Implementation of the Procedures Directive (2005/85) in Italy

Lara Olivetti[1]

1.

INTRODUCTION

This contribution proposes to detect the Italian response to Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. After an introductory approach to the general setting of the Italian regulation of the right of asylum, we will follow the steps of the legislative process for implementing the new community norms on asylum procedures (Chapters 2 and 3). That will allow us to understand how a limited transposition of the Directive's provisions brought to the introduction of measures sensibly upgrading the existing national standard and stretching beyond the Directive's horizon itself. The Italian implementing norms will be examined through the pattern followed by the community legislator in the Directive in order to better highlight the features of the Italian regulation with relationship to the issues addressed by the Directive: general provisions, basic principles and guarantees, procedures at first instance, procedures for withdrawal of refugee status, appeals.

2.

LEGAL FRAMEWORK AND IMPLEMENTATION PROCESS

The right to asylum is recognized since 1948 by the Constitution of the Italian Republic on a broad basis to "the foreigner who is denied in his own country the real exercise of the democratic liberties guaranteed by the Italian Constitution".[2] Still, the legislator has never enacted laws providing access to such a right. Rather the Italian Parliament ratified in 1954 the Geneva Convention Relating to the Status of Refugees and

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[2] Constitution of the Italian Republic, Article 10, section 3 at http://www.cortecostituzionale.it

only in 1990 dedicated a few norms to refugee status application within the framework of the Aliens Act.[3]
While the 2001 Constitution Reform retained the State competence in matter of asylum vis à vis the Regions,[4] the 1998 Aliens Act introduced a general prohibition of deportation to countries where the concerned foreigner can be exposed to persecution[5] and 2002 Aliens Act Reform provided for a further integration of the existing norms leaving relevant issues uncharted.[6] On one side, the Court of Cassation recognized the right to apply for constitutional asylum - following Article 10 of the Constitution - at any Italian civil Tribunal by declaring its direct application.[7] On the other, the European Union Council Directive on minimum standards for the reception of asylum seekers[8] led to the introduction of a whole set of new norms building up a layered structure of subsequent law acts lacking coordination.[9]

The Italian legislator proceeded on the same path when confronted with Council Directive 2004/83 EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or otherwise needing international protection and Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. New norms were added on top of the existing ones and others were abrogated, by avoiding the adoption of a coordinated text of law. At the transposition deadline of December 1st 2007, the Italian Council of Ministers had approved a legislative decree for implementing Directive 2005/85/EC adding on more rules to the existing structure.[10] The decree was adopted on January 28th and published on February 16th, 2008.[11] The Implementation Decree will enter into force on March 2nd, 2008.

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[3] Aliens Act (*legge*) of February 28th, 1990 n. 39, Article 1 and Implementation Decrees, President of the Republic decree of May 15th, 1990 n. 136 and of July 24th, 1990 n. 237, Articles 1 to 6.

[4] Constitution Article 117 section 2 (see above note n. 2) as reformed by Constitutional Law n. 3 of October 18th, 2001.

[5] Article 19 section 1 of Aliens Decree of July 25th, n. 286 in Official Gazette of the Italian Republic General Supplement, 18 August 1998 no. 191. http://www.giustizia.it/cassazione/leggi/dlgs286_98.html

[6] Articles 31 and 32 of Aliens Act Reform (decreto legislativo) of 30 July, 2002 no. 189 at http://www.giustizia.it/cassazione/leggi/l189_02.html and implementation decree (decreto del Presidente della Repubblica), Asylum Application Procedure Regulation currently in force, 16 September 2004 no. 303 in Official Gazette of the Italian Republic, 22 December 2004 no. 299, at http://www.giustizia.it/cassazione/leggi/dpr303_04.html

[7] Corte di Cassazione, I civil law section, April, 9th, 2002 no. 5055.

[8] Council Directive 2003/9/EC of January 27th, 2003, OJ L31 of 2 February, 2003.

[9] Government legislative decree (*Decreto legislativo*) of May 30th, 2005 n. 140 in Official Gazette of the Italian Republic 21 July 2005 no. 168.

[10] Government legislative decree adopted by the Council of Ministers in session n. 74 of November 9th, 2007 at http://www.governo.it/Governo/Provvedimenti/testo_int.asp?d=37199 abrogating Article 1, section 4, 5 e 6, 1-bis,l 1-ter, 1-quater, 1-quinquies of Aliens Act (*decreto legislativo*) of February 28th, 1990 n. 39 and referring to Minimum Standards for Asylum Act (*decreto legislativo*) of May 30th, 2005 n. 140 implementing EC Directive 2003/9.

[11] Government legislative decree no. 25 of 28 January 2008, "Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status", hereafter: *Implementation Decree*. Text available at http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/legislazione/immigrazione/0984_2008_02_15_Dlgs_28_1_2008_25.html; coordinated text with mentioned Articles from related law, as published on the Official Gazette: http://gazzette.comune.jesi.an.it/2008/40/2.htm.

As for March 2nd 2008, the Italian asylum law in force will be the following:

- 1948 Constitution on the Italian Republic (with particular reference to Article 10)
- Geneva Convention Relating to the Status of Refugees of 28 July 1951, ratified by Act of Parliament no. 722 of 24 July, 1954[12]
- Aliens Act of February 28th, 1990 no. 39 (as amended by 2002 Aliens Act of 30 July): Article 1 sections 1,2,3,8,9,10 and 11, Articles 1 sexies and 1 septies[13]
- 1998 Aliens Act, Articles 5 (6), 19 (1) and 20[14]
- Council Regulation (EC) No 2725/2000 of 11 December 2000
- Council Regulation 343/2003 of 18 February 2003
- Asylum Application Procedure Regulation no. 303 of 16 September 2004 (in force until a new regulation will be adopted according to Article 38 of Government legislative decree no. 25/2008)
- 2005 Government legislative decree no 140 of 30 May, implementing Council Directive 2003/9/EC
- Government Legislative Decree no. 251 of 19 November 2007 implementing Council Directive 2004/83/EC
- Government legislative decree no. 25 of 28 January 2008, implementing Council Directive 2005/85/EC.

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The Italian process of European Union Directives implementation is prompted on a yearly basis by the obligation for the Parliament to adopt an act of law in order to transpose all directives with expiring deadlines for implementation under 1989 Act of Parliament on implementation procedures and obligations under community law.[15] The juridical instrument is an act of Parliament called *legge comunitaria.* It may include proxies to the Government to pass decrees giving European Union directives due implementation within a set deadline, according to criteria and principles set by the Parliament.[16]

The Procedures Directive engaged the Italian Parliament into animated discussions between summer and winter 2006. Deputes and senators addressed for the first time the issue of a future European Union minimum common list of safe foreign countries from where asylum applications could be rejected, or even refused to be admitted. Elaborated provisions of the Directive opened prospects for the Member States to further select asylum

[12] Official Gazette of the Italian Republic no. 196 of 27 August, 1954.

[13] See note no. 3.

[14] See note no. 5.

[15] Act of Parliament (*Legge*) n. 86 of 9 March 1989 "General norms on the participation of Italy to the community law process and on procedures of implementation of community law obligations" in Official Gazette of the Italian Republic n. 58 of 10 March 1989.

[16] Act of Parliament (*Legge*) no. 13 of 6 February 2007 "Provisions for implementing obligations deriving from the Italian membership to the European Union – *Legge comunitaria* 2006" in Official Gazette of the Italian Republic no. 40 of 17 February 2007.

applications if the Member State authorities ascertain that the applicants reached the state territory from countries where, according to the legal situation, the application of the law and the general circumstances, the potential asylum seekers are neither subject to persecution, torture or inhuman or degrading treatment or punishment, the concerned country has ratified international protection conventions, it has in place an asylum procedure prescribed by law, it has granted refugee status and the applicant still can avail himself/herself of that protection, he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*, he/she will be admitted to that country. More norms resulted intricate, by proposing to combine various categories of "safe countries" with the further possibility for the Member State to differentiate the procedures for handling applications, if a number of listed circumstances occur. Parliamentary proceedings mark an escalating pressure in the discussion when considering that social and political parties in Italy called for the adoption of a comprehensive law on asylum, putting order among the various forms of protection based on both international and national law. However, a long list of EU directives needed to be transposed before the set deadlines and the yearly statute of community law accomplishment had to be enacted.[17] That helped the Italian Parliament members to quickly resume the legislation process in a way that we may call "minimum effort/maximum output". Implementation of the Procedures Directive was ensured with a proxy to the government with a single specific principle to observe:

> "[A]pplications shall be declared unfounded in case the asylum applicant is a safe Third Country national or, if stateless, he was habitually resident in that country, or he comes from a safe country of origin, unless the applicant has submitted serious grounds for considering the country not to be safe in his particular circumstances. Serious grounds may include discrimination and repression of the applicant's conduct being prosecuted by the state of origin or provenance, but not amount to an offence according to the Italian legal system."[18]

The deadline for implementing Directive 2005/85 was set in one year (4 March 2008), during which the Government was to adopt the transposing decree upon proposal of the President of the Council of Ministers or of the Minister for European Policies and the Minister with prevailing institutional competence on the subject, upon agreement with other Ministers of concerned matters and after acquiring the advisory opinion of both Parliament Chambers.[19]

The ongoing legislative process at the Italian Government for implementing EC Directive 2005/85, as well as Directive 2004/83 during 2007, became a field of animated

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[17] Chamber of Deputes proceedings of Law Draft "Implementation provisions of obligations deriving from European Union membership – *legge comunitaria* 2006" XV Legislature, file C 1042 on http://www.camera.it/_dati/leg15/lavori/schedela/trovaschedacamera.asp?pdl=1042; Senate proceedings of the same Law Draft, file S 1014 on: http://www.senato.it/leg/15/BGT/Schede/Ddliter/25690.htm

[18] Article 12 of Act of Parliament no. 13 of 6 February 2007, see above note n. 16.

[19] Parliament Chambers Advisory opinions had to be communicated to the Council of Ministers within forty days from request, following Article 1 (3) of the *legge comunitaria*. Only the Chamber of Deputes communicated its Advisory opinion in this legislative process.

discussions between the Government and social parties. Human rights organisations working for asylum seekers gathered around the so-called "Asylum Table" (*Tavolo Asilo*) which soon was recognised as one of the main stakeholders the Government met while drafting the implementing decrees.[20] This network animated debates at various levels of the society and in the Parliament around the many issues raised by the Directives and the need to reform the existing regulation of the access to the right of asylum in Italy in point of: rejection of any measure aimed at excluding the admissibility of applications from selected countries, a common procedure for all applications for international protection, the need to reform the responsible authorities system in order to guarantee their independence from the executive, the adoption of specific measures for vulnerable applicants, conferring Tribunals the competence of examining appeals against first instance decisions, the right to remain in the state territory pending the application and its possible challenges, the right to adequate legal assistance at all steps of the procedure, the right to access legal assistance on the expenses of the State for those lacking financial resources, the need to decentralise the asylum seekers reception system and to significantly limit the cases of asylum seekers detention.

The Chamber of Deputes actively contributed to the legislative process with its Advisory Opinion by setting specific conditions and observations for amending the Procedures Directive decree draft.[21] The Chamber recalled the results of the Investigating Commission on state-run reception and detention centres for immigrants and asylum seekers[22] and required the Government to lay down guarantees to prevent that the negative consequences reported by the Commission will repeat, namely to avoid the widespread detention of undocumented asylum applicants and to limit the recourse to state-run centres to emergencies for transfer operations. The Chamber's recommendations also regarded the need to ensure access to legal assistance on the State expenses for this category of foreigners without the cooperation of the Consulate of the State of origin as provided by the existing law, extending the fifteen-days term for appeals, measures aimed at favouring the right to an effective remedy and further recommendations for taking measures ensuring the independence of competent authorities for the evaluation of asylum application.

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[20] The Asylum Table counted among its participants the following organizations: Italian Association of Municipalities/Associazione Nazionale dei Comuni Italiani (ANCI), Italian Recreative Cultural Association – Immigration section (ARCI), Caritas, House of Social Rights/Casa dei Diritti Sociali, Focus, Centro Astalli/Jesuit Rights Service, Comunità di Sant'Egidio, Italian Counsil for Refugees/Consiglio Italiano per i Rifugiati (CIR), Consorzio Italiano di Solidarietà (ICS), Federation of Italian Evangelical Churches/Federazione delle Chiese Evangeliche in Italia, Doctors Without Borders/Medici Senza Frontiere (MSF), NOBorder/Senzaconfine, International Social Service/Servizio Sociale Internazionale, Amnesty International, the Italian Association for Immigration Law Studies (ASGI), High Commissioner of Refugees in Italy – UNHCR. More information available at
http://www.asgi.it/index.php?page=app.home&idint=cn06112918&mode=detail&imm=

[21] Advisory Opinion of the Chamber of Deputes Permanent Commission for Constitutional Affairs of 17 October 2007, Act. 154 at
http://www.camera.it/_dati/leg15/lavori/bollet/200710/1017/html/01/allegato.htm#44n1

[22] Independent Commission on appointment of the Ministry of the Interior, Investigation Report on State-run reception and detention centres for immigrants and asylum seekers, 31 January 2007, on the Ministry of Interior website on
http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/notizia_23602.html

The transposition decrees of Directives 2003/84/EC and 2005/85/EC have been adopted by the Government during Council of Ministers session of November 9th, 2007. The discussion in the Council had reportedly not ended and amendments may have been discussed in point of extending the opportunity to set a second term for interview, due to the foreseeable long duration of procedures and the limited capacity of the public reception system, to drastically limit the use of detention and reception state-run centres and to fully decentralise the reception system to local governments, as suggested by the Investigating Commission 2007 Report on State-run reception and detention centres for immigrants and asylum seekers.[23] Given the impending one-year-deadline for the directive transposition, the options were very limited. Possible modifications could be introduced later according to Article 1 (5) of the Parliament proxy to the Government (legge comunitaria) in matter of correcting and completing the provisions of implementation decrees within eighteen months from the date of their entry into force. However, on the 24th of January 2008 the Government fell and the XV legislature ended before time. The Government decree for implementing Directive 2005/85 EC was enacted on January 28th and published on February 16th on the Official Gazette.

3.

GENERAL PROVISIONS

Scope of protection

A first salient feature distinguishes the Italian Implementation decree of Procedures Directive 2005/85 EC from the start with Article 1: the purpose of the decree is to establish the procedures for examining applications for international protection. All applications of asylum seekers lodged in Italy will be evaluated both under the lens of 1951 Convention relating to the status of refugees and that of subsidiary protection as defined by Article 1 of Legislative Decree 251/2007 giving transposition to Council Directive 2004/83 EC. Subsidiary protection evaluations are integrated at all levels of the procedure and concern:

> "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in this Decree and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country".[24]

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[23] See previous note.

[24] Government Legislative Decree n. 251 of 19 November 2007 "Implementation of Directive 2004/83 EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted", Official Gazette of the Italian Republic, 4 January 2008 no. 3. By recalling the same wording of Article 15 of Directive 2004/83, Article 14 of Legislative Decree 251/2007 defines serious harm as follows: "Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

Grafting the principles of the European Union directives on the Italian stock did not prove an easy operation and the result is not fully encouraging. On one hand, including subsidiary protection within the scope of the Procedure Directive has the important consequence to prevent the risk of deporting individuals whose applications for refugee status have been rejected before their need for subsidiary protection has been examined. It corresponds to the issues raised by many international organizations and is in accordance with Member States' obligation under Articles 3 and 13 of the European Convention on Human Rights[25] and meets the specific request for a single asylum procedure by the Italian Network of organizations for the right of asylum and of the Parliament.

On the other, the different forms of protection regulated by Italian law still lack coordination and prove hard to understand and achieve. While terms and responsible authorities are different, the relevant norms on different forms of protection are contained in various acts of law or in Courts' judgement which are difficult to trace and correctly combine with each other, the result being an intricate briar. To illustrate: a general prohibition is set to deport foreigners to countries where they can be exposed to persecution for reasons related to race, sex, language, citizenship, religion, political opinions, personal or social position;[26] other provisions define humanitarian protection either as a limit to the police authority's denial of a residence permit in case of "serious grounds, in particular if for humanitarian reasons or deriving from constitutional or international obligations of the Italian State"[27] or as protection granted by the Italian State upon decree of the President of the Council of Ministers when urged by conflicts, natural disasters or other severe events in non-EU Member States;[28] the Italian Constitution numbers the constitutional the right of asylum among its fundamental principles for any "[t]he foreigner who is denied in his own country the real exercise of the democratic liberties guaranteed by the Italian Constitution …, in accordance with the conditions established by law". Although no law on constitutional asylum was ever enacted, the Court of Cassation maintained that this form of protection shall be applied before the Civil Tribunal only by challenging a first instance decision denying refugee status. [29] We may wonder how this condition for accessing constitutional asylum can relate to the protection procedure as disciplined by the Italian Implementing decree of Directive 2005/85, if we consider that the former applies to all not Italian nationals, including EU citizens, while the latter restricts the applicant definition to Third Country nationals and stateless persons.

Responsible Authorities

[25] See, for example, Jabari v. Turkey Application No. 40035/98 Judgement of 11 July 2000.

[26] Article 19 (1) 1998 Aliens Act, see note no. 5.

[27] Article 5 (6) 1998 Aliens Act.

[28] Article 20, 1998 Aliens Act.

[29] Court of Cassation, I Civil Section, judgement no. 18941 of 1 September 2006, no. 25020 of 25 November 2005, III Civil Section no. 8323, 3 May 2004.

While applications are received only by the police at the border and on the State territory by the Police Province headquarters (Questure), the examination will continue to be carried out by a pool of "Territorial Commissions for the recognition of international protection" (*Commissioni Territoriali per il riconoscimento della protezione internazionale* (Article 4).[30] The many entreaties to guarantee the independence of these bodies from the executive have apparently not been taken into consideration by the Government.[31] Each Commission is mainly composed by members belonging to administrative branches competent for securing public order and local governance: a Préfet from the Ministry of the Interior with the role of President and a prevailing vote on the others in case of parity of votes, a State Police officer, a local government representative, an UNHCR representative. An additional member from the Ministry of Foreign Affairs may be appointed occasionally, if more specific information or support is needed. The members of the prospective ten Territorial Commission, being employed in the respective administrative offices, will not be paid for their job in the Commission, rather they will receive a fixed fee for every meeting attended.[32]
Similar considerations apply to the National Commission for the Right of Asylum, a State body responsible for revoking and ending protection status, as well as coordinating Territorial Commissions and providing them with the necessary information (Article 5). The Commission members are appointed by the President of the Council of Ministers upon proposal of the Minister of the Interior and the Minister of the Foreign Affairs. It is composed by a director officer from the administration of the Presidency of the Council of Ministers, a diplomatic officer, a Prefet from the Ministry of Interior Department of Civil Liberties and Immigration and a director officer from the Ministry of Interior Department of Public Security. The President of the National Commission is a Prefet. A representative of the Italian delegation of UNHCR takes part to the Commission's meetings without a right to vote. The Ministry of Interior Department of Civil Liberties and Immigration provides the Commissions with logistic and management support.[33]

The National Commission is also the body in charge of ensuring information and training support for Territorial Commissions (Articles 5 and 15), but we may argue that the mere provision of this duty can fully satisfy the requirements for examining applications and decision-making detailed in Articles 8 section 2 of the Directive, with regard to obligation of Member States to ensure that "precise and up-to-date information is obtained from various sources" and that "the personnel examining applications and taking decisions have the

[30] The Territorial Commission currently active are seven, located in Gorizia, Milan, Rome, Foggia, Siracusa, Crotone, Trapani, according to Article 12 of Asylum procedure Regulation, President of the Republic decree no. 303 of 16 September 2004.

[31] The Chamber of Deputes Advisory Opinion to Implementing Decree draft (see note no. 21) considered that "the composition of the Territorial Commissions under Articles 4 and 5 of the decree draft appear questionable as….they result in not bearing the requirement of full independence from the executive, a fundamental element in order to guarantee a free examination from any influence by the Executive". Moreover, "in international law, the recognition of refugee status constitutes an humanitarian act and not a political one, therefore the risk of interferences is absolutely real, also taking into consideration that the Italian history of asylum is characterized by numerous situations in which the recognition of the right of asylum was strongly affected by contingent political evaluations, with regard to the commercial and diplomatic relations between Italy and the countries of origin..."

[32] The current regulation expressly excludes any form of remuneration for Commissioners, (Article 1 quater of Statute no. 39 of 28 February 1990).

[33] Article 5 of the Implementing Decree.

knowledge with respect to relevant standards applicable in the field of asylum and refugee law".[34]

Other bodies with administrative responsibilities regarding international protection applications are the Dublin Unit (part of the Ministry of Internal Affairs Department for Civil Liberties and Immigration), in charge for transfers under Council Regulation no. 343/2003 and the National Commission for the Right of Asylum, the authority responsible for revoking and ending protection status, as well as coordinating Territorial Commissions and providing them with the necessary information.

4.

BASIC PRINCIPLES AND GUARANTEES

Applications shall start and be processed on an individual basis. The only exception concerns minor age children whose application is submitted by their parents. The Implementing Decree makes no reference to dependent adults under Article 6 (3) of the Procedures Directive. The individual application principle, contained in Article 6 of the decree, is to be welcomed as it entitles every adult family members to apply for international protection and prevents from the risk that dependent adults may not be put in a position to substantiate their claim. This provision is particularly relevant as Article 12 (1) of the Directive does not require Member States to interview dependent adults.[35] As a result, the position of spouses, namely of women as dependent family members in many cases, could not be duly evaluated and could result misrepresented by only taking into account the situation of the partner. By considering that the consequences may negatively affect the position of the dependent family member during the application process and afterwards, we may wonder if a dependent application may lead to acquiring a dependent residence permit that could be revoked in case the principal applicant would withdraw his/her application, leave the country, leave the spouse or decease.

Guarantees for minor age applicants

The position of children is considered as dependent family members or as unaccompanied children. Unaccompanied minors are eligible for lodging an individual application according to Article 6 (3). Article 26 (5) of the Implementing decree, by following the pattern of the existing regulation, requires that their application is confirmed by a guardian appointed by the judicial authority for capacity matters (*giudice tutelare*), as

[34] The Chamber of Deputes pointed out the need "for at least one qualified expert in matter of immigration and asylum law for each Territorial Commissions, independently chosen possibly by the University National Council among appointed lecturers or researchers or designated by the National Forensic Council among attorneys", Advisory Opinion, note no. 21.

[35] Article 12 (1) of the Italian Implementing decree provides that the adult family member interview may be omitted only in case the concerned person requires so with a motivated request.

requested by the Civil Code for any person under age whose parents have died or cannot exercise their authority for other reasons (Article 343). However, the practice shows that the appointment of a guardian to unaccompanied children may take more months instead of the twenty days provided by the Implementing decree. Moreover, the Government does not cope with the practical problem of the lack of informed and suitable guardians to be appointed and the widespread choice of judges to appoint mayors as a last resort, as the Civil Code allows if no other suitable person is available (Article 350).
On the other hand, mayors, or other delegated officers of the municipality, are not in a position to effectively exercise unaccompanied children's guardianship. This situation is due to the fact that unaccompanied children can amount to a very considerable number for each mayor in several municipalities and, importantly, mayors are subject to a specific obligation to cooperate with the administrative authority in charge of repatriating unaccompanied children and may be influenced by the opportunity to favour their repatriation to their country of origin instead of confirming the minors' applications for asylum in Italy, especially when considering that mayors are the authority responsible for the management of public funds needed for the accommodation and reception of the same unaccompanied minors.[36]

All safeguards detailed in Article 17 of the Directive are implemented in the existing regulation and in the Implementation decree, as well as in the legislation on medical examination for ascertaining the age oh the applicant, with reference to the criminal procedure norms based on the presumption of minor age in case of doubt.[37]

Married applicants under the age of eighteen are not mentioned by the Implementing Decree, resulting in their apparent exclusion from access to international protection application. This regrettable pitfall is also to be found in the wording of Article 6, under 4 (c) of the Directive. Other norms of the Italian law system can be recalled in order to ensure access to the procedure in these cases, namely Articles 390 and 394 of the Italy Civil Code. According to these provisions, minor age persons become emancipated with marriage and can perform valid acts of ordinary managements, whilst a judicial authorization is mandatory for extraordinary ones. Given the crucial importance of an international protection application for the life of a person, we must regard it as an act of extraordinary management to be handled by the competent judicial authority. As doubts remain, the provision should be interpreted in the light of the principles of 1989 UN Convention of the Right of the Child. In particular, the best interest of the child should prevail as well as the consideration that the marital status of a minor should not have a bearing on his/her maturity and consequent need for special treatment.

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[36] Article 7 (3) of Regulation concerning the duties of the Committee for Foreign Children, President of the Republic decree no. 535 of 9 December 1999 in Official Gazette of the Italian Republic no. 19 of 25 January 2000.

[37] Article 8 (2) of Regulation of Criminal Procedures for Minor Age Defendants, President of the republic Decree no. 448 of 22 September 1988; Ministry of the Interior Directive no. 17272/7 of 9 July 2007 "Identification of Migrant Children", see Ministry of the Interior website on http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/legislazione/_circolari/ministero_interno/circolare_9_luglio_2007.html

Right of the applicant to remain in the country while pending a decision

The Implementing Decree introduces the right for the asylum applicant to remain in the state territory until the second instance decision is taken (Articles 7 and 35 section 6). With reference to Article 7 (2) of the Directive, the Italian legislator opts for derogations from the right to remain where the applicant is subject to extradition to other Member States competent for examining the application according to Council Regulation no. 343/2003 or pursuant to obligations in accordance with a European arrest warrant or to international criminal courts or tribunal (Article 7).
After the twenty to thirty-five-days time of stay in a reception centre, a residence permit is granted for three months and can be renewed until the end of the procedure and during its challenge process, when suspension of the appealed decision applies (Article 20 section 3, 26 section 4, 35 section 7). The residence permit entitles applicants to work and to access professional training according to Articles 5 (7) and 11 of Implementing decree of EC Directive on minimum standards for the reception of asylum seekers 2003/9.[38]

Important limits apply to the effective right to remain in those cases when a residence permit cannot be extended during the process, according to Government decree no. 140/2005 implementing the Qualification Directive as recalled by Article 7 of the Implementing Decree.[39] In particular, the residence permit will not be extended after six months, if a first instance decision on the application is not yet taken, when the delay is due to the applicant. A conclusive presumption applies: the delay is due to the applicant not only in case he or she presented false documents, or refused to give information on his/her identity or nationality, but also when he or she failed to appear before the Territorial Commission after being summoned at the reception centre or at the last known address. If we consider that the reception system will have to be centralised in state-run centres for the majority if applicants, that the centres' capacity is insufficient (see further, *A Dual Reception System*) and the reception time limits are short (twenty to thirty-five days), we may understand that it will not be easy for applicants to find accommodation and be reachable at any time, notwithstanding the possible length of the procedure duration. The legal presumption, being irrebuttable, does not take into account that asylum seekers are often abandoned on the territory without an accommodation perspective and apparently puts all the burden of a lacking reception system on the applicants.

Information and communication guarantees

The further guarantees for applicants, as provided by the Directive, are recalled literally in the text of the Italian Implementing decree and at times interpreted in a restrictive way with reference to the requirements for the examination and for a decision of the applications, the applicant's obligations.
The norms on the duty to inform applicants appear particularly lacking. The main measure provided in detail is a booklet (Article 10). The booklet, in the language of Article 10 "*opuscolo*" – from the Latin *opusculum*: "a little work" – proposes the introduction of the same

[38] Government Legislative decree no. 140 of 30 May 2005, see note no. 9.
[39] Article 11, see note no. 9.

measure that proved highly insufficient during the past years (and eventually abandoned in many police offices), yet foreseen by the existing regulation with the same wording.[40] The new provision disposes the handing out of this information vehicle at the moment of presenting the asylum application and is translated into languages indicated by the applicant "or, if not possible, in English, French, Arab or Spanish". It cannot but be regarded as *too a little work* with respect to the obligation of a State to give real access to the right of asylum, especially if we consider that the Ministry of Interior data on asylum applications show that asylum seekers mainly come from countries where other languages are mainly used: Afghanistan, Eritrea, Turkey, Iraq, Somalia, Ivory Coast.[41]

The basic requirements and guarantees set out in the Directive will arguably find due accomplishment if we consider that the transposition decree does not mention the duty to ensure that interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner (Article 13 section 3 Directive). The Italian Implementation norms make no reference in point of ensuring that the interviewer is sufficiently competent and that communication is appropriate. Instead, we only can find a general reference to the importance of an adequate training of officers in the Italian Implementing decree of Council Directive 2004/83/EC (Article 36)[42] and a provision establishing the duty of the National Commission for the Right of Asylum to train the ten Territorial Commissions. However, no mention is made on the point of taking the necessary steps and of finding the resources in order to ensure a sufficient level of competence in handling protection applications.[43]

Far from guaranteeing the use of a language which the applicant may reasonably be supposed to understand and in which he or she is able to communicate, as required by Article 10 and 13 (3) of Directive 2005/85/EC, the transposition decree only requires that communications during the procedures shall be made to the applicant in the language he or she prefers only if that is possible.[44] Alternatively, communications shall be made in English, French, Spanish or Arab. The assistance of an interpreter shall be guaranteed, if necessary, according to Article 10 (2) and 2 (1). But the decree does not set criteria to appreciate when it is considered "possible" to communicate in the language of the applicant or what makes the assistance of an interpreter "necessary". As a result, much room is left to administrative authorities to exercise discretional power and adopt diverse practices through the country.
These norms not change the existing language guarantee standard as set in 1998 Aliens Act for the communication of all decisions concerning entry, residence and expulsion. These shall be "translated into a known language or, where not possible, into French, English or Spanish" (Article 13 section 7). The same applies according to wording of Article 4 of the

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[40] Articles 2 (6) and 9 (3) of Asylum Application Regulation no. 303 of 16 September 2004, see note no. 6.

[41] National Commission for the Right of Asylum, data communicated in the seminar "Refugees Universe: From Persecution To Protection", promoted by the Ministry of the Interior Department for Civil Liberties and Immigration, 19 December 2007, Rome, Accademia Nazionale dei Lincei at Palazzo Corsini, on http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/_sottosegretario_lucidi/0869_2007_12_17_convegno_CIR_Roma.html
and http://www.cir-onlus.org/Statisticheitalia.htm

[42] See note n. 24.

[43] Article 5 of the Implementing decree.

[44] Article 10 section 4 of the Implementing decree.

Asylum Application Procedure Regulation no. 303/2004. The Court of Cassation affirmed that this provision shall be interpreted in a restrictive way and that the competent authorities have a duty to specify in written what circumstances make it impossible to translate the concerned decision into the language of the foreigner.[45]

Other safeguards

The Italian legislator provides for the obligation of personal and individual interviews for all applicants with limited exceptions. These occur in case the Commission is able to take a positive decision on the basis of the evidence available or when a public health authority certifies that it is not possible for the applicant to attend the interview. Since the language of the norm does not specify that the impeding circumstances must be enduring, the provision leaves room to different interpretations and may clash with the following very similar conditions for delaying the interview (Article 12).
The interview report has to be undersigned by the applicant (Article 3). This important requirement, by providing the opportunity for the applicant to correct possible mistakes in the report, is also included in the Asylum Application Procedure Regulation currently in force at Article 2 (2).[46]

Asylum seekers' access to legal assistance at the State's expenses, as generally granted to people lacking of sufficient resources is a years-long vexed question in Italy. For long time applicants have had difficulties and often have been excluded from this benefit because the law requires foreigners to provide for a confirm of their income statement by the Consulate of their State of origin, which cannot be required to people seeking protection from the same Authorities.[47] Upon specific request of the Chamber of Deputes, the Government found a satisfying solution by expressly making reference to the applicant's statement as a sufficient proof of his/her lacking resources as the main requirement for being admitted to this benefit (Article 16 section 2).[48]

Article 25 of the Transposition decree stipulates a full prohibition of disclosing information on individual cases, although it is only explicitly referred to the Territorial Commissions and to the National Commission, among the different bodies in charge at the various stages of the procedure. On the other hand, a clear forbiddance to disclose information "in any case" results in a reinforced guarantee with respect to the corresponding Directive provision in Article 22 which limits prohibition to directly disclosing such information.

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[45] Court of Cassation, I Civil Section, judgements no. 275 of 11 January 2006, no. 17253 of 24 August 2005, no. 13817 of 8 November 2001, no. 12581 of 16 October 2001, no. 9264 of 7 July 2001, no. 9078 of 7 July 2000.

[46] See note no. 5.

[47] Article 79 (2) of President of the Republic decree no. 115 of 30 may 2002 in Official Gazette of the Italian Republic no. 139 of 15 June 2002.

[48] Chamber of Deputes Advisory Opinion, condition (b), see note no. 19.

A dual reception system

A good part of the discussion around asylum procedures and the implementation of the Directive in Italy referred to the detention of asylum applicants. The State choice to concentrate applicants in fourteen isolated centres in precarious conditions, often overcrowded and with very limited opportunity to exit was criticised by the Parliament and by the Investigating Commission appointed by the Minister of the Interior in 2006.[49]

The Implementation decree declares that "the applicant cannot be detained for the sole reason of examining his/her protection request" (Article 20 section 1). On the other hand, the same provision gives the floor to a number of cases in which applicants must reside in state-run centres.

The Government decided to confirm the existing dual reception system for asylum applicants:

1. a reception and detention system in a few state-run centres for all undocumented applicants and those who violated administrative or criminal law (Reception Centres for Asylum Applicants - CARA and Centres for Temporary Residence and Assistance - CPTA);
2. decentralised reception system managed by municipalities and coordinated by the National Association of Italian Municipalities (ANCI), called Protection System for Asylum Applicants and Refugees (SPRAR).

As for the first system, Article 20 and 21 of the Implementing Decree distinguish between the concepts of "hospitality" (*ospitalità*) and detention (*trattenimento*).
Hospitality is defined at Article 20 as the mandatory residence of the applicant in Reception Centres for Asylum Applicants (CARA), for a twenty-days period, with the permission to leave only during day hours when:

a) "[I]t is necessary to ascertain his/her nationality or identity and the applicant does not dispose of travel or identity documents, or has submitted false or counterfeited documents when entering the State territory;
b) The concerned foreigner applied after having been stopped by authorities for avoiding border checks or immediately afterwards;
c) The concerned foreigner applied for international protection after being stopped by authorities for illegal residence;
d) The concerned foreigner applied after a deportation decision is adopted after 13 section 2, subsection a) and b) of 1998 Aliens Act, [50] or the

[49] Chamber of Deputes Advisory Opinion, condition (d), see note no. 19. Commission Report, 31 January 2007, p. 10 and 18, ff. Text available in Italian on the Ministry of the Interior website on page http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/notizia_23602.html

[50] administrative deportation, i.e. adopted for the reason of illegally entering the State territory or illegally residing.

foreigner has been repelled at the border, also when already been interned in detention centres after Article 14 of the same Act."[51]

This provision upgrades the condition of asylum applicants with respect to the existing regulation and practice. Until now, applicants in the listed situation have been detained in Identification Centres (CID) in the problematic conditions described by the Investigating Commission previously mentioned. On the other hand, we have to observe that the new centres (CARA) are deemed to concentrate again almost all asylum seekers, since most of them reach Italy by boat at unauthorised borders and are usually undocumented. Given the actual capacity of the existing reception centres is very limited (730 places) if compared to the number of applicants (11.819 in 2007), we may wonder if the Government intends to build many new reception centres and how will cope with the coming applicants until the possible new centres will be ready.[52]

Detention is the restriction of applicants in closed centres where foreigners to be deported are interned, without permission to leave at any time (Centres for Temporary Residence and Assistance, CPTA). Article 21 provides detention when:

a) there are serious reasons for considering that the applicant committed crimes as described in Article 1 paragraph F of the Geneva Convention relating to the status of refugees, or
b) the applicant has been convicted for a number of crimes listed in Article 380 sections 1 and 2 of the Italian Criminal Process Code or for any offence concerning drugs, sexual freedom, aiding illegal immigration to the Italian territory and from Italy to other states, or for crimes aimed at recruiting persons for prostitution, exploitation or minors to be employed in criminal activities, or
c) a deportation decision has been adopted for different reasons than mentioned in Article 20.

Time limits for hospitality are set for a period up to thirty-five days and for up to sixty days in case of detention. However, these limits may expand to more months in case of appeal against the decision on the application. In fact, in case the judge will grant a suspension of the impugned decision allowing the applicant to remain in the country during the trial (art. 35 section 8 of the transposition decree), the applicant will be hosted in centres under Article 20 (Article 36 section 3). The same applies to hosted applicants who lodged their application after a deportation decision had been adopted and to those previously repelled at the border, as provided at Article 20 subsection *d* (Article 38 section 8). By considering the time limits set to appeal judgements under Article 35, internment is to be prolonged of three months and of further three months in case of second degree appeal to the Court of Appeal, if the Court grants suspension of the impugned decision effects.

[51] Article 14 of 1998 Aliens Act provides the detention of foreigners when deportation cannot be carried out immediately.

[52] Data from the Investigating Commission 2007 report (note no. 22) and to the National Commission for the Right of Asylum information (see note no. 41).

The second reception system provided by Italian Asylum norms (SPRAR) is headed by a governing body comprised of many institutions at various levels dealing with asylum issues. These institutions include the government, local and civil society international organisations working together to implement strategies and adopt protocols in the asylum process. Article 1-sexies of Statute no. 39/1990 (not abrogated by the Procedures Directive Implementation decree) stipulates that the protection system has to be made up of local authorities providing reception services and assistance for asylum seekers and refugees as well as for all non-nationals, who are granted other forms of humanitarian protection.[53]
The Italian municipalities and regions participate voluntarily in the protection system by offering reception and monitoring services to asylum seekers, refugees and persons granted humanitarian protection. Reception is ensured from the application to the final decision and beyond, until the concerned person has acquired an independent financial and legal position. These services, according to article 1-septies of the same Statute, are financed by the National Fund for Asylum Policies and Services managed by the Ministry of the Interior and by funds allocated annually to refugees in Italy by the European Refugee Fund. Through this protection system, the local authorities ensure that they provide standardised services respecting local diversity, by meeting or even exceeding the criteria set by the European Council Directive 2003/9/EC laying down standards for the reception of asylum seekers. The Ministry of the Interior established a Central Service (*Servizio Centrale*) for information, consultation and monitoring, to coordinate the system.[54]

Unaccompanied minors cannot be hosted or detained in any case according to Article 26 (6) of the Implementing Decree. However, accompanied children follow their parents in the centres where they must reside. While the Implementing Decree remains silent on this point, the Asylum Procedure Regulation no. 303/2004 (Article 8 section 1) provides that "centres directors shall take into account the needs of families and of persons with specific conditions: minors, disabled, elderly, pregnant women, persons who suffered discrimination, abuses and sexual exploitation in the country of origin." The current discipline is thus uncertain and children may continue to be concentrated in centres when accompanied, if their parents fall into the categories of applicants to be mandatorily hosted in reception or detention centres.

[53] See above note n. 3.

[54] The protection system in Italy (SPRAR) is currently composed of 97 local authorities throughout Italy, which are responsible for 105 reception, assistance and integration programmes for asylum seekers,refugees and persons granted humanitarian protection. They work closely with more than one hundred guardianship associa-tions. The reception system in Italy is presently able to accommodate 2,350 people at a time. In 2006 it the SPRAR assisted about 6,000 people out of a total of approximately 10,000 who requested asylum un the country. See http://www.serviziocentrale.it/

5.

PROCEDURES AT FIRST INSTANCE

Rules for examination

All first instance applications are processed according to a single procedure before the same authorities. A shorter handling time is provided for applications lodged by asylum seekers hosted in reception centres (CARA), those detained (in CPTA) and for the categories specified below. As a result, most applications are deemed to be handled in a shorter time than the ordinary process duration period of thirty-three days. [55]

Reasons for prioritising the examination, as listed at Article 28, are the following:

a) The application is manifestly well-founded,
b) The applicant belongs to vulnerable categories as listed in Article 8 of European Council Directive 2003/9/EC transposition decree on minimum standards for the reception of asylum seekers, [56]
c) The application is submitted by a foreigner hosted or detained following Articles 20 and 21, except for those interned for the reason of ascertaining the applicant's identity.

If we compare this list with the recalled cases justifying hospitality and detention under Articles 20 and 21, we may notice that the transposition decree lacks correspondence with the categories numbered at Article 23 par. 4 of the Directive resulting in the unlawful application of accelerated examination to different cases than those provided by the Directive. While the Directive requires that the applicant is a danger to the national security or public order, the national decree makes mainly reference to past convictions, putting the evidence of the existence of danger on a mere formal level (compare above mentioned Article 21 of the Implementing Decree and Article 23 par. 4, subsection m). Furthermore, the content of Article 20, as above recalled in Article 28 sub c) of the Decree, does not correspond to the language of Article 23 par. 4 subsections (j) or (l) of the Directive giving way to a contradictory national practice.

While the Implementing Decree sets very short time limits, prioritised examination will apply to the majority of cases in which applicants find themselves. Interviews shall be held within seven days instead of thirty and the competent authority, the Territorial Commission, shall take a decision in two days instead of three. Still, the procedure must be followed in accordance with the basic principles and guarantees set in Chapter II of the decree, as set in Chapter II of the Directive (Article 28 section 1 Transposition Decree, Article 23 par. 4 Directive).

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[55] Ordinary procedure time limits set by Article 27 of the Implementing Decree.

[56] Reference is made to minors, disabled and elderly people, pregnant women, single parents with minor children, people for whom it is ascertained that they suffered torture, rape or other forms of serious psychological, physical or sexual violence, Article 8 of Government Legislative decree of May 30th, 2005 n. 140 (see note n. 9).

Given the present experience of long processes, where procedures may last many months and interviews only a few minutes, we may wonder if the new norms, so similar to the existing process regulations and yet so optimistic, will enable Italian authorities to respect the law. The accelerated procedure rule under Article 28 entails achieving in nine days the ambitious goal of duly informing the applicant, performing a proper examination, obtaining precise and up-to-date information from various sources regarding the situation in the countries of origin and in those of transit, interviewing every applicant with competent officers, translators and take an individual, objective and impartial decision.
Moreover, we may argue that the basic requirements and guarantees set out in the Directive will find due accomplishment if we consider that the transposition decree does not mention the duty to ensure that interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner (Article 13 section 3 Directive). The text makes no reference in point of ensuring that the interviewer is sufficiently competent and that communication is appropriate. Instead, we only can find a general reference to the importance of an adequate training of officers in the Italian transposition decree of Council Directive 2004/83/EC (Article 36)[57] and a provision establishing the duty of the National Commission for the Right of Asylum to train the ten Territorial Commissions. However, no mention is made on the point of taking the necessary steps and of finding the resources in order to ensure a sufficient level of competence in handling protection applications.[58]

By adhering to the existing process norms, the Italian legislator did not opt for introducing accelerated procedures with regard to all the cases listed at Article 23 (4) of the Directive, nor for setting up preliminary examinations of applications or specific procedures under Article 24, 34, 35 36 of the Directive.
New measures on inadmissibility declaration were approved with reference to Article 25 of the Directive. The wording of the interested norm finds a poor transposition in Article 29 with the consequence to negatively the position of the applicant. Applications will be considered inadmissible and not further examined in two cases: a) another signatory State of the Geneva Convention has granted refugee status, in place of "another Member State"; b) the applicant has lodged an identical application after a first instance decision, instead of "after a final decision".

Decisions

The Italian first instance procedure shall lead to the following possible decisions (Article 32):

a) Declaration of inadmissibility of the application following Article 23;
b) Declaration of process ending if another Member State is competent according to Council Regulation no. 343/2003;
c) Recognition of refugee status or subsidiary protection according to Articles 11 and 17 of Legislative Decree 251/2007 giving transposition to Directive 2004/83;

[57] See note n. 24.
[58] Article 5 of the Implementing Decree.

d) "Rejection if applicant does not qualify for refugee status or subsidiary protection according to Legislative Decree 251/2007 or if the reasons for ending or exclusion from international protection apply, according to the same Legislative Decree 251/2007, or if the applicant comes from a safe country of origin and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances. The Commission will not take a decision on the application before examination according to the principles and safeguards under Chapter II. Among serious grounds may be included discrimination and repression of the applicant's conduct being prosecuted by the state of origin or provenance, but not amount to an offence according to the Italian legal system."

Similarly to what suggested by the European Parliament in its proposal for amendments to the Procedures Directive, the principle for decision-making in the Italian implementation (as well as of the existing regulation) is that all applications be assessed on the basis of the definition of refugee contained in the Geneva Convention and, only if those criteria are not fulfilled, on the basis of the requirements for subsidiary protection.[59]

The concepts of first country of asylum, of safe third country and of European safe third countries were not introduced. The Implementation decree defines a "safe country of origin" as "the country included in the minimum common list according Article 29 of Council Directive 2005/85/EC" (Article 2).

Notwithstanding the individual approach to decision-making that characterises the Italian procedure regulation, the Italian protection standard would be significantly diluted if a minimum common list of third countries was adopted by the European Union Council as provided by Article 29, given the obligation for Member States to observe the prospective common list (section 1) and to consider the application unfounded following Article 31 provided that it is safe for the particular applicant and as requested by the Parliament proxy to the Government.[60]

No specific norms provide for the case of subsequent applications. As a consequence, the general rule for administrative proceedings apply, according to which any application foreseen by a law norm must be examined and a written decision must be taken.[61]

Examination is discontinued during the time necessary to determine what State is competent to process the application. As soon as another state is deemed competent after Dublin Regulation, Italian authorities shall end the procedure (Article 30). Taking back applicants under the same regulation would thus lead to re-opening the procedure and not to regard the application as a "subsequent" one. Since an identical subsequent application

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[59] See European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards for procedures in Member States for granting and withdrawing refugee status, P6_TA(2005)0349, OJ C 227 E, 21 September 2006, p. 46.

[60] See Article 12 of *legge comunitaria*, note no. 18.

[61] Article 1 of Act of Parliament (*Legge*) no. 241 of 7 August 1990 in Official Gazette of the Italian Republic no. 192 of 18 August 1990.

would be regarded as inadmissible, this norm prevents application who have never been substantively considered from the risk of *refoulement*.

6.

PROCEDURES FOR WITHDRAWAL OF REFUGEE STATUS

The guarantees for applicants undergoing a withdrawal procedure, detailed in Article 33, refer to the right to be informed in writing by the National Commission for the Right of Asylum and to be given the opportunity to submit either personally or in a written statement, the reasons as to why the applicant's status, either refugee status or subsidiary protection, should not be withdrawn. The additional safeguards foreseen by the general rule for administrative proceedings apply, providing for a more comprehensive set of rights to information and participation of the applicant.[62]

An application shall be regarded as withdrawn if stated so in written by the applicant, under Article 21 and the process shall lapse by law. No implicit withdrawal is considered by the Implementing Decree. In case of leaving a reception or detention centre without justified reason or if the residence permit expires and the concerned applicant does not request its renewal, the application will still be processed and the Commission will take a decision on the basis of the collected information (Articles 22 and 13 section 1).

7.

APPEALS

The most relevant modifications introduced by the Implementing Decree concern the right to an effective remedy to first instance decisions. Above all, the competence of the Civil Tribunal for examining appeals represents a first and extremely important reform, the extent of which will be clearly perceived if we consider that the only remedy provided by the existing procedure regulation against a decision of the Territorial Commission is to challenge that decision before…the same Territorial Commission.[63]

The prospective remedy system consists of three degrees of judicial appeals against the following decisions:[64]

- Refugee status application rejection, withdrawal and cessation
- Subsidiary protection recognition
- Subsidiary protection application rejection, withdrawal and cessation

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[62] Act of Parliament no. 241/1990, note no. 61.

[63] Article 1ter (6) of 1990 Aliens Act, see note no. 3. Soon this remedy took the popular name of "supplication", by underlining its intrinsic lack of remedial nature.

[64] Article 35 of the Transposition Decree.

- Application inadmissibility[65]
- Decision in case of failure to appear on Article 22 (2).[66]

A first degree appeal must be lodged before the Civil Tribunal within thirty days from the date of the formal communication of the Commission decision.[67] This time limit is reduced to fifteen days for applicants detained according to Article 21 in consideration of the time limits set to their detention.[68] After that moment, the applicant will be escorted to the State border or, for those who have been previously granted a residence permit, formally invited to leave the country within fifteen days.[69]
The judgement is taken by the Civil Tribunal within three months and can be impugned (*reclamo*) within ten days before the Court of Appeal. This second degree judgement will also be taken in three months time. The Appeal judgement can be challenged before the Court of Cassation within thirty days.[70]

A second modification upgrades the existing procedures regulation by providing an automatic suspensive effect to first degree appeals against the rejection of protection application and its withdrawal with the effect of allowing the applicant to remain in Italy pending its outcome. [71]
The judge may also grant for serious grounds a stay of the first instance decision which:
- declare the application inadmissible (Article 25),
- declare the application unfounded after the applicant left the hospitality centre without a justified reason,
- reject the application when the applicant previously received a deportation decision or was repelled at the border, as provided in Article 20 subsection d.[72]

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[65] It must be noted that Article 29 of the Italian Transposition Decree provision widely departs from that of Council Directive at Article 25, with the result to unlawfully increase the scope of inadmissibility to other cases: "The Territorial Commission declares the application inadmissible and does not conduct an examination in the following cases: a) the applicant has already been recognised refugee status by another signatory State of Geneva Convention relating to the status of refugees, b) the applicant has lodged an identical application after a decision is taken by the Commission, without introducing new information regarding his personal position or the situation
of his country of origin". We recall here the text of Directive Article 25: "a) another Member State has granted refugee status; (…)(f) the applicant has lodged an identical application after a final decision".

[66] Following Articles 22 and 13 of the Implementation Decree, in case of failure to go to a reception or detention centre without justified reason or if the residence permit expires and the concerned applicant does not request its renewal, the application will still be processed and the Commission will take a decision on the basis of the collected information.

[67] While the implementing Decree draft provided that the appeal time-limit be set at fifteen days in all cases, the text was eventually amended after the Deputes of Chamber hearing of 17 October 2007 with reference to the Advisory Opinion condition (f), see note no. 19 .

[68] Secretary of the Ministry of the Interior statements during parliamentary hearing at the Permanent Commission for Constitutional Affairs, 17 October 2007, Act. No. 154.

[69] Article 32 section 4 of the Implementing Decree.

[70] See note n. 64.

[71] Article 35 section 6 of the Implementing Decree.

[72] Article 35 sections 7 and 8 of the Implementing Decree.

The procedures regulation currently in force provides a very restrictive regime for suspensive measures in order to prevent their abusive recourse. The Head of the local Police Headquarters may grant a stay of the Territorial Commission decision "for serious personal or health-related grounds requiring the presence of the concerned foreigner in the territory of the State", provided the Préfet corresponding advice (Article 15 section 2 of Procedures Regulation no. 303/2004).
Similarly to what provided by the existing procedure norms, the Implementing Decree measures on the right to remain in Italy pending the decision entails the applicant's mandatory residence in a reception or in a detention centre in case the applicant was previously repelled at the border or deported (Article 35 section 8).

The aforementioned provision of Article 16 (2) significantly contributes to achieving the right to an effective remedy by clearing access to legal assistance on the State expenses for asylum seekers without sufficient financial means. The applicant's statement concerning his/her resources will be considered a sufficient proof, whilst the confirmation by the Consulate of the State of origin required by the existing law will no longer be necessary.

8.

CONCLUSIONS

After EC Directives 2005/85 Italian regulation of asylum procedures has certainly changed its face. More than the principles contained in these directives, the very fact of their introduction and the impending deadline for implementation gave a considerable impulse to the Italian debate through society, political representatives and the Government.
The modifications operated to the existing asylum procedures regulation that we can directly derive from the Procedures Directive are limited, and possibly reduced to the introduction of the "safe third country" concept as a reason to reject asylum applications according to Article 29 and 31 and the reasons for declaring applications inadmissible after Article 25 of the Directive. But more important reforms were made possible by the long and widespread discussion caused by the introduction of the Directive principles of freedom from detention, right to legal assistance, guarantees for applicants with specific needs, right to an effective remedy. It is a fact that, after the Implementing Decree of Procedures Directive will enter into force, reception centres will finally open their doors to applicants during daytime, the duration of mandatory reception and detention periods will be shorter, time limits for appeals will be extended from fifteen to thirty days, the competent authority for examining appeals will be a Tribunal, instead of the same Territorial Commission that examined the application in the first instance and legal assistance for appeals will be accessible free of charge to all asylum seekers without sufficient financial means.
We can take these events as a proof that even from the least courageous EU Directives can derive significant improvements in the Members States regulations with respect to their obligations under international refugee and human rights law.

The Italian asylum system will continue to be based on a single procedure for the recognition of refugee status and of subsidiary protection, a strong individual approach at all steps of the process, a three steps appeals system and a dual reception regime. Along with the imperviousness of Italian implementation decrees' language to the gender sensitive

wording of European Union Directives, distinctive weak points remain. Features of concern are the dependent character of examining authorities from the executive, the limited guarantees for applicants to access general information and specific on their procedure in a known language and, particularly, the recourse to centralised reception system formula that already proved highly ineffective. These elements, along with the flaws in the law enforcement pointed out by the Investigation Commission on the Italian reception system in 2007, may undermine procedures to their foundations with the predictable consequence to limit the positive effect of the newly introduced safeguards. To illustrate: the automatic right to remain in the country until a second instance decision is taken is of limited impact if the reception system is insufficient and most applicants are dismissed and left to their wits through the country as the reception time ends, before any decision is taken on their application; more effective remedy measures may not help if a large number of applications will be decided without the participation of the applicant because he/she has no known residence; longer time-limits for challenging a decision on one's application become meaningless if the applicant does not know about them.

Above all, the lack of a coordinated discipline of asylum Italy jeopardises the effective access to this right. The multi-layered structure of the law makes it complicated to achieve a correct and complete information on the norms in force, while it remains unclear which further procedural provisions apply to asylum processes: the Government stated that the existing Asylum Procedures Regulation no. 303/2004[73] will still be applicable "in so far as compatible" with the Implementing Decree no. 28/2008, until a new regulation will be enacted.[74] As no provisions clarify how a *compatibility* evaluation should be made, it will lie in the discretional powers of administrative authorities and in the interpretation of lawyers to compare the new Implementation Decree norms and the previous procedure rules, in order to tell which provisions will be applicable and how. As a result, the practice of the access to the right of asylum takes a very uncertain path, possibly varying in different areas of the country and leading to the predictable consequence of a lacking implementation.

As lawyers, we were taught that "the fulfilment of a right lies in its procedure" (*Il diritto è procedura*). For this reason, the implementation process of Council Directive 2005/85 EC will be regarded as accomplished in so far as the prospected implementation rules will be adopted and we may argue that Italy actually respected the obligation to implement the Procedure Directive until now.

[73] See note no. 6.

[74] Article 38 of the Implementing Decree no 28/2008 sets a six months deadline for adopting a new Procedures Regulation, although past experience shows that regulations have been enacted after two years.