

## Stuck and Exploited

Refugees and Asylum Seekers in Italy Between Exclusion, Discrimination and Struggles

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# Asylum Seekers Excluded from the Reception System in the COVID-19 Emergency Expulsions, Restrictions, Administrative Extensions and Access to the 'Surfacing' Procedure

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**Abstract** This contribution analyses the main consequences of the emergency regulations caused by the pandemic crisis by COVID-19 on non-EU citizens and, in particular, on asylum seekers; from health risks to movement restrictions, from difficulties in accessing administrative procedures to the critical issues of the regulations on the emergence of irregular work referred to in Law Decree 34/2020, as an emergency and ineffective response to the closure of the borders, within the framework of the current Italian reception system, generally without long-term planning and with access preclusions for homeless, 'sur place' or 'dublinati' asylum seekers.

**Keywords** Asylum seekers. Coronavirus emergency. Emersion procedure. Regularisation. Protection void.

**Summary** 1 From the Right to Reception to Reception as a Reward Measure. – 2 The Condition of Asylum Seekers during the Italian Lockdown among Administrative Suspensions and Extensions, Restrictions on the Freedom of Movement and Sanctions. – 3 The Strict Regulatory Funnel of the New Emerging Regulations Provided for by the Recovery Decree: Relevant Features and Critical Aspects of the Access to Asylum Seekers' Procedures. – 3.1 The Regularisation Cases Provided for by Article 103 of Law Decree 34/2020 Converted into Law 27/2020: Regulatory Hints and General Criticalities. – 3.2 The Difficult Access of Applicants for International Protection to the 'Surfacing' Procedure.



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## 1 From the Right to Reception to Reception as a Reward Measure

In the last decade the Italian legislator seems to have forgot that the right to reception is closely linked to the procedure for the recognition of international protection.<sup>1</sup> Reception is, in fact, functional to the effectiveness of the right to apply for asylum, in so far as it allows the asylum seeker to properly arrange his or her application, which, for instance, requires the gathering of full and adequate documentation on the fear of persecution or on the danger of serious harm.<sup>2</sup>

The functional role of reception shows why it should be intended as a genuine right to hospitality, rather than a mere 'qualified interest' to it, as the caselaw has proved to consider it. If correctly intended and implemented, reception would be consistent with the function of guaranteeing the effectiveness of the application for international protection, and it would also contribute to safeguard the extensive protection that the constitutional charter provides to the right of asylum.

In particular, after the amendments introduced by Law Decree 113/2018 (converted into Law 132/2018), Art. 14 of Legislative Decree 142/2015 now submits the access to all reception measures to a decision of the Prefect, meaning that the person concerned could not only be denied the transfer from the 'first' to 'second' reception,<sup>3</sup> but even be excluded from the reception system as a whole. This mechanism increases the risk of being forced into sufferings that the European Court of Human Rights (ECHR) has repeatedly considered to amount to a inhuman and degrading treatment against Art. 3 ECHR. If, according to Directive 2013/33/UE (the so-called 'Reception Directive'), Member State authorities are bound to provide asylum seekers with housing and to care for their basic needs. The obligation for Member States to provide asylum seekers with adequate reception

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**1** The 'subjective right' consists of a legal situation of advantage accruing to a person in respect of a good, protected in full, immediately and against all. In Italian law, in addition to the subjective right, there is also the 'legitimate interest', which consists in a position of advantage that the legal system reserves to a subject with regard to a utility or an asset of life subject to administrative power. That position is undoubtedly less strong than the subjective right, since, for the purposes of its satisfaction, the intermediation of the public administration is necessary.

**2** On the right to reception as a subjective right recognised by Art. 10 of the Italian Constitution, see Bonetti 1999.

**3** The reception system in Italy is abstractly conceived on two levels: the first reception, which includes hotspots and first reception centres providing only basic services, and the second reception, made up of smaller structures, inserted in the local communities, which assist the asylum seeker in his/her path of socio-occupational integration. With Art. 4, §§ 3-4 of Law Decree 130 of 2020, the second reception is now called Reception and Integration System (SAI), which replaces the Protection System for Persons with International Protection and Unaccompanied Foreign Minors (SIPROIMI, previously SPRAR).

conditions in kind, or through the payment of vouchers or allowances, descends directly from Article 13 of the Convention, according to which contracting Parties must ensure adequate reception conditions for political asylum seekers.<sup>4</sup>

Access to reception measures should occur whenever the asylum seeker does not have adequate means of subsistence. Despite this, there are frequent cases of exclusion from the reception system or withdrawal of reception measures against asylum seekers who, having found a job, even a short one, are considered capable of supporting themselves.

Although the caselaw on withdrawal of reception has proven to be rigorous (Ferrero 2019), the illegal practices resulting in the exclusion of asylum seekers from reception still appear to be rarely brought to the attention of the judges. Similarly, national legislation does not seem to offer any direct protection to asylum seekers who find themselves – and will increasingly find themselves – living in precarious reception conditions, within structures that often lack the necessary standards to guarantee the possibility of integration and interaction with the surrounding territory. At least in the most serious cases, it may be necessary to refer the matter to the European Court of Human Rights, recalling the need to provide asylum seekers, as disadvantaged persons, with enhanced special protection and highlighting how, in the face of particularly vulnerable persons, conditions of extreme poverty can constitute a inhuman and degrading treatment.

Moreover, it should be remembered that Art. 4, § 4 of Legislative Decree 142/2015, which states that access to reception measures and the granting of a residency permit for international protection applications cannot be subject to the existence of requirements other than those expressly required by law, is constantly disregarded by the Italian Public Administration. This provision must be interpreted in the light of Art. 6(6) of Directive 2013/33/EU, according to which Member States must not require unnecessary or disproportionate documents or impose other administrative requirements on applicants before granting them the rights conferred by the direc-

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<sup>4</sup> See first of all *M.S.S. v. Belgium and Greece* [GC], case no. 30696/09 21 January 2011, which was followed by other rulings including: *V.M. and others v. Belgium*, case no. 60125/11, 7 July 2015; *A.E.A. v. Greece*, case no. 39034/12, 15 March 2018; *Khan v. France*, case no. 12267/16, 28 February 2019. Similarly, the Court of Justice of the European Union has stated that in order to ensure decent living conditions, subsistence and physical and mental health, reception must be sufficiently stable and adequate to meet the material health needs of those who are in the context of the asylum procedure and that, while Member States have discretion regarding concrete forms of reception, they must apply standards which are normally sufficient to ensure a decent living and comparable living conditions in all Member States (CJEU, judgment of 27 February 2014, *Saciri*, C-79/13). For a critical reading of the judgment *M.S.S. v. Belgium and Greece* [GC], see Syring 2011.

tive. However, this obligation is consistently disregarded by a large number of *Questure* (Police stations), which require asylum seekers to prove their residence in the territory by means of a 'declaration of hospitality' or other similar documentation, even when they declare themselves to be without means of subsistence and homeless. The illegality of this practice, which hinders access to the procedure and reception and infringes both Art. 6, § 6 of Directive 2013/33/EU and Art. 5 of Legislative Decree 142/15, has been assessed by several Courts, before which the matter has been brought before them following urgent proceedings.<sup>5</sup>

Access to reception measures is hard to obtain not only for immigrants who have entered Italy for the first time, but also for those who are transferred to Italy from other Member States in application of the Dublin Regulation (in Italian, so-called 'dublinati'), who frequently do not receive any information and are forced to apply autonomously to the competent *Questure* and *Prefetture* (Prefectures) in order to re-access the procedure and reception measures.

In particular, according to the circular of 14 January 2019 of the Ministry of Interior on the application of Law Decree 113/2018, if the person under the Dublin procedure had already applied for asylum in Italy, upon return, the prefecture of the airport of arrival, at the indication of the Central Dublin Unit, shall facilitate the transfer to the province where the application had been first submitted. If, on the other hand, the applicant had not formalised the application in Italy before leaving the country, reception must be arranged in one of the centres of the region where the airport of arrival is located, according to the criteria set out in the regional coordination table.

The Circular does not clarify how prefectures should facilitate the transfer of the person under the Dublin procedure: therefore, it is likely that competent authorities will simply notify an invitation to report to the *Questura* where the application was formalised.

The consequences of this reform of the Italian asylum system appear to have major impact on the safety of applicants for international protection who are in other European countries and who, under the Dublin Regulation, could be transferred to Italy, especially vulnerable ones.

It is precisely because of this imperfect correspondence between the CEAS (*Common European Asylum System*) and the Italian system resulting from the amendments made by Law Decree 113/2018.

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<sup>5</sup> Trieste Court order of 22 June 2018; Milan Court order of 25 July 2018; Rome Court order of 29 November 2018; Palermo Court order of 13 September 2018; Rome Court order of 26 February 2019.

## 2 The Condition of Asylum Seekers during the Italian Lockdown among Administrative Suspensions and Extensions, Restrictions on the Freedom of Movement and Sanctions

The above mentioned regulatory and administrative context, which already renders the condition of applicants for international protection very precarious, was further aggravated by the recent provisions adopted to deal with the COVID-19 pandemic.

Since the very first days of March, in fact, the Italian government has implemented, with a pressing overlapping of decrees of the Prime Minister, ministerial decrees and circulars, measures restricting the freedom of movement, allegedly in order to reduce the risk of contagion in favour of the protection of collective health.

In the first place, in order to buffer the effects deriving from the generalised lockdown of public offices, Art. 103, § 1 of Law Decree 18/2020, converted with amendments by Law 27/2020,<sup>6</sup> provides for the suspension of the preliminary, endoprocedural and conclusive terms of most of the administrative proceedings pending at the *Questure* or at the prefectural immigration offices.<sup>7</sup>

The purpose of the regulation is clear: by deferring the deadlines for the conclusion of proceedings considered to be non-urgent, it has intended, not to lead to an indiscriminate interruption of the activities of the public administration, but rather to justify its slowdown, also in the face of the forced continuation in home working of all administrative activities closely related to the management of the emergency, ordered by D.P.C.M. (decreto del Presidente del Consiglio dei ministri, 'decree of the President of the Council of Ministers') of 11 March 2020.

Therefore, the practices adopted by those *Questure* that refused to process urgent requests for residence permits for special cases (e.g. for medical treatment), previously included in the so-called humanitar-

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<sup>6</sup> With regard to immigration, the most relevant regulatory interventions are Legislative Decree 9/2020 of 2 March 2020, classified as "administrative procedures falling within the competence of Public Security Authorities"; Art. 78, § 3-*sexies*, Art. 83 and Art. 103 of Law Decree 18/2020 of 17 March 2020, as converted into Law no. 27 of 24 April 2020, containing provisions concerning the suspension of the terms of administrative and judicial proceedings and the extension of the effectiveness of expiring administrative acts. Among the many decrees issued by the President of the Council of Ministers, the Prime Minister's Decree of 11 March 2020 on the closure of police headquarters to the public is of particular note here.

<sup>7</sup> They have therefore been suspended until 15 May 2020 the terms of sixty days, referred to in Art. 5, § 9 of Legislative Decree 286/98, established for the conclusion of administrative procedures for the renewal or conversion of pending residence permits, and the ninety-day term for the issue of authorisations for family reunification by Art. 29, § 8 of Legislative Decree 286/98, to seasonal work, as well as for particular cases of entry for extra-quota work (such as, among others, for scientific research, blue card, intra-corporate transfers).

ian protection (which was repealed by Law Decree 113/2018, so-called ‘Security Decree’, converted into Law 132/2018), by virtue of the alleged impossibility of carrying out the photo-signalling procedure until the end of the lockdown, are not legitimate, and that according to the first paragraph of Art. 103 of Law Decree 18/2020 itself, which requires administrative bodies to guarantee “the rapid conclusion of the procedures, with priority for those to be considered urgent”.

Similarly, is against the law the tendency of some immigration offices to formally guarantee the reception of the application for international protection, in compliance with the international obligations set out in Art. 6, § 2 of Directive 2013/32/EU,<sup>8</sup> limiting, however, the ways in which this will could be conveyed to certified e-mail only, which asylum seekers in almost all cases are deprived of.

In any case, the legislator intervened relatively promptly to at least order the extension of the validity of expired residence permits in the full force of the COVID-19 restrictions. Also the six-monthly permits for request of asylum, therefore, are now valid until 30 April 2021, as lastly provided by Law Decree 2/2021. This also affects the social rights connected to the residence permit for request of asylum, such as the extension of the validity of the enrolment in the National Health Service and, the possibility to continue to work or look for a new job.

As for the fate of judicial proceedings already pending and aimed at the recognition of international protection, on the other hand, they cannot reasonably be included among the “proceedings of a precautionary nature, having as their object the protection of the fundamental rights of the person”, for which the postponement of the hearings should be excluded in accordance with the third paragraph of Art. 83 of the same Law Decree 9/2020.<sup>9</sup> It is clear, in fact, that these pro-

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<sup>8</sup> This is clearly stated in the circular of the Ministry of Interior, Central Directorate of Immigration and Border Police, no. 20359 of 9 March 2020: “It is understood that activities related to the expulsion of irregular foreigners and those related to the reception of the manifestation of willingness to apply for international protection must be ensured”. For a closer examination of the illegitimacy of the expulsions during the COVID period, also in view of the objective impossibility of repatriation following the closure of the borders and the high risk of contagion within the Centres of Permanent Residence for Repatriation (CPR), please refer to the ASGI form Emergency COVID-19. The impact on the rights of foreign nationals and the necessary protection measures: a first reconnaissance of 22 March 2020, p. 6 ([https://www.asgi.it/wp-content/uploads/2020/03/EMERGENZA-COVID-19\\_DIRITTI-STRANIERI-22-marzo-finale.pdf](https://www.asgi.it/wp-content/uploads/2020/03/EMERGENZA-COVID-19_DIRITTI-STRANIERI-22-marzo-finale.pdf)), and the statements of the Commissioner for Human Rights of the Council of Europe, made on 26 March 2020 and available at <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues>.

<sup>9</sup> It should be noted that the Court of Appeal of Venice has adopted a contrary orientation, already subject to litigation of legitimacy, with which it decided not to suspend the proceedings pursuant to Art. 702-*quarter* of the Italian Criminal Code for the recognition of international protection due to their alleged urgent nature.

ceedings are not urgent, since they are aimed at reforming a measure rejecting protection, the effects of which are automatically suspended at least for legal proceedings started before 17 August 2017.<sup>10</sup>

This is all the more true for the judgments referred to in Articles 35 and 35-*bis* of Legislative Decree 25/2008, which still require a personal hearing of the applicant in the first instance and which therefore cannot be turned into a paper or electronic hearing. Thus, the practices of some courts aimed at qualifying *tout court* international protection proceedings as urgent because they have as their object the protection of the fundamental rights of the person, do not appear to be justified.<sup>11</sup>

The legislative willingness to suspend all non-urgent activities, in order to limit travel to a minimum and to prevent the increase in contagion, finds pale but positive expression also in the new Art. 86-*bis*, § 2, introduced by Law 27/2020 of conversion of Law Decree 18/2020, which provides for the stay in the reception system of asylum seekers, holders of international or humanitarian protection and other vulnerable persons, even in the face of the lack of the necessary requirements to continue to access them.<sup>12</sup>

Exit from the reception system is also appropriately postponed, at least until the end of the epidemiological emergency: an extension of a few months, which, however, is unlikely to offset the negative repercussions suffered by incoming applicants, who have been hard hit by the economic crisis, let offs and the hiring freeze resulting from the interruption of production activities.

On the other hand, the opportunity has not been taken to set up reception facilities for beneficiaries who are not already included, leaving the issue of health protection of applicants for international protection outside the reception area and of the community at the mercy of fate, relying on – meritorious but – often partial solidarity measures, implemented by private social workers and a few virtuous local authorities.<sup>13</sup>

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**10** For an examination of the effects of the amendments introduced by Legislative Decree 13/2017, read: Contini 2018.

**11** See the case of the Court of Appeal of Venice, the subject of a complaint to the CSM by the CAIT, Chamber of Immigration Lawyers of the Triveneto, motivated not only by the obvious deflatory purpose of the litigation pursued by the celebration of the international protection hearings in full lockdown, but also in light of the percentage of rejections that is close to 100% of appeals, which has no equal throughout the peninsula.

**12** These include MSNAs (unaccompanied foreign minors), upon reaching the age of majority, other vulnerable subjects, holders of residence permits as per Articles 19, § 2, letter d-*bis*, 18, 18-*bis*, 20-*bis*, 22, § 12-*quater*, and 42-*bis* of Legislative Decree no. 286 of 25 July 1998, at least for those included in the protection system *ex Art. 1-sexies*, § 1 of Legislative Decree 416/89.

**13** For all of them see the public-private emergency intervention, carried out in Padua during the lockdown. <https://www.difesapopolo.it/Diocesi/Coronavirus.-Casa-Arcella-mette-al-sicuro-chi-e-senza-dimora>.

In any case, new provisions regarding reception have also been issued by Law Decree 34/2020, the so-called 'Recovery Decree', which has provided for the mere possibility (not the obligation) of temporarily allocating the places available in the SIPROIMI to applicants for international protection, in derogation of Art. 1-*sexies* of Legislative Decree 426/1989.<sup>14</sup>

It should be remembered that, following the amendments introduced by Law Decree 113/2018, converted into Law 132/2018, the aforementioned Art. 1-*sexies* has stripped the reception of its function of guaranteeing the effectiveness of the application procedure for international protection, giving it an almost 'rewarding' nature, since reception in SIPROIMI today is guaranteed only to those who have already been granted refugee *status* or subsidiary protection. For this reason, the possibility to use the places in the reception system also for homeless asylum seekers is a weak corrective, aimed at addressing some asylum seekers in smaller structures than the first reception DACs, in order to reduce the gathering of people within the large centres which, as ASGI and other associations for the protection of migrants' rights have pointed out, constitute a dangerous receptacle at high risk of contagion.<sup>15</sup>

Despite the clear legislative intent underlying the above mentioned rules is to avoid the precarious housing of asylum seekers during the pandemic period, the travel prohibitions, imposed by Art. 2 letter a) of Law Decree 19 of 25 March 2020 during the most acute phase of the epidemiological emergency from COVID-19, have had serious consequences both on asylum seekers included in the reception system and on those who, outside the reception circuits, do not have a permanent residence.

Those who are included in the reception system, in fact, during the lockdown, have suffered a strong limitation of their freedom of

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**14** With the reform of the second reception system carried out with Art. 12 of Law Decree 113/2018, the SPRAR network is replaced by the protection system for holders of international protection and for unaccompanied foreign minors (acronym SIPROIMI). For a closer examination of the consequences on the reception system of the security decree and on the access of asylum seekers only to first reception services, please refer to the ASGI contribution, "Il diritto all'accoglienza dei richiedenti asilo in Italia: quali sfide dopo la legge 132/2018", by Anna Brambilla (2019).

**15** On the health hazards of the large concentrations of people found in first aid centres, please refer to the ASGI planning document of 22 March 2020: COVID-19 emergency. The impact on the rights of foreign citizens and the necessary protection measures: a first reconnaissance. [https://www.asgi.it/wp-content/uploads/2020/03/EMERGENZA-COVID-19\\_DIRITTI-STRANIERI-22-marzo-finale.pdf](https://www.asgi.it/wp-content/uploads/2020/03/EMERGENZA-COVID-19_DIRITTI-STRANIERI-22-marzo-finale.pdf). If we consider the current reception system, mostly characterised by large centres and with funds almost halved by the reform implemented by Law Decree 113/2018, it seems very difficult to implement the prescriptions given by the Ministry of Interior with the circular of April 1, 2020, which requires to ensure health care and information services and that "within the centres the necessary hygienic-sanitary and preventive measures are adopted, as well as to avoid forms of particular concentration of guests".



movement, whose legitimacy can certainly be doubted. In fact, many prefectural measures were adopted by the Ministry of the Interior on the basis of the Ministry of Interior's circular of April 1st, 2020, which conferred to the heads of the reception centres the power to adopt coercive measures to prevent asylum seekers from leaving the facilities, in contrast with the provisions of the ministerial decrees that allowed people to leave for proven occupational or health reasons, i.e., to do motor activities, even if they were close to their place of residence.<sup>16</sup> This new legislation raises once again the issue of the role of reception centres' managers and staff, who, especially with Law 40/1998 and the entry into force of Law Decree 113/2018, are increasingly renouncing their role as promoters of inclusion in order to assume mere containment and control functions (Spinelli, Accorinti 2019).<sup>17</sup>

In large reception facilities and, to an even greater extent, in the informal camps that host a large number of former asylum seekers who have left the reception system and have become irregular, the risk of contagion was and is very high, given the poor hygienic-sanitary conditions, the restricted spaces with a high concentration of housing, the lack of any information on the precautions to be taken and the difficulties in accessing health services in the area.<sup>18</sup>

In addition to being more exposed to the risk of contracting COVID-19, those who live in marginal conditions and are homeless, because they have never been admitted to reception or have been expelled through informal and illegitimate procedures, during lockdown also had to deal with the criminal and administrative sanctions issued by the government to those who violated the travel ban: therefore obliged to remain on Italian territory waiting for the outcome of a procedure, deprived of the necessary reception, forced to live on

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**16** Reference is made to the circular of the Ministry of Interior, Department for Civil Liberties and Immigration of April 1, 2020, available at [https://www.interno.gov.it/sites/default/files/modulistica/circolare\\_covid-19\\_prot\\_del\\_1\\_4\\_2020\\_ulteriori\\_indicazioni\\_protocollo\\_3728\\_1\\_.pdf](https://www.interno.gov.it/sites/default/files/modulistica/circolare_covid-19_prot_del_1_4_2020_ulteriori_indicazioni_protocollo_3728_1_.pdf), in which it is explicitly requested that reception managers primarily ensure strict compliance with the containment measures provided for at national level.

**17** In this regard, consider the provisions of Art. 11, § 3, in the new wording introduced by Law Decree 13/2017, converted with amendments by Law 46/2017, which gives the person in charge of the reception structure the task of providing for the notification of the measure of rejection of protection, with the obligation to certify that the notification has been made, similar to those imposed on the public administration. In the same way, the provisions of the so-called 'Security Decree', which exempts the reception management bodies from guaranteeing social and work integration services and almost halves the *pro capite* funds available to reception centres, only impoverish their role, relegating them to a parking place pending the outcome of the asylum procedure. For an interesting analysis of the effects of Law Decree 113/2018 on the role of the reception system, see Spinelli, Accorinti 2019.

**18** This aspect is also found in the policy document drawn up by Brambilla 2019.

expedients and even sanctioned because they did not comply with an order from the authorities impossible to execute. Art. 3, § 4 of Law Decree 6/2020 of 23 February 2020 establishes, in fact, that failure to comply with the prohibitions of containment is punished with the offence referred to in Article 650 of the Criminal Code, which punishes non-compliance with the measures issued by the Authority for reasons of safety, health and hygiene with imprisonment for up to three months and a fine of up to 206 euros. In view of the inability of a large number of homeless people to comply with these provisions, the introduction of this provision has led to the sudden and unfair initiation of a large number of criminal proceedings.

In addition, in the first half of March 2020, there was an uncontrolled proliferation of regional and municipal ordinances that closed access to parks, green areas and cycle-pedestrian routes, notoriously refuge areas for those who are temporarily homeless, which made the existence of almost all asylum seekers, relegated *ex lege* out of reception, even more difficult.

With the enactment of Law Decree 19 of 25 March 2020, following vehement critics such conducts were eventually decriminalised and turned into administrative sanctions, however salacious they may be (from 400 to up to 3,000 euros).

On the other hand, in accordance with the guidelines of some courts, the violation of the absolute ban on people who tested positive and are thus subject to stay quarantined in their homes is subsumed in an offence provided for back in 1934 by a royal decree,<sup>19</sup> which provides for imprisonment from 3 to 18 months and a fine from 500 to 5,000 euros.

This sanctioning framework raises numerous concerns with regard to the actual suitability of these instruments to guarantee compliance with the containment rules, sanctioned by the cases outlined. It cannot be ignored that, in relation to homeless people, and in particular asylum seekers expelled from reception centres, the number of criminal complaints registered in the first period of the pandemic prior to Law Decree 19/2020 (about 50,000 complaints already as of 20 March 2020), largely concerned irregular foreigners, with all the complications associated with the initiation of criminal proceedings (election of domicile, assignment of a trusted defender, notifications). It follows that even following the decriminalisation of the offence of mere violation of the exit ban without justified reason, many administrative proceedings will not be challenged within the legal deadlines because notified to fictitious domiciles or already abandoned by the violator of the rule.

Not to mention the numerous complaints for false declarations to public officials, originating from the declarations, which subsequent-

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<sup>19</sup> Royal Decree no. 1265 of 27 July 1934, Consolidated text of health laws.

ly turned out to be untrue, but sometimes are merely the result of a linguistic misunderstanding or bad information, contained in the self-certifications imposed to justify the trips.

A rather bleak picture therefore emerges, where those who are the most vulnerable and exposed to the danger of the pandemic are also the first and privileged victims of the legislative and factual countermeasures adopted to contain it.

### **3 The Strict Regulatory Funnel of the New Emerging Regulations Provided for by the Recovery Decree: Relevant Features and Critical Aspects of the Access to Asylum Seekers' Procedures**

The forms of regularisation provided for by Art. 103 of Law Decree 34/2020, not by chance included in the so-called 'Recovery Decree' among the measures to react to the epidemiological emergency, have the primary intent of encouraging the immediate employment of labour in some limited productive sectors, undoubtedly affected by the closure of borders and the failure to adopt, for 2020, the decree that yearly regulates the entry into Italy for work, almost exclusively of a seasonal nature.

Even more than in the past, therefore, this regularisation procedure is an emergency intervention that, as it cyclically happens, aims at correcting *ex post* the distortions that derive from a short-sighted management of migration policies that, more than sectoral remedial interventions, would need a radical, reasoned and profound rethinking.

Suffice it to think how, for years, the entries for unskilled workers have concerned only seasonal work, by its very nature of short duration, and few hypotheses of self-employment. The purpose of the 1998 legislator, first with Law 40/1998 and then with the Testo Unico sull'Immigrazione (Immigration Law - Legislative Decree 286/98), is to guarantee a structured planning of entries for work, so much so that Art. 3 of Legislative Decree 286/98 prescribes the three-yearly issue of a planning document on the management of migration policies. In spite of this, for several years now, the more and more meagre way to regulate entry for work has been relegated annually to the so-called 'decreto flussi', which establishes the number of 'slots' available for entry and conversions for work reasons.

Entry for work subject to the 'slot' system is subject to a cumbersome procedure which, due to bureaucratic formalities (request for authorisation from the Prefecture, call for names) and the time required for its definition (from the request for authorisation to the signing of the residence contract, on average, no less than six months elapse), does not meet the needs of the labour market, nor does it allow an organised management of migration flows caused by work requirements.

As a direct consequence of the lack of a far-sighted planning and management of migration policies, and even of any kind of mechanism allowing for legal matching of labour supply and demand abroad, there is a massive recourse to the asylum procedure to regularise at least temporarily one's position of stay for work purposes, thanks to the limited preclusion to enter the labour market, now reduced to only two months after the submission of the application for international protection.

In this context, the government decided to resort to a so-called 'sanatoria' (amnesty), which is disciplined by Art. 103 of Law Decree 34/2020 and by the interministerial decree published in the Official Gazette on 29 May 2020.

Thus, these new legal instruments set a regularisation of irregular migrants, the eighth in the history of Italian migration policies, which not by chance have made use of it in a recurrent and somehow structural way. Moreover, this new regulation has already become the subject of several ministerial circulars which only partly contribute to smoothing out the many interpretative knots which remain difficult to understand.<sup>20</sup> The regulatory framework, at least in the declared intentions, aims, on the one hand, at favouring the surfacing of undeclared work, counteracting the widespread phenomenon of labour exploitation and the distortions to competition on the market caused by the use of low-cost irregular labour, and, on the other hand, at stabilising the position of those who are irregularly present on the territory, or, even if regularly, are still in a precarious condition of stay.

This regularisation mechanism should therefore primarily concern applicants for international protection who, provided they have a six-monthly permit of stay renewable until the outcome of the procedure but not convertible, have lingered for years in a condition of regularity that is only temporary. The asylum seeker is only granted a permanent residence permit if his application for international protection is accepted. However, those purposes were massively missed, since the discipline on surfacing from irregular work provided for by Art. 103 of Law Decree 34/2020 is not only very difficult for asylum seekers to access, but also risks to generate distorting phenomena that may even worsen their precariousness.

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**20** Even the regular frequency of the so-called amnesties, regularisations, or the resurfacing of irregular work, as the case may be, is emblematic: 1986, 1990, 1995, 1998, 2002, 2009, 2012, 2020.

### 3.1 The Regularisation Cases Provided for by Article 103 of Law Decree 34/2020 Converted into Law 27/2020: Regulatory Hints and General Criticalities

With no claim to be exhaustive on the regulatory details of the discipline, it is important, however, to highlight its scope of application and its fundamental features, in order to focus on the effects on the regularisation of asylum seekers.

As already mentioned, despite the declared intent of Art. 103 of Law Decree 34/2020 is to fight labour exploitation and encourage the surfacing of irregular work, the legislator has limited the applicability of the rule to a few limited productive sectors of the market. In fact, it only allows for the regularisation of workers employed by natural persons, companies or other bodies whose activity is related to agriculture, breeding, fishing, zootechnics and aquaculture, as well as in the sectors of assistance to people who are not fully self-sufficient and of domestic work.<sup>21</sup> There is a clear reference to sectors that require a low profile of specialisation and that largely employ foreign workers, because of the widespread ‘glass ceiling’ for racial reasons, the extreme difficulty in recognising qualifications obtained abroad and the low wages.<sup>22</sup> As is evident, the needs of other large segments of the market, such as construction, textile, engineering and tourism sectors, which are also affected by employment restrictions and the economic repercussions deriving from the epidemiological emergency, remain forgotten and unheeded and lend themselves as fertile ground for more or less widespread forms of exploitation of foreign labour.<sup>23</sup>

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**21** The narrowing of the scope of application of Art. 103, § 1, letter a) of Law Decree 34/2020, implemented with the Interministerial Decree of 27 May, to which the regulation does not provide details on this point, will be the subject of extensive litigation. While, on the one hand, the wording of the provision is extremely broad, since it also includes “activities connected” to agriculture, breeding, zootechnics, fishing, aquaculture, in the list of sectors concerned by the regulation, on the other hand, Annex 1 of the Interministerial Decree, with an opposite excess of restrictive zeal, identifies the Ateco codes as the only “connected activities” that can be considered for the regularization procedure. Therefore, there is no doubt about the possibility of access to the sanctuary for those workers who are employed with tasks that can be perfectly attributed to the production sectors of the amnesty but who operate within companies whose prevalent Ateco code of activity goes beyond those listed in the Interministerial Decree.

**22** The metaphorical expression ‘glass ceiling’, refers to the sociological phenomenon whereby certain categories of people are denied access to top jobs and positions of responsibility and enjoy full equality of rights, due to gender or racial discrimination.

**23** Of interest is the report drawn up by the Inter-University Research Centre on Prison, Deviance, Marginalisation and Governance of Migration, in collaboration with FLAI CGIL, which analyses and monitors the progress of legal proceedings initiated since 2018 on the national territory against labour exploitation. <http://www.adir.unifi.it/laboratorio/primo-rapporto-sfruttamento-lavorativo.pdf>. The study notes that the agricultural sector is not the only one affected by heavy forms of labour exploitation,

The discipline introduced with the Recovery Decree, published in the Official Gazette on 19 May, is improperly referred to as “surfacing from irregular work”, since, in addition to the regularisation of existing non-regular employment relationships, it also provides for the possibility of concluding new employment relationships, while respecting strict minimum limits on working hours and monthly pay. The first paragraph of the above mentioned article, therefore, which is very similar to the previous amnesties while adding new and stringent requirements, outlines the main road for the regularisation of the stay. This presupposes the declaration of an employer that an irregular relationship already exists or, more likely, that he is willing to hire a non-EU citizen, regular or irregular but present in the territory as of 8 March 2020, with a new contract, in order to employ him/her in the sectors concerned by the amnesty.

In the legislative design outlined by the law, therefore, the administrative procedure, which is entrusted to the Prefecture if the worker is a non-EU citizen and to the INPS (National Institute of Social Previdence) if he is an EU citizen, is activated by the employer and leads, or should lead, to the regularisation of illegal employment relations, granting of a residence permit for work.

With the submission of the application, the employer has the opportunity to shield himself from the criminal and administrative consequences of the use of irregular labour, even if the procedure for the surfacing turns out eventually unsuccessful for reasons for which he is not responsible. This causes a clear disparity with respect to the position of the worker, who, on the other hand, completely depends on the employer accomplishing the subsequent duties in order for his procedure to be successfully terminated.<sup>24</sup>

In order to avoid the risk of entry into Italy as a result of the application for amnesty, the rule requires foreign citizens to give proof of their presence on the territory as far as – at least – 8 March 2020. Evidence of presence is proof of having been subjected before that date to photodactyloscopic surveys aimed at issuing a residence permit or administrative identification, or having made the declaration of presence as Law 68/2007 at the *Questura* within eight days of the entry from another Schengen Area country or with the stamp on the passport affixed at external Italian crossings. Likewise, proof of pres-

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since 12 of the 46 criminal proceedings for serious labour exploitation under Art. 603-bis of the Italian Criminal Code, to the attention of the study, concern the construction, textile, manufacturing, logistics sectors.

**24** Reference is made, in this regard, to § 15 of Art. 103 of Law Decree 34/2020: “The Immigration Desk [...] summons the parties to stipulate the residency contract, for the compulsory notification of employment and to fill in the application for a residency permit for subordinate work. Failure to present the parties without justified reason will result in the procedure being closed”.

ence is provided by dated certifications issued by public bodies, such as public, private or municipal entities that perform a public function or attribution.<sup>25</sup>

Alongside the hypothesis of the triggering of the procedure by the employer, there is another way, more risky and less secure, which is open to non-EU citizens who have recently lost their regularity of residence (after 31 October 2019, the norm states) and who can prove that they have already worked in those productive sectors affected by the amnesty. Those who meet the above mentioned conditions can obtain a six-monthly permit for the purpose of seeking new employment, thus benefiting from a temporary regularisation, the stabilisation of which is subject to the stipulation – within six months after the formalisation of the application – of an employment contract in one of the activities already listed.

There are, however, many flaws to this second procedure: first of all, previous work in the sectors concerned by the amnesty must be ascertained by the National Labour Inspectorate, in accordance with the combined provisions of Art. 103, §§ 2 and 16 of Law Decree 34/2020.<sup>26</sup> This results in the exclusion of those who, in the past, have been exploited in precisely those sectors that are largely plagued by the scourge of illegal exploitation of workers. Furthermore, the time limits set for the successful outcome of the application are very strict: the worker must have been irregular for a few months, must have already and recently worked in the sensitive sectors affected by the amnesty, and has only six months to find an employment, always in the same sectors, with the requirements of incensorship under § 8 of Art. 103.

The attempt to release the procedure of surfacing on employer's impulse through the procedure referred to in § 2 of Art. 103, will presumably lead to a very poor effectiveness thereof, as has already occurred previously, particularly in 2012, because all the stringent requirements mentioned are required.

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**25** For a non-exhaustive list of admitted evidence of presence, please refer to page 10 of the circular of the Ministry of the Interior, Department for Civil Liberties and Immigration, dated 30 May 2020.

**26** The list of evidence of employment provided by ministerial circular of 29 May 2020, presupposes the existence of a regular employment relationship. Only the final provision of the aforementioned list, which authorises the production of “any paper correspondence between the parties during the employment relationship, originating both from the employer and the employee, from which the identification elements of the parties necessary to confirm the work activity can be obtained (e.g.: the list of evidence of work), communications of changes in working hours, requests for holidays or leave or absence for any reason whatsoever transmitted to the employer, disciplinary disputes, application of contractual institutions, etc.)”, seems to broaden the scope also to those black relationships, rarely found, where the employer has left a written record of the employment relationship.

In common with the previous legislation on emersion from irregular work, there is, however, the full safe-conduct for employers, protected from any repercussions resulting even from the negative outcome of the procedure; which makes way once again to the trade of fake employment contracts and, at best, to the establishment of fictitious employment relationships, whose related costs are fully borne by the workers, which is yet another form of exploitation or extortion.

### 3.2 The Difficult Access of Applicants for International Protection to the ‘Surfacing’ Procedure

From a brief examination of the regulatory requirements to access regularisation, it is clear that asylum seekers, except for very limited cases,<sup>27</sup> can only trigger the procedure disciplined by § 1 of Art. 103 of Law Decree 34/2020, namely that dependant from the employer, since they cannot submit the autonomous request for a six-monthly permit referred to in the second paragraph. In fact, as long as the application for international protection is pending, they remain excluded from this latter procedure, precisely because the regularity of their stay, however fragile and temporary, rules them out of the subjective scope of application of the second paragraph, which refers only to foreigners who have a residence permit that expired after 31 October of last year.

What about asylum seekers? Can they apply for this kind of regularisation? If it is true, in fact, that also asylum seekers can be holders of a “residence permit expired on 31 October, not renewed or converted” - especially in this historical moment, characterised by the prolonged closure to the public of the police headquarters and by widespread delays in renewing permits -, it should not be forgotten that they are basically regular in Italy until the outcome of the procedure that ascertains the need for protection, regardless of the events of the administrative attestation of regularity of stay. In spite of the silence of the law, the Ministry of the Interior intervened with a circular letter specifying that asylum seekers could also have access to this form of regularisation.<sup>28</sup>

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**27** Reference is made only to asylum seekers who have received a rejection order after 31 October 2019 and only when the appeal against the rejection order has not resulted in the suspension of its effects (the effects of administrative measures declaring the application for international protection to be manifestly unfounded are not suspended *ex lege* by means of a judicial appeal, which is particularly the case in the case of a repeated application for asylum).

**28** In this sense, moreover, the Ministry of the Interior expressed itself in circular 44360 of 19 May 2020.



The only way to access regularisation provided for by Article 103, § 2, consists, therefore, in withdrawing the application for international protection, which corresponds to an absolute subjective right strongly protected both at constitutional and international level, in exchange for a job search permit of only six months, which – in the current context of economic crisis – appear to be decisively few.

However, the increasingly restrictive guidelines of some Courts in relation to recognition of international protection and the repeal of humanitarian protection by Law Decree 113/2018, will make even the option to withdraw the application for asylum attractive.

This waiver, which, by the way, must take place within the very strict time limits set for the submission of applications, as it is a procedural condition for the assessment of the application, is far from painless, since, due to the general procedural principle according to which the defeated party must pay the costs of the judiciary process, it usually entails an order to pay the legal costs of the other party.

Therefore, in the face of the substantive non-applicability of Art. 103 § 2 to asylum seekers, the latter have no choice but to persuade those who already employ them illegally to expose the irregular employment relationship, or persuade a new employer to consent to the conclusion of an employment contract.

According to the literal wording of the law moreover, whoever accesses regularisation on the basis of an employer's request will have to work only for that employer; Article 103, § 6, leaves little room for different interpretations, since it provides, in the hypothesis of § 1, that "the foreign citizen will work exclusively for the employer who presented the request". This leads, as is evident, to a paradoxical effect, which is contrary to the very purpose of the law, since it leads to the forced interruption of previous employment relationships, often of indefinite duration and in activities that are more remunerative and professionalising than those affected by the amnesty.<sup>29</sup>

What fate awaits, then, the application for international protection pending the application for emersion of the employer? The non-compatibility between the application pursuant to Art. 103, § 1 of Law Decree 34/2020 and the continuation of the application for asylum lies in the very nature of the right whose recognition is requested in the latter case. In fact, the administrative condition of regularity of stay, in this case for work reasons, cannot be confused and is perfectly compatible with the verification of the status of refugee or foreigner deserving subsidiary protection.

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**29** On this point, only with the circular of the Ministry of the Interior of the 24 July 2020 was clarified the possibility of maintaining a job that existed before the application for emersion, provided that it is part time.

If these considerations are not sufficient to avoid the administrative practice of forcible renunciation of the asylum application for the admissibility of the application for amnesty, Ministerial Circular no. 44360 of 19 June 2020, provides for the possibility to continue the procedure for the recognition of international protection even after the stipulation of the contract of stay at the Prefecture, expressly legitimises the coexistence of the two procedures.

Moreover, since the entry into force of Law Decree 34/2020, some *Questure* have adopted questionable practices, which were later curbed by law making the issuance of passports subject to the withdrawal of the asylum application, aware that the passport, detained at the time of submission of the application for international protection, is often the only identity document in the possession of most asylum seekers.<sup>30</sup>

What is certain, however, is that from the moment the application for emersion is submitted, the stay in the reception facilities is at risk. Despite the fact that the revocation of the measures for income reasons can only be ordered when the state of poverty referred to in Article 14 of Legislative Decree 142/2015 has effectively ceased to exist, i.e. when, on the basis of an *ex post* factual judgement, an amount higher than the annual amount of the social allowance (5,977.79 euros for 2020) is received, in recent years there has been an illegitimately restrictive prefectural practice, which requires expulsion from the reception even for those who have just started working, without having yet achieved the expected income.

More shadows than lights, therefore, characterise the newly-introduced discipline of emersion, which with its unjustifiably tight mesh risks directing the same workers towards fictitious working relationships that it would apparently like to bring out and regularise.

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**30** In this regard, see the circular issued by the Ministry of the Interior, Department for Civil Liberties and Immigration on 30 May 2020, which, on page 10, when listing the worker's identification documents, equates to a passport the EU or border pass, the travel permit for foreigners, stateless persons, refugees, the identity certificate issued by the diplomatic authority of one's own country in Italy, as well as, exceptionally and, just to make the application, the expired residence permit. With a circular issued by the same Ministry on 19 June 2020, the asylum seeker can obtain from the Police Headquarters a certified copy of his or her passport, which was withdrawn when the application for international protection was submitted.

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