politics strives to envisage an integration model that is more adherent to the new migratory reality, as clearly indicated by the many judicial decisions and various European directives. With this scenario in mind, we decided to examine the situation of migrants' rights focussing on the three areas identified above (work, housing and welfare) and paying special attention to the so called "institutional discrimination".

## 2. Episodes of racist violence

According to UNAR's data, 679 discrimination cases for ethnical or "racial" reasons were reported in 2012 alone. It is more difficult to estimate racist violence episodes, some of which are described hereinafter:

27 March 2013. Mantova. Three Nigerian youngsters, one being minor, while travelling on a bus were attacked by an Italian passenger, who, after heavily insulting them with racist comments, injured the hand of the minor with a scalpel. The aggressor was arrested and charged with threats, bodily injuries, possession of objects intended to offend and racist violence.

3 April 2013. Civitavecchia (RM).

A 17-year-old young man kicked and punched a Bengalese itinerant salesman because he refused to hand him in his proceeds of the day. The victim suffered the fracture of the nasal septum and bruises all over the body. In summer 2012, the same aggressor attacked another Bengalese citizen.

7 April 2013. Palermo. Sar Gar, a young Bengalese itinerant salesman, died as a result of stabbing wounds. In the same place where Sar was attacked, some other Bengalese salesmen were equally attacked. The Bengalese community called a march on April 17<sup>th</sup>2013.

27 April 2013. Pordenone. Six young men, two of them minors, were attacked by two individuals while strolling because of the presence of a black boy in the group who was subsequently slapped and invited to go home. Then the aggressors equally attacked two other boys in the group, kicking and punching them.

Apparently, the attackers belonged to a far right association: "Veneto Fronte Skinheads" and were investigated for bodily injuries, beating and abuse. One of them was even charged with the aggravating

circumstance of the Mancino Law.

18 May 2013. Rome. A Bengalese young man was sent to hospital with broken lips and eyebrow, after being beaten up by two Roman guys aged 19 and 16 respectively who were arrested as a result.

18 June 2013. Afragola (Naples). A young immigrant coming from Burkina Faso was attacked by two young men, suffering fractures and haematomas all over his body.

19 June 2013. Milan. A musician, actor and Brazilian composer, founder of the Mitoka Samba Cultural Association, while strolling was pointed at by a child, as the person who had beaten him the previous day. Despite this being a case of mistaken identity, the musician was attacked and brutally beaten up by a group of people who only stopped when a police car arrived.

8 July 2013. Mortise (PD). A Sudanese political refugee was brutally attacked while cycling back home by three passengers in a car. They firstly pushed him causing him to fall off the bicycle and then they kicked and punched him.

11 July 2013. Alghero. A Senegalese itinerant salesman living in Sassari was attacked by three people, who injured him on his face and abdomen. The arrival of a carabinieri car stopped the brawl.

14 July 2013. Sant'Antioco (CA). A 60-year-old Senegalese itinerant salesman along the Coecuaddus beaches, in Sant'Antioco, was threatened and insulted by 5 students from Cagliari.

15 July 2013. Genoa. An Ecuadorian woman was verbally attacked on a bus by an Italian passenger who did not find a space to sit and urged her to stand up and give her seat to him.

23 July 2013. Ziano. A minor was sent to hospital as a result of an evening fight during which a group of young people from Ziano commented on his colour of skin.

26 August 2013. Naples. The Antirazzista Interetnica Association 3 Febbraio announced that over the last 10 days two Africans had been attacked with weapons, in Naples.

One of them had been injured and still was at the hospital. Their only fault was to have accidentally bumped into two idiots on a scooter in the centre.

30 August 2013. San Benedetto dei Marsi (AQ).

A Moroccan citizen was attacked by a group of young people only because he had asked them not to make too much noise at night time. Another Moroccan citizen had his car burnt. Among the individuals under investigation, there are a minor and a carabinieri.

9 September 2013. Lasize (Verona). Violence was stopped thanks to the presence of a security guard. Four foreign young men, of as many nationalities, were firstly verbally attacked with racial comments by some Italian young people on a Lake Garda boat, and then two of them were heavily beaten up once on ground.

10 September. Naples. A group of boys and girls, one of them being "black" were playing and singing in Piazza Bellini when the "black" boy was bullied by some youngsters. He was verbally abused with discriminatory and racist comments. At that point the group decided to leave, but unfortunately various glass bottles were thrown at them, one of which hit a 24-year old young woman on the head causing a wound that required 5 stiches at the Emergency Unit.

12 September 2013. Rome A 30-year old Indian-American citizen, while strolling with an Italian friend, was punched by a group of youngsters only because she had stopped in the street to look at them dancing in the street. The victim stated she was insulted with racist comments (“Go away Banglaintia”)

30 September 2013. Rome. While on a bus, a Peruvian 20-year old young man who had been living in Rome for 6 years, was insulted with racist comments (“ You Chilean piece of shit”) and beaten up by at least 30 Italians who managed to escape.

October 2013. Pieve di Cento (Bologna). A Guinean musician while cycling was hit by a car that did not stop when it was supposed to. The driver, after the impact, went out of the car hurling an iron bar on him and verbally attacking him with racist comments.

13 December 2013. Padoa. A 16-year old Moroccan guy finished up in hospital as a result of a violent aggression by three school mates because of an altercation triggered by racist insults.

14 December 2013. Cisterna di Latina (Latina). Some thirty people burst into a Pizza-kebab place called ““La bella Istanbul” in Cisterna, attended and managed by Kurdish immigrants destroying some pieces of furniture, hurling abuse at them and threatening the owner, the workers and the regular customers, warning them that if they reported them to the police, they would burn the place down.

The news was unveiled thanks to the courage of one of the owners, who has been a political refugee for more than 10 years and publicly reported the event with an open letter to the mayor of the town, asking for support so as not to be left on their own.

According to the Senza confine association “that was the third time for the ‘gang’ to burst into the shop and according to some residents, the group is responsible for various attacks against non-nationals in the area. On Saturday [December 14th], just before going to the kebab place, the same group was seen slapping two “black” citizens.

December 2013. The Public prosecutor's office in Rome set up an enquiry into the brawls perpetrated on various foreign citizens by some right wing young people.

The charges to be possibly brought include incitement to crime and serious injuries, with the aggravation of racism. According to a preliminary reconstruction of facts almost 50 Bengalese citizens had been attacked from November 2012, especially in the areas where the Bengalese community is especially thriving such as: Tor Pignattara, Prenestino, Casilino and Pigneto.

They were real raids defined as "bangla tours" targeting Bengalese people because, as one of the attackers said, they are "quiet, do not react and do not report the attackers to the police".

In fact, most of the victims did not report to the police probably because they did not hold the required stay permits. According to the press, the Bangla Tour is a kind of initiation to be accepted in the group.

In 2012-2013, on the one hand racist violence kept occurring in the so called "traditional ways", on the other hand it took on different forms as was clearly highlighted by the Court of Cassation that issued three judgments on the enforcement of the Mancino Law.

In the first one, the Court reinforced the notion that there is the aggravating circumstance of the racial discrimination objective whenever micro-criminality offences perpetrated against non-nationals reveal a derogatory attitude even without explicit verbal racist attacks<sup>6</sup>

In the second, instead, it reaffirmed that the externalisation of a feeling of repugnance or discrimination, objectively perceivable as such by general consensus, is enough to trigger the aggravating circumstance of racial hatred in the commission of an offence, irrespective of the motive triggering the conduct, which can be of a completely different nature. Therefore, the increase in the sentence is triggered if the illicit conduct, such as in case of bodily injuries, is

intended for ethnic hatred with no need for further investigations.<sup>7</sup> In the third judgement, the Court decreed that “by criminal association for the purpose of inducing to violence for racist, ethnic and religious reasons an organisation is also meant (...) that managed the blog to a) keep in contact with members, recruit proselytes, even by the dissemination of racist documents and texts, b) plan protests and violent actions, c) gather money contributions for the forum, and d) record lists of people and episodes”.

According to the Court of Cassation, in fact, the crime of propaganda and inducement to discrimination and racial hatred, as per Law No. 205/1993 (“Mancino Law”), is a crime consisting in a type of conduct that arises regardless of whether the addressees of the message take up the propaganda or the inducement.

Therefore, social networks and the Internet are certainly suitable enough to disseminate messages that may affect public opinion’s ideas and behaviour, thus the web-based propaganda of ideas advocating hatred and racial discrimination clearly amounts to the statutory offence in question.

Similarly, beyond and apart from the physical contact among members belonging to the “classical” criminal association, an “Internet virtual community” is structurally adequate to act as an association if the requirements of stability and organisation in managing web-based communications are met because there is a person in charge of that and the mens rea element of participation in the association is also to be detected because the group members are informed of and share the group’s objectives.

Finally, according to the Cassation the fact that the source website was set up abroad and operated from a foreign server was irrelevant as Section 6 of the Criminal code is applicable.

The latter section sets out the State’s interest in punishing those who have performed whatever unlawful activities if at least part of such criminal activities took place in the territory of the State, including those pertaining to their programming, devising and guidance<sup>8</sup>.

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7 Court of Cassation, judgement n.30525 of 15 July 2013.

8 Court of Cassation, judgement no. 33179, deposited on 31 July 2013

### 3. Legislation and policies

#### Labour

Despite the economic crisis, 2012 experienced a stabilisation of the migrants' labour demand, with an ensuing growth of 82 thousand people over 2011 and a drop by 151 thousand in the number of Italians employed. However, this general stabilisation is to be attributed to workers employed in the services sector (+6%), whereas a considerable drop has been registered in those employed in the industrial (-2.6%) and building (-3.1%) sectors. Furthermore, an increase has been experienced in unskilled foreign workers (34%, +5% compared to 2008) employed in those jobs where advancement in career is extremely difficult and there is no certainty as to whether they will move to more added value sectors-with a drop in the number of "skilled" labourers (5.9%, -3.3% compared to 2008). However, this is not enough to account for the circumstance that the average monthly net salary of a non-national is EUR 968 (against EUR 973 in 2008) compared to EUR 1.304 of Italian workers performing the same activity. Such a gap has increased over the last 4 years, shifting from EUR 266 to EUR 336, despite section 8 of Law No. 943/1986. This situation is partly due to the discrimination taking place in the recruitment process and to easiness in job termination. There has been an increase in the setting up of immigrants' enterprises (+5.8%), in 81% of the cases in the form of sole traders. According to Unioncamere, the contribution given by immigrant businessmen to business growth in 2012 "proved fundamental to keep the whole Italian entrepreneurial system above the zero growth threshold – as the number of enterprises rose by only 19,911 units in the year".

#### Access to employment

According to the 2012 UNAR data, no less than 61.7% of discrimination cases in the employment sector due to "racial" or "ethnic" reasons concerned access to employment.

However, these data are to be interpreted with a dual perspective in mind, depending on whether the access is being stonewalled by a public body or a private entity.

In the latter case, the non-national declares that despite the eligible criteria, he/she is being excluded from the selection process only because he/she is a foreigner<sup>9</sup> or due to his/her skin colour or even because of his/her foreign name and surname (and in some cases Italian citizens were concerned too). In some other cases, access to employment in the private sector is forbidden due to the existence of an unjustified clause requiring Italian or EU nationality.

This is the case of recruitment by urban and extra-urban public transportation companies, which are mostly public limited companies despite being controlled by regional and local administrations and having public capital (hence occupational relations are regulated by private law).

The nationality clause is based on Laws No. 628/1952 and 1054/1960, in line with what is envisaged by the Royal Decree No. 148 dated January 8<sup>th</sup>, 1931 (concerning railway, tramway and internal navigation lines operated in concession and still in force); it may only be derogated from via sector-specific national agreements (which has never been the case so far).

However, besides UNAR's opinion rendered in October 2007 and a judgement of the Court of Milan on July 20<sup>th</sup> 2009<sup>10</sup>, the discriminatory nature of such a clause (regarding calls for the recruitment of drivers, mechanics, administrative personnel etc..) was reiterated by the recent judgement of the Court of Turin, on October 13<sup>th</sup> 2013 (which partially upheld the appeal of a Congolese refugee excluded by GTT spa in Turin, a public transportation company) and the complaint addressed by ASGI in November 2013 to the European Commission, regarding the call issued by COTRAL spa in Latium for the recruitment of drivers, which was reserved for Italian and EU citizens.

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9 "Social condition and integration, in a gender perspective, of non-national citizens", ISTAT

10 According to this judgement, the 1931 regulation is to be considered implicitly repealed following the regulatory evolution that occurred in particular with art. 2 of the Consolidation Act on immigration and in pursuance of international and European obligations relating to equal treatment.

Another access-to-work discrimination against non-nationals concerned the resolutions by some municipalities in the Lombardy area, banning or limiting the presence on their territory of economic activities involving the sale of kebabs and the like, international telephone centres and money transfer points, allegedly because of their negative impact on traffic and liveability.

The Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), better known as the Antitrust Authority, published its opinions on September 17th, 2012 stating the aforesaid deliberations were in breach of the national and European regulations on free competition. Similarly, the Government intervened in April 2012 against Lombardy's Law No. 3/2012 - requiring an official certification to prove the adequate level of knowledge of the Italian language, an educational qualification obtained in Italy or the attendance at a vocational course in trading for all foreigners wishing to start or carry on a commercial activity. The Government found that those regulations were discriminatory in nature and violated the constitutional principles of equality and fairness as well as European regulations (and therefore were in contrast with art. 117 of the Constitution); accordingly, it challenged the said law before the Constitutional Court, claiming that the subject fell within the state's law-making competence. The Constitutional Court equally deemed as discriminatory the requirements of seniority of residence and mandatory registration of an enterprise in the regional territory to obtain the authorisation to conduct a taxi, as envisaged by the Molise Region's Law dated November 13<sup>th</sup> 2012<sup>11</sup>.

Another discrimination area in access to work concerns public employment.

Paradoxically this has been the case of long-term foreign residents, although Directive No. 2003/109/EC, transposed in Italy via Legislative Decree No. 3 of January 8<sup>th</sup>, 2007 (which also transposed the Charter of Nice, namely art. 34 thereof) had introduced, in art. 11, paragraph 1, the equal treatment principle as regards work as an employed or self-employed person, provided this does not imply,

even occasionally, the participation in the exercise of public authority and does not pertain to the national interest (as foreseen by Section. 27-quater of Legislative Decree No. 286/1998). Despite the above, there continued to be a generalised failure to enforce Directive No. 109/2003, which has been mostly interpreted restrictively, so that courts had to step in repeatedly<sup>12</sup> and the European Commission launched preliminary infringement proceedings against Italy; the latter led to the enactment of Law No. 97 dated 6 August, 2013 (“Provisions for the compliance of obligations by Italy as part of the EU - 2013 European Law”, entered into force on September 4<sup>th</sup>) which, in section 7, provides that long-term residents are to be afforded access to public sector employment and also opened up the possibility for those employed in the public administration on a limited-time basis to shift to contracts of an unlimited duration. Conversely, the open competitive examinations in the police forces, in the army or to serve on the bench remain intended for Italians only as they “imply the direct or indirect exercise of public authority or pertain to the national interests”.

However, the fact of excluding third-country nationals that are not long-term residents from public service is still an open issue, ridden with contradictions and ambiguity. And this happens despite the ILO Convention No. 143/1957 (which at art.10 reinforces the notion of the “Equal opportunities and treatment in terms of employment and profession”, as also referred to in Leg. Decree 286/1998), the ordinance of the Constitutional Court No. 139/2011, the Leg. Decree 215/2003 (forbidding ethnic and racial discrimination in “access to employment and work - whether on an employed or self-employed basis - including recruitment criteria and hiring conditions”), the two UNAR’s opinions (July 31<sup>st</sup> 2010 and June 6<sup>th</sup> 2011), the various anti-discriminatory civil actions brought by associations and the measures adopted by judicial authorities - which led, in various cases, to rearrange the admission terms for open competitive examinations.

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12      Among the most recent cases: Court of Milan, precautionary order pursuant to art.700 c.p.c. of 29 August 2013, regarding the State exam to be qualified to work as a labour consultant.

Even in this case, in the aforementioned two-year period, there have been various judgements which recognised the discriminatory behaviour adopted during the examinations intended to recruit professional nurses<sup>13</sup>, staff for merely technical<sup>14</sup> health care professions and positions, French- and Spanish-speaking legislation experts<sup>15</sup>, environmental operators<sup>16</sup>, administrative accountants<sup>17</sup>, or for the selection of personnel belonging to the “less-advantaged categories”<sup>18</sup>

Another remarkable judgement was issued by the Court of Appeal in Florence, on May 11th 2012, which established that third-country nationals may compete for employment in the public sector where completion of mandatory education periods is required. Despite the expectations, the decree published in the Official Journal of December 12th, 2012 did not envisage any regulation on third-country nationals’ access to public service jobs. The topic was taken up subsequently during the debate for the approval of the “2013 European Law”. However, the proposal put forward by some MPs was only carried in the form of a commitment by the government to “consider this option”.

It will be important to assess the correct enforcement of Directive 2011/98/EU of December 13<sup>th</sup> 2011 (whose deadline for transposition expired on December 25<sup>th</sup> 2013) which foresees a single application procedure to issue a single permit for third-country nationals staying and working in the territory of a Member State as well as a set of rights for those third country workers who are legally residing in a Member State, namely in the following areas (Chapter III art. 12): a) Working conditions with compensation and dismissal including health & safety on the workplace; b) Education and vocational training; c) Equivalence of diplomas and professional qualifications; d) Tax benefits; e) Access to goods and services for the public

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13 Court of Trieste, 17 March 2012; Court of Perugia, 8 June 2012; Court of Milan, 30 October 2012 concerning the hospital of the province of Lecco and the health care unit of the Marche region; Court of Trieste, 4 July 2013

14 Court of Reggio Emilia, 19 December 2012

15 Court of Rome, 20 December 2012

<sup>16</sup> Court of Florence, 26 February, 2013

<sup>17</sup> Court of Como, 15 May 2013

<sup>18</sup> Court of Florence, 30 January 2012 (concerning a call by the Ministry of Cultural Assets)

including access to housing.

The directive contains, however, some possibilities for Member States to derogate from or limit the scope of the equal treatment principle at the transposition stage.

Limitations still remain as far as the access of foreigners to freelance activities is concerned.

## Housing

### Public housing

According to Title V of the Constitution, regions have exclusive competence over public housing, therefore they make laws and establish the criteria the municipalities will use in issuing the calls where the assessment criteria for the applications are set out.

In this case, the possible discrimination falls within the “institutional discrimination” category. In this regard, it is worth noting that section 40, paragraph 6 of the Consolidation Act on immigration limits the chances for an immigrant to have access to Popular Residential Housing (ERP), the social renting agencies, and easy-term loans for the purchase and reclaiming of buildings as this is only allowed to long-term residents or the holders of at least two-year stay permits and only if they work legally whether as employees or on a self-employed basis. If these requirements are met, all the other conditions imposed on all the applicants being equal, a non-national is to be treated like an Italian national with the same score.

However, for various years now, some Regions despite the aforementioned requirements have been including further time-related criteria which turn out to be real hindrances for the non-nationals - to mention but a few: the 5 year-residence requirement or having worked for 5 years in the regional territory to participate in the call for tenders or to be granted a council house. This occurred even though some previous judicial decisions had defined this criterion as being “unrelated to the rationale of the ERP legislation”<sup>19</sup> and to the equality and reasonableness principles recalled by the constitutional Court as also related to the social right to housing<sup>20</sup>. Indeed, in some cases the judge seized with an action for lifting the

discriminatory measures went as far as ordering not only that the call should be amended, but that the allocations already made on the basis of the discriminatory measures should be revoked<sup>21</sup>.

The European Commission, on May 20th 2012, had actually to start an infringement proceeding against the regional legislation of Veneto on ERP, as the additional requirement imposed on non-EU nationals was considered to violate Directive 109/2003/EC.

Also the Umbria region's Law No. 15 of October 5th, 2012 envisaged, in Sections 24 and 34, as a general requirement having resided or worked in the region for a 5 year period - not only to benefit from contributions but, in particular, for the allocation of ERS (Social Residential Housing) dwellings. The Prime Minister's Office, with deliberation of December 7th, 2012, challenged the law before the Constitutional Court, considering that the regional legislator, in foreseeing the seniority requirement in question, introduced a form of indirect discrimination against the nationals of other EU Member States, Italian nationals residing abroad, and third-country nationals that were long-term residents in Umbria, protected in their access to ERP houses as a result of art. 11 of Directive 109/2003 and art. 40, paragraph 6 of the Consolidation Act on immigration.

There have been cases of discrimination at a municipal level as well. This is the case of the municipality of Ghedi (Brescia) which allocated, by means of a call exclusively intended for Italian citizens, municipal "capped maximum rent" or "fair rent" ("equo canone") houses. The Court of Brescia, on June 12th 2012, reiterated that "the requirement of the Italian citizenship to participate in the aforesaid call is an unreasonable treatment inequality that is applied to individuals who are all equally in need and has therefore a discriminatory nature according to section 43 of the Consolidation Act, as it is totally irrelevant for the above purposes that the houses cannot be qualified as public or subsidized housing"<sup>16</sup>.

<sup>22</sup> In this case, the judge rejected even the Municipality's interpretation according to which the houses referred to in the aforementioned tender would not fall within the category of subsidised houses but would belong to the assets to be freely managed; being subject to the fair rent regime, their allocation becomes, broadly speaking, subsidised.

## Housing subsidies

A further institutional discrimination within the housing sector concerns the “leasing fund” (or “tenancy funds”)<sup>17</sup>. For instance, the Court of Trieste, on November 24th 2012, deemed as discriminatory and contrary to the free movement of individuals the 10-year residence requirement to access the “leasing fund” as envisaged by the regional legislation of Friuli Venezia Giulia (Regional Law 18/2009) and applied by the Municipality of Trieste in the call put out in April 2010 with a view to assigning some subsidies in favour of tenancies. The judge also ordered the payment of damages to the 14 Romanian families who had been excluded from the list, acknowledging that the residence requirement was an indirect or occult discrimination vis-à-vis the EU regulations. Hence, the Region issued a new law (16/2011), replacing the aforementioned ten-year residence requirement by a 2-year one, which applies to Italian nationals, nationals from other EU Member States and non-EU nationals protected by the EU law (long-term residents and refugees), together with a five-year stay requirement in Italy for other non-EU nationals.

The Italian government similarly challenged such a regulation before the Constitutional Court, but the latter, during the hearing of November 6th, 2012, declared the claim inadmissible as it was submitted belatedly. Another case regarded the regulation on the “house subsidy” in force in the province of Bolzano, which excluded the long-term residents. On April 26<sup>th</sup> 2012, the European Court of Justice deemed that regulation as incompatible with the EU law, thus highlighting the illegitimacy of the national regulations on the “leasing fund”.

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17 <sup>23</sup> The leasing fund is a tool providing monetary support to help in the payment of rental fees. Those receiving ERP houses are not entitled to this benefit. The leasing fund was established in 1998, by a State Law (Law No n. 431/98, art. 11) and every year the Region approves a resolution defining the eligibility requirements for the benefit and the opening terms of the calls the Municipalities are to issue on the basis of the needs they establish. Citizens wishing to be afforded such benefits are to address the application to the Municipality they belong to.

## Welfare

Section 41 of the C.A. on immigration equates foreigners to Italians as far as welfare benefits and services are concerned.

However, it may also be the case that the non-national is excluded or limited in the fruition of health care, welfare and economic benefits,; as recalled on several occasions by the Constitutional Court, this is not deemed as a discriminatory act only if the exclusion is justified according to reasonableness criteria.

Indeed, the Constitutional Court in the past intervened regarding access by non-nationals to the services guaranteed in case of disabilities, declaring section 80, paragraph 19 of Law No. 388/2000 illegitimate as it makes such access conditional upon holding a stay permit (as from 2007 called EC long-term stay permit); nevertheless, even in this two-year-period, different views were issued by the courts.

Third-country nationals who were not long-term residents and were affected by disabilities were afforded the right to a monthly disability benefit<sup>18</sup>, mobility allowance<sup>19</sup>, civil disability pension<sup>20</sup> and attendance allowance<sup>21</sup>. Only after these judicial actions did INPS (the National Social Security Agency) finally acknowledge, on September 4th 2013, with a message addressed to the central Directorate of assistance and civil disability and the Central pensions Directorate, that “in order to comply with what is established by the Constitutional Court, the mobility allowance, the disability pension, the monthly disability benefit and the monthly attendance allowance, subject to verification of compliance with additional legal requirements (health conditions, residence in Italy etc.), will have to be granted to “all foreigners lawfully staying in the country even if they do not hold the EC long-term stay permit, on the sole condition that they hold a stay permit of at least one year duration as

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18 <sup>24</sup> Court of Appeal of Perugia, 22 June 2012; Court of Cassation, 27 June 2012, 22 January 2013 (which considered the Calabrian regional law No. 40/2011 unlawful, in the specific section where benefits offered to non self-sufficient people were limited to long-term residents) and 19 March 2013.

19 <sup>25</sup> Constitutional Court, judgement n.40/2013. Court of Cassation, order 26830 published on 26 November 2013, rejecting INPS appeal which, despite acknowledging the previous act of the Constitutional Court, kept denying such a right to short term non-EU immigrants.

20 <sup>26</sup> Constitutional Court, judgement n.40/2013

21 <sup>27</sup> Court of Pavia, order of 11 July 2013

per section 4 of the C.A. on immigration”<sup>22</sup>. With the same message, INPS informed that its website had been updated.

Various judicial decisions have addressed cases where there has been a failure in recognizing other welfare benefits to foreigners (not necessarily disabled) such as the welfare allowance<sup>23</sup>, the health care allowance<sup>24</sup> or the “former” purchase credit card<sup>25</sup>. In the latter case, as a result of the threat by the European Commission to initiate an infringement procedure before the European Court of Justice, Government issued section 60 of L.D No. 5 of February 9th, 2012, converted into Law No. 35/2012, which introduced a new purchase credit card aptly named “experimental purchase credit card” also intended for EU citizens and their family members, long-term residents, refugees and anyone entitled to subsidiary protection, but limited to municipalities with more than 250,000 inhabitants.

This testing was launched in July 2013. However, the geographical limitation of the new card was considered by the European Commission as insufficient to overcome the discriminatory provisions in breach of the EU law as laid down in Law No 133/2008; therefore the Commission launched a formal procedure of infringement (No. 2013/4009). Following this procedure, Government included, in the 2014 Stability Law, a further extension of this new card to the whole national territory.

Another principle that has given rise to a lot of ambiguity is the one whereby the access to welfare measures is made conditional upon a prolonged residence, usually of at least 5 years. Again, as was the case in the past, the Constitutional Court found that there was no reasonable relationship between the period of residence and the situations of need and distress, affecting directly a person as such, which make up the prerequisites to benefit from the allowances aimed at coping with the aforementioned situations<sup>26</sup>. Furthermore,

22 <sup>28</sup> INPS message n.13983 of 4 September 2013

23 <sup>29</sup> Court of Brindisi, 26 March 2012. A recent judgement by the Court of Bologna (30 September 2013) acknowledged the family allowance to over 65 Moroccan long-term residents, according to what is envisaged by the EC – Kingdom of Morocco Agreement (ratified with Law No. 302/1999).

24 <sup>30</sup> Constitutional Court, judgement n.172/2013 of 11 July 2013, with which an article of Law No 15/2010 of the autonomous province of Trento, on the protection of non self-sufficient people and their families was declared constitutionally unlawful.

25 <sup>31</sup> On the exclusion of nationals from other EU member states regarding the “former” purchase credit card, introduced by Law No 133/2008, see Court of Trieste, 19 September 2012 ( in this case the Ministry of Economy, INPS and the Friuli Venezia Giulia Region were involved).

26 <sup>32</sup> Constitutional Court, judgement n.40/2011

the Constitutional Court clarified that, once ascertained the right to reside in the national territory, “foreigners may not be discriminated against by establishing, towards them, particular limitations on enjoying the fundamental rights of individuals that are otherwise afforded to nationals <sup>27</sup>.” In line with the above, the Constitutional Court, with judgment No. 2/2013 of January 14, 2013, rejected the law of the autonomous province of Bolzano on the social integration of foreigners, according to which welfare and study subsidies were dependent upon seniority of residence. Conversely, with judgement No. 133/2013 of June 3rd, 2013, the Court held the requirement of “at least five-year” residence in the region to be unlawful as foreseen by Law No. 8/2011 of the Autonomous region of Trentino-Alto Adige/Südtirol in respect of the regional family allowance for children and persons treated as dependent children.

The case of the allowance granted by INPS to long-term residents with large families

There has been a long dispute regarding the INPS allowance granted to low-income large families (households with at least three children)<sup>28</sup>. This is an annual allowance granted by the municipalities to families meeting the abovementioned requirements, which is paid by INPS according to section 65 of Law No. 445/1998 (including subsequent amendments and implementing regulations). Whereas this allowance was considered by many as being part of the allowances afforded to long-term residents according to art. 11, paragraph 4 of the European Directive 109/2003 (transposed via L.D. No 3/2007), INPS kept denying it, maintaining that art. 65 does afford the allowance exclusively to “Italian resident citizens with three or more children under 18”.

Various orders and judgements<sup>29</sup> were issued in 2012-2013 to

27 <sup>33</sup> Constitutional Court, judgement n.61/2011

28 <sup>34</sup> Art.5, Law No 448/98

29 <sup>35</sup> Court of Gorizia, 3 May 2012; Court of Milan, 16 July 2012 (INPS lodged an appeal which was rejected by the Milan Court of Appeal, with a judgement of 24 August 2012); Court of Padova, 26 July 2012; Court of Tortona, 22 September 2012; Court of Genoa, 24 September 2012; Court of Verona, 17 October 2012; Court of Venice, 24 January 2013; Court of Bergamo, 24 January 2013; Court of Tortona, 23 February 2013; Court of Bergamo, 15 March 2013; Court of Pescara, 29 March 2013; Court of Alessandria, 11 April 2013; Court of Alessandria, 12 April 2013; Court of Busto Arsizio, 29 April 2013; Court of Alessandria, 2 May 2013 (with three different orders); Court of Tortona, 3 May 2013; Court of Gorizia, 17 May 2013. But see also the judgement of the European Court of Justice, in *Kamberaj case. Social Housing Institute of the Autonomous Province of Bolzano/Bozen*, 24 April 2012 (Case-571/10)

establish a correct interpretation which, besides condemning a score of municipalities that had denied such an allowance, pinpointed INPS' discriminatory stance.

This situation, which is paradoxical and had led the European Commission to start an infringement procedure, came to an end in September 2013, when INPS finally agreed to grant the allowance also to long-term residents. On the other hand, on September 4th, 2013 Law 97/3013 came into force, this being the so-called "2013 European law", which includes a specific equal treatment clause in favour of long-term residents as regards welfare benefits. However, there are outstanding issues. Firstly, INPS delayed the enactment of a specific circular letter in that regard and has yet to update its website. Secondly, the application to benefit from the allowance regarding the year 2013 may be submitted until January 31st, 2014, so that some municipalities and INPS believe that the allowance should be paid to those eligible for it only for the second semester of 2013 as the financial coverage mentioned in law No. 97/2013 was scheduled to begin as of July 1st. Once again several judicial decisions were required to clarify that the allowance has to be paid for the first semester of 2013<sup>30</sup> as well.

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30 <sup>36</sup> Court of Varese, 11 September 2013; Court of Cuneo, 23 September 2013; Court of Verona, 10 October 2013 (with three judgements); Court of Rome, 21 October 2013; Court of Turin, 21 October 2013.

#### 4. Recommendations

Reforming Law No. 91/1992 on nationality by paying increased attention to the jus soli and people with intellectual disabilities.

Amending Section 61 of the Criminal Code so that the racist motivation is included among the “aggravating circumstances”.

Adopting a new Consolidated Law on immigration to take account of the new Italian situation and fully transpose the European directives on the rights of migrants, and in particular Directives 2000/43/EC, 2000/78/EC, 2003/109/EC, 2006 /123/EC, 2011/98/EU

Transferring the administrative functions relating to applications for issuance, renewal and transformation of residence permits to the Municipalities

Ensuring access of foreigners to employment in the public sector

Ensuring access of foreigners to the professions

Promoting specific training schemes and a system for the certification of foreign workers’ skills

Promoting the recognition of educational and professional qualifications acquired at training institutions in Europe and beyond, in order to facilitate access to the labour market

Fostering the regularisation of undeclared work

Introducing the entry permit “to seek employment”

Repealing the requirement of five- or ten-year residence in a region to be granted access to the national fund for the support of leases

Repealing the ten-year residence requirement to be granted a welfare allowance and restrictions still in force as far as access is concerned

Repealing the restrictions on access to the allowance for large families that exclude all third-country nationals and whoever is not a long-term resident.

Extending the duration of residence permits

Affording all residing non-nationals the right to vote and be elected with regard to the elections in municipalities and metropolitan cities

Using public funding for integration policies rather than for countering illegal migration, where the relevant objectives have not been achieved