

# The Regularisation of Foreign Undocumented Workers from the Relaunch Decree to the Cutro Shipwreck.

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1. Vulnerable and invisible: the situation of undocumented migrant workers in Italy. 2. The regularisation of the “Relaunch Decree”. 3. The several contradictions of the 2020 amnesty. 4. A never-ending story? 5. The reform of the 2020 “special” protection. 6. The “special” protection as a way out of invisibility. 7. The “Cutro Decree” and the new reform of the special protection: another lost opportunity.

## Abstract

The paper proposes an analysis of the regularisation procedure introduced by the Decreto-Legge 34/2020, so called “Relaunch Decree”, addressing some of its many contradictions. Secondly, the paper shows how the “special protection”, after the reform with Decreto-Legge 130/2020, could have overcome the limits of this instrument, representing a permanent channel of regularisation, and how the Decreto Legge 20/2023, also called “Cutro Decree”, has stopped these positive outcomes.

**Keywords:** Regularisation; Undocumented migrants; Exploitation; Covid-19; Humanitarian protection.

## 1. Vulnerable and invisible: the situation of undocumented migrant workers in Italy.

At the beginning of 2020, more than 500,000 undocumented migrants were living in Italy.<sup>1</sup> Due to their irregular position, these people usually live in a precarious and highly vulnerable situation, trapped in a kind of legal *limbo* where they are unable to fulfil even their basic needs, despite the Italian Constitution ensures the enjoyment of their fundamental rights.<sup>2</sup>

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<sup>1</sup> Cesareo V., 2020: *un anno di inattesa discontinuità*, in Cesareo V. (eds), *Fondazione ISMU - Ventiseiesimo rapporto sulle migrazioni 2020*, Franco Angeli, Milan, 2021, 17.

<sup>2</sup> Under Articles 2, 3 and 10 of the Italian Constitution, different treatment of foreign nationals is allowed only if reasonable and still ensures their fundamental rights; see Viscomi A., *Immigrati extracomunitari e lavoro subordinato - Tutele costituzionali, garanzie legali e regime contrattuale*, Edizioni Scientifiche Italiane, Naples, 1991, 25 ff. The

This position of vulnerability is partially caused by the same immigration policies, usually undertaken to fight illegal immigration, instead of providing a comprehensive legal framework on the entrance and stay of people.<sup>3</sup>

It is well-known that the “flow” system adopted to regulate the entry of migrants is not effective, since the provided “quotas” do not suffice all the demands of people willing to enter, but are also failing to meet the increasing labour demand of employers.<sup>4</sup>

The several inefficiencies and issues characterizing this system eventually encourage foreign national to enter in Italy irregularly.<sup>5</sup> Nevertheless, once in Italy, they have no other choice than working in the informal economy, since the irregularity of their residence inevitably leads to the irregularity of employment,<sup>6</sup> with the consequent presence of an enormous number of “invisible” - and therefore easily exploitable - workers.

Not having obtained a regular residence permit, these people are prevented from accessing any regular job, due to the criminal legal framework, which criminalises both employers of undocumented migrants and undocumented migrants themselves. On the one hand, employers of undocumented migrants are criminally liable, according to Article 22, paragraph 12 of Decreto Legislativo 25 July 1998, n. 286 (also called Consolidated Immigration Act).<sup>7</sup> In addition, foreign nationals who are in an irregular situation are always at potential risk of being expelled and criminally persecuted for the crime of illegal entry and stay provided under Article 10bis of the Consolidated Immigration Act.<sup>8</sup>

The result is a system that prevents undocumented migrants from having recourse to judicial protection and eventually makes them potential victims of multiple forms of abuse and exploitation,<sup>9</sup> with almost no chance of getting out of this situation of invisibility since

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enjoyment of fundamental rights of both documented and undocumented migrants is also ensured under Article 2, paragraph 1, Legislative Decree No. 286/1998 (so-called Consolidated Immigration Act).

<sup>3</sup> As addressed by the UN Human Rights Council, “The vulnerable situations that migrants face can arise from a range of factors that may intersect or coexist simultaneously, influencing and exacerbating each other and also evolving or changing over time as circumstances change”, UN High Commissioner for Refugees (UNHCR), *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations*, Report of the United Nations High Commissioner for Human Rights, 12, UN Doc. A/HRC/37/34, (Jan. 3, 2018).

<sup>4</sup> On the flow system, see Neri L., *Il lavoro*, in Morozzo della Rocca P. (eds), *Immigrazione, asilo e cittadinanza*, IV ed., Maggioli Editore, Rimini, 2019, 204 ff.; Riccobono A., *Immigrazione e lavoro al tempo della crisi. Aspetti problematici e prospettive di riforma del quadro normativo*, in *Nuove Autonomie*, 4, 2013, 401 ff. An analysis of the latest news introduced in 2020 is made by Sgroi A., *Ordinamento giuridico e ingresso dei lavoratori dei paesi terzi: considerazioni a margine del d.l. 10 marzo 2023 n. 20*, in *Diritto del mercato del lavoro*, 2, 2023, 403 ff.; Chiaromonte W., *Una lettura giuslavoristica del d.l. 20/2023: le inadeguate politiche migratorie del Governo Meloni*, in *Giornale di diritto del lavoro e di relazioni industriali*, 179, 3, 2023, 431 ff.

<sup>5</sup> Recchia G.A., *L'accesso al lavoro dei migranti economici*, in Chiaromonte W., Ferrara M.D., Ranieri M. (eds), *Migranti e lavoro*, Il Mulino, Bologna, 2020, 100.

<sup>6</sup> Chiaromonte W., «Cercavamo braccia, sono arrivati uomini». *Il lavoro dei migranti in agricoltura tra sfruttamento e istanze di tutela*, in *Giornale di diritto del lavoro e di relazioni industriali*, 158, 2, 2018, 348.

<sup>7</sup> The crime is analysed by Lanza E., *Il diritto penale dell'immigrazione*, in Morozzo della Rocca P. (eds), *Immigrazione, asilo e cittadinanza*, IV ed., Maggioli Editore, Rimini, 2019, 340 ff.

<sup>8</sup> Chiaromonte W., nt. (6), 349. About this crime, see Spena A., *Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law*, in *Criminal Law and Philosophy*, 8, 2014, 637 ff.

<sup>9</sup> Laforgia S., *Il contrasto allo sfruttamento lavorativo dei migranti*, in Chiaromonte W., Ferrara M.D., Ranieri M. (eds), *Migranti e lavoro*, Il Mulino, Bologna, 2020, 176 ff.; Chiaromonte W., D'Onghia M., *Cronaca di una sanatoria in tempo di emergenza sanitaria: genesi, finalità e limiti*, in *Diritto, immigrazione e cittadinanza*, 3, 2020, 4 ff., available at <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-3-2020-1/651-cronaca-di-una-sanatoria-in-tempo-di-emergenza-sanitaria-genesi-finalita-e-limiti/file>.

the Italian legal framework does not provide any general mechanism to ensure the regularisation of migrant undocumented workers.

Only in cases of “serious” exploitation, undocumented workers might be entitled to protection and to get a permit to stay, under Article 18 or Article 22, paragraph 12 *quater*, of the Consolidated Immigration Act.<sup>10</sup> Nevertheless, not only these provisions are really difficult to apply, but they are also limited to cases of serious exploitation.

In any other case, undocumented workers who report an abuse by an employer would not be entitled to regularise their administrative situation, they rather risk to be expelled. Similarly, there is no way for a potential employer to regularly hire an undocumented migrant.

According to the Italian legal framework, in fact, regularisation is only possible through the “amnesty” mechanisms (known as “*sanatoria*”), cyclically<sup>11</sup> provided by the Italian legal system, even if justified as “exceptional” and, therefore, ruled according to emergency-based approaches, as shown by the last regularisation procedure, introduced in 2020 for the COVID-19 pandemic.

## 2. The regularisation of the “Relaunch Decree”.

Article 103 of Decreto Legge 19 May 2020, n. 34, known as the Relaunch Decree, introduced the eighth amnesty for irregular foreign nationals in the history of the Italian Republic,<sup>12</sup> as part of an emergency decree aimed at responding to the COVID-19 pandemic.

To ensure the regularisation of foreigners, the Decree provided for three different procedures under Article 103, the scope of which was limited to the sectors expressly listed by paragraph 3 of the same article, namely agriculture and domestic work.<sup>13</sup>

According to paragraph 1, employers could contract a foreign national who was in Italy illegally by 8<sup>th</sup> March 2020. The same paragraph also provided for the possibility of

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<sup>10</sup> Article 18 of the Consolidated Immigration Act provides for the release of a permit for social protection to victims of trafficking and of “serious” labour exploitation, through a judicial and a social pathway. Thus, victims of exploitation do not always need to report in order to be entitled to this kind of protection. A different purpose is served by Article 22, paragraph 12 *quater*, Consolidated Immigration Act, which entitles people to get a permit to stay as a reward mechanism if they collaborate with the justice system. About this topic, see Boiano I., Cecchini C.L., *Le frontiere del diritto: gli artt. 18 e 18 bis TU 286/98 in una prospettiva di genere e femminista*, in Giovannetti M., Zorzella N. (eds), *Ius Migrandi*, Franco Angeli, Milan, 2020, 662 ff.; Palumbo L., Sciarba A., *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU: The Need for a Human Rights and Gender Based Approach*, European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Bruxelles, 2018, 59; Chiaromonte W., nt. (6), 350.

<sup>11</sup> Chiaromonte W., D’Onghia M., nt. (9), 1 ff.

<sup>12</sup> Ranieri M., *Mafie, imprese, lavoro. Diritto del lavoro e normativa di contrasto*, Edizioni Scientifiche Italiane, Naples, 2021, 201. About the oldest amnesties, see Briguglio S., *Una regolarizzazione in tempo di pandemia: la lezione del passato*, in *Questione Giustizia*, May 28, 2020, [https://www.questionegiustizia.it/articolo/una-regolarizzazione-in-tempo-di-pandemia-la-lezione-del-passato\\_28-05-2020.php](https://www.questionegiustizia.it/articolo/una-regolarizzazione-in-tempo-di-pandemia-la-lezione-del-passato_28-05-2020.php).

<sup>13</sup> Under Article 103, paragraph 3, the provision applied only to the following sectors: “a) agriculture, stock-farming, fishing, aquaculture and related activities; (b) personal assistance to the employer or members of his family, even if they do not live with them, suffering from an illness or handicap which limits their self-sufficiency; (c) domestic work to meet the needs of the family”. However, the reference made to “related activities” under lett. A has been interpreted broadly, embracing a wide range of activities listed by “Ateco” code; Morozzo della Rocca P., *La regolarizzazione dei lavoratori stranieri tra molte incertezze e possibili contenziosi*, in *il Corriere giuridico*, 8-9, 2020, 1019.

regularising existing employment relationships with both foreign and Italian workers that had not yet been regularised. Lastly, paragraph 2 allowed foreigners - whose residence permits were due to expire on 31<sup>st</sup> October 2019 and who had already worked in the strictly defined product sectors - to apply for a six-months temporary residence permit to seek work. However, the possibility of converting this permit for employment purposes was limited to those who had found work in the same sectors listed in paragraph 3.

These instruments were intended to protect the “invisible”, according to the political discourse of the time.<sup>14</sup> The same incipit of the provision stated that the amnesty was intended to “guarantee an adequate level of individual and collective health protection as a consequence of the contingent and exceptional health emergency linked to the disaster resulting from the spread of the COVID-19 infection and to encourage the emergence of unregistered labour relations”.

However, a first look at the structure of the amnesty reveals that it was the need to respond to the shortage of labour in the agricultural sector caused by the lockdown to be decisive, rather than any humanitarian purpose or desire to regularise labour relations.<sup>15</sup> This is evidenced by the fact that the government created an amnesty with a particular target, restricting access only to categories of people for whom it was considered that our country had an indispensable and urgent need, namely those working in agriculture and family care.<sup>16</sup>

### 3. The several contradictions of the 2020 amnesty.

Compared with an estimate of more than 648,000 foreign nationals who could potentially have access to the measure,<sup>17</sup> there were 207,542 applications relating to the procedures of paragraph 1 and 12,986 applications for residence permits to seek work, under paragraph 2.<sup>18</sup>

As the data clearly show, the amnesty was a missed opportunity to “make visible the invisible” – as the political class of the time claimed to do – and to finally introduce an amnesty characterised by a universal scope of application, as the one civil society had long been calling for.<sup>19</sup>

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<sup>14</sup> Ero Straniero, *Regolarizzazione 2020, ancora in troppi senza risposta*, November 2021, 2, available at [https://erostraniero.radicali.it/wp-content/uploads/2021/11/Monitoraggio-regolarizzazione-ed-emendamenti\\_25-novembre-2021.docx.pdf](https://erostraniero.radicali.it/wp-content/uploads/2021/11/Monitoraggio-regolarizzazione-ed-emendamenti_25-novembre-2021.docx.pdf); Gonnelli E., *La regolarizzazione dei lavoratori migranti come intervento straordinario per far fronte all'emergenza sanitaria da Covid-19*, in *Labour & Law Issues*, 7, 1, 2021, 43, <https://doi.org/10.6092/issn.2421-2695/13183>.

<sup>15</sup> Chiaromonte W., D'Onghia M., nt. (9), 7; Bologna S., *Lavoro e sicurezza sociale dei migranti economici: l'eguaglianza imperfetta*, in De Marzo G., Parisi F. (eds), *Diritto e immigrazione. Un quadro aggiornato delle questioni più attuali e rilevanti*, in *Foro it. Gli speciali*, 3, 2021, 287.

<sup>16</sup> Cesareo V., nt. (1), 18-19.

<sup>17</sup> Cesareo V., *ibidem*, 17.

<sup>18</sup> Ero Straniero, nt. (14), 2-3.

<sup>19</sup> One example is a proposal for a legislative bill of popular initiative entitled “Nuove norme per la promozione del regolare soggiorno e dell'inclusione sociale e lavorativa di cittadini stranieri non comunitari”, presented to the *Camera dei Deputati* on 27<sup>th</sup> October 2017 by the “Ero Straniero” campaign; see Curigliano V., Mason F., *La regolarizzazione straordinaria del 2020: una prima analisi*, in *Diritto, immigrazione e cittadinanza*, 3, 2021, 304 ff., available at <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/note-e-commenti/fascicolo-2021-3/819-la-regolarizzazione-straordinaria-del-2020-una-prima-analisi>.

According to these claims, the Italian legal framework needed (and still needs) a permanent regularisation procedure based on individual assessment, finally providing a structural and non-emergency response to the presence of more than 500,000 irregular immigrants destined to live in precarious conditions because of their legal status.<sup>20</sup>

The government of the time opted instead for a procedure precisely aimed at responding to the pandemic, but with many contradictions. Indeed, as scholars pointed out, if the moment of emergency justified the amnesty at the political level, the issue that lawmakers completely ignored it was still a fact.<sup>21</sup>

As already said, the decision to limit access to the procedure to the listed production sectors may have been taken in response to the contingent needs of the agricultural sector. Nevertheless, the demand for a workforce in the agricultural sector does not seem to have been met. According to data, 85% of the applications were for domestic work, while there was a clear failure in the area of rural employment.<sup>22</sup> This amnesty has therefore confirmed a considerable indifference to regularisation procedures in the agricultural sector, where the widespread phenomena of *caporalato* and serious exploitation are well known.<sup>23</sup>

Moreover, the limitation of the procedure scope of application, under paragraph 3, does not seem compatible with either the health objective or the aim of uncovering working irregularities,<sup>24</sup> both formally pursued by Article 103 of the Relaunch Decree. Therefore, not only the limitation to the scope of application provided by paragraph 3 may be considered as a violation of the principle of equality,<sup>25</sup> but the question which arises is if this limitation is not “intrinsically unreasonable”<sup>26</sup> in terms of the pursued objectives.

Such an unreasonableness of the system can be found, for instance, in the context of the procedure of paragraph 2, which limited the convertibility of the temporary permit only to those who had found work in the productive sectors strictly listed by paragraph 3. Those who had already “emerged” but had found work in other productive sectors were denied the possibility of converting the permit at its expiry date, being once again destined to illegality.

This issue has never been addressed by the Constitutional Court. However, the Court already had the opportunity to declare unconstitutional another criterion which had the same effect of excessively restricting the scope of the procedure, jeopardising the achievement of

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<sup>20</sup> Ero Straniero, *Regolarizzazione 2020: dopo due anni, più di centomila ancora in attesa dei documenti*, May 2022, 8, available at <https://erostraniero.it/wp-content/uploads/2022/05/Dossier-maggio-2022-EroStraniero.pdf>.

<sup>21</sup> Morozzo della Rocca P., *La tutela del lavoratore in caso di mancata o interrotta regolarizzazione*, in *Questione Giustizia*, 19 October 2021, 2, available at <https://www.questionegiustizia.it/articolo/la-tutela-del-lavoratore-in-caso-di-mancata-o-interrotta-regolarizzazione>.

<sup>22</sup> Ero Straniero, *Regolarizzazione 2020 a rischio fallimento: tempi lunghissimi e ostacoli burocratici. Alcune proposte per “salvare” una misura necessaria*, March 2021, 3, available at [https://erostraniero.radicali.it/wp-content/uploads/2021/03/Report-monitoraggio-regolarizzazione\\_ERO-STRANIERO.pdf](https://erostraniero.radicali.it/wp-content/uploads/2021/03/Report-monitoraggio-regolarizzazione_ERO-STRANIERO.pdf).

<sup>23</sup> Pasini N., Regalia M., *La politica dell’immigrazione nel 2020: regolarizzazione ed elezioni regionali*, in Cesareo V. (eds), *Fondazione ISMU - Ventesimo rapporto sulle migrazioni 2020*, Franco Angeli, Milan, 2021, 233-234.

<sup>24</sup> Cesareo V., nt. (1), 20; Ranieri M., nt. (12), 201.

<sup>25</sup> Bellavista A., *L’emersione del lavoro irregolare nel «Decreto Rilancio»*, in Garilli A. (eds), *Dall’emergenza al rilancio: lavoro e diritti sociali alla prova della pandemia*, Giappichelli, Turin, 2020, 166; S. Bologna, nt. (15), 287.

<sup>26</sup> The expression has been used by the Constitutional Court to state the unconstitutionality of a provision aimed to exclude asylum seekers from the civil registers; C. Cost., 31 July 2020, n. 186, in *Giurisprudenza Costituzionale*, 4, 2020.

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the objectives pursued by the procedure and thus ultimately undermining the principle of reasonableness.<sup>27</sup>

Regarding the procedures referred to in paragraph 1, it is also worth noting that the Decree provided access to the procedure as a mere faculty of the employer and not, instead, as a right of foreign nationals, following the structure of previous similar instruments adopted by the Italian legal system.<sup>28</sup> This approach not only has had significant consequences for the overall structure of the instrument,<sup>29</sup> but it is also to be considered critical since it seems to identify foreign workers not as bearers of rights, but rather as mere recipients of “concessions” bestowed by employers.

#### 4. A never-ending story?

The number of submitted applications was also affected by the time limitation of the amnesty, initially possible only from 1<sup>st</sup> June 2020 to 15<sup>th</sup> July 2020, eventually extended until 15<sup>th</sup> August 2020.

Given the aim of the regularization, extending the procedure to the entire duration of the emergency would have been more reasonable. Indeed, the need to safeguard health had, at the same time, prompted the legislator to extend *ex lege* the duration of the residence permits of already legally residing foreign nationals, preventing people from irregularity during the whole emergency period. On the contrary, it is evident that the imposition of such strict timing withheld many foreign nationals from obtaining the necessary documentation for submitting an application or establishing new employment relations.

Moreover, the short time window for submitting applications did not match the promptness of the administrations involved in examining applications, as data clearly show. On 27<sup>th</sup> October 2021, more than a year after the end of the application period, the files processed and finalised corresponded to about one-third of the applications of the procedures under paragraph 1.<sup>30</sup> In March 2022, the processed applications were approximately 62% of the total.<sup>31</sup> In May 2023, almost three years after the submissions, residence permits physically issued by police headquarters were just 31.5 per cent of the total received, with 14.75 per cent of rejected applications.<sup>32</sup>

This slow applications processing by the administration was censured in court following a class action brought by civil society against the stagnant process particularly in the prefectures of Rome and Milan. Concerning the case of Milan, in December 2023, the Court

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<sup>27</sup> C. Cost., 18 July 2023, n. 149, in <https://www.cortecostituzionale.it/>.

<sup>28</sup> Bologna S., nt. (15), 287.

<sup>29</sup> For instance, it led to overlook the fact that the exorbitant costs, theoretically imposed on the employer, were often borne by the foreign worker, despite his or her contractually precautionary status; Gonnelli E., nt. (14), 52.

<sup>30</sup> Ero Straniero, nt. (14), 3.

<sup>31</sup> Ero Straniero, nt. (20), 1.

<sup>32</sup> Ero Straniero, *Regolarizzazione 2020: a tre anni dalla misura pratiche in stallo e uffici sotto organico. È questa la vera emergenza di cui governo e parlamento devono occuparsi*, May 2023, 2, available at [https://erostraniero.radicali.it/wp-content/uploads/2023/05/Aggiornamento-monitoraggio-regolarizzazione\\_maggio-2023.pdf](https://erostraniero.radicali.it/wp-content/uploads/2023/05/Aggiornamento-monitoraggio-regolarizzazione_maggio-2023.pdf).

held that the failure to the procedures to regularise migrants within the 180-day deadline cannot be justified; it represented, instead, a damage to the rights and interests of all those who have not yet seen such procedures concluded.<sup>33</sup>

Nevertheless, it is a fact that the slow procedures of administrations were also caused by a lack of workforce. The need to process applications initially led to recruit temporary workers, who were all suspended at the beginning of 2022,<sup>34</sup> thus affecting the capacity of administrations to process the enormous number of still pending applications.

Thus, despite the formal conclusion of the emergency period, many foreign workers, who had applied to have their status regularised, continued to live in a legal situation of uncertainty. Despite being allowed to stay on the Italian territory pending the definition of the procedure,<sup>35</sup> they are not allowed to leave the country<sup>36</sup> and are subject to any change that may affect the successful completion of the procedure. Moreover, this uncertainty regarding their status appears to still affect their life conditions, since the lack of documents causes work instability, insecurity and a lack of legal certainties.<sup>37</sup>

Lastly, it cannot be ignored that, in order to conclude the procedure, many asylum seekers, applying for the regularization procedure, were pressured by administrations to abandon their application for international protection, consequently losing their rights as asylum seekers and, eventually, refugees, although the renunciation of the asylum application was not required by law.<sup>38</sup>

## 5. The reform of the 2020 “special” protection.

The year 2020 saw another important reform that could have influenced the possibility of undocumented foreign workers to regularise their status.

To fill the gap left by the suppression of humanitarian protection,<sup>39</sup> the Government intervened once again in immigration matters with the Decreto Legge 21 October 2020, n. 130, also known as Lamorgese Decree.

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<sup>33</sup> Tar Lombardia, Milano, sez. IV, 4 December 2023, n. 2949, available at [www.asgi.it](http://www.asgi.it).

<sup>34</sup> Ero Straniero, nt. (32), 6-7.

<sup>35</sup> While the procedure is pending, applicants are considered as legal residents due to a specific provision. They can, therefore, work and enjoy equal treatment in accessing goods and services; Curigliano V., Mason F., nt. (19), 309-310.

<sup>36</sup> Nevertheless, according to case law the application cannot be rejected due to the sole circumstance of having left the country, if the application is not processed after 180 days, *see* TAR Campania, Napoli, sez. VI, 15 June 2022, n. 4239, available at [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>37</sup> Ero Straniero, nt. (20), 4.

<sup>38</sup> TAR Roma, sez. I-ter, 11 March 2022, n. 2832, in *Diritto, immigrazione e cittadinanza*, 2, 2022; *see* Gonnelli E., nt. (14), 48.

<sup>39</sup> Morandi N., *La protezione speciale nell'ambito del procedimento di protezione internazionale. La relazione tra la “vecchia” protezione umanitaria e la nuova protezione speciale nei giudizi pendenti*, in Giovannetti M., Zorzella N. (eds), *Immigrazione, protezione internazionale e misure penali*, Pacini Editore, Pisa, 2021, 62. The Decree Law No. 113/2018, also known as “Salvini I” Decree or “Security Decree”, suppressed the humanitarian protection previously provided for in Article 5, paragraph 6, d.lgs. 25 July 1998, n. 286, listing instead hypotheses of residence permits for “special cases”, with a much narrower scope. This caused alarm among civil society and international organisations, as it deprived many foreign nationals of the possibility of renewing their residence permits, and reduced the scope of international protection. For a closer examination of the regulations introduced in 2018 and their critical

The decree reformed the so-called “special protection”, provided for by Article 19 of the Consolidated Immigration Act.

In its original wording, Article 19 provided for a prohibition of expulsion if the return of foreign nationals resulted in a violation of the *non-refoulement* principle. In other words, the prohibition was originally provided for if, in the event of expulsion, foreign nationals risked to be persecuted, if their safety was at risk or, alternatively, risked to be subject to torture or inhuman or degrading treatment. In these cases, Article 19, paragraph 1.2 of the Consolidated Immigration Act recognised the right of foreign nationals to a “special protection” residence permit in accordance with Article 32, paragraph 3 of the Decreto Legislativo 28 January 2008, n. 25.

The reform, introduced at the end of 2020, considerably extended the scope of the expulsion prohibition and the associated right to protection. On the one hand, the right to special protection was also intended to cases protected by the constitutional and international obligations of the Italian State, pursuant to Article 5, paragraph 6, Consolidated Immigration Act.<sup>40</sup> On the other, the right was also extended to cases with reasonable grounds for believing that removal from the national territory would lead to a violation of the right to respect private and family life.<sup>41</sup>

The 2020 reform has thus essentially extended the traditional scope of the *non-refoulement* principle.

Moreover, the reform has also extended the ways to access the permit to stay on the ground of special protection. Indeed, after the 2020 reform, this “special” protection could be granted during the examination of an application for international protection, as a form of “complementary” protection, or by means of an application directed to the *Questore*, pursuant to Article 19, paragraph 1.2 of the Consolidated Immigration Act.

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issues, please see Chiaromonte W., *Ideologia e tecnica della disciplina sovranista dell'immigrazione. Protezione internazionale, accoglienza e lavoro dopo il "decreto Salvini"*, in *Giornale di diritto del lavoro e di relazioni industriali*, 162, 2, 2019, 321 ff.; Balboni M., *Abolizione della protezione umanitaria e tipizzazione dei casi di protezione: limiti e conseguenze*, in Curi F. (eds), *Il Decreto Salvini – Immigrazione e sicurezza*, Pacini Giuridica, Pisa, 2018, 19 ff.; Algostino A., *Il decreto "sicurezza e immigrazione" (decreto legge n. 113 del 2018): estinzione del diritto di asilo, repressione del dissenso e disuguaglianza*, in *Costituzionalismo.it*, 2, 2018, 167 ff.

<sup>40</sup> The reference to the constitutional and international obligation in the framework of Article 5, paragraph 6, of the Consolidated Immigration Act was also abolished by the reform of 2018 and reintroduced in 2020, in the same context of the “special protection” reform.

<sup>41</sup> Lawmakers have, thus, indirectly referred to case law which, on the subject of humanitarian protection, has given relevance to the protection of “private and family life” in relation to the provisions of Article 8 ECHR, allowing “protection through social integration” since Cass., sez. I, 23 February 2018, n. 4455, in *Questione Giustizia*, 2018; please see Ferri M., *La tutela della vita privata quale limite all'allontanamento: l'attuazione (e l'ampliamento) degli obblighi sovranazionali attraverso la nuova protezione speciale per integrazione sociale*, in *Diritto, immigrazione e cittadinanza*, 2, 2021, 78 ff. available at <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2021-1/762-la-tutela-della-vita-privata-quale-limite-all-allontanamento-l-attuazione-e-l-ampliamento-degli-obblighi-sovrannazionali-attraverso-la-nuova-protezione-speciale-per-integrazione-sociale/file>.



## 6. The “special” protection as a way out of invisibility.

Since the reform of its scope of application, Article 19 of the Consolidated Immigration Act has been widely applied in both administrative and judicial practice to guarantee the protection of the social and labour integration of foreign nationals.

The evaluation of their working position, as well as any training activities, took place first and foremost within the concept of “private and family life”. In fact, according to case law, the employment relationship would fall within the scope of “private life”, since it should protect the right to enter into relations with other individuals and society, not limited to the intimate circle.<sup>42</sup> Case law has thus issued the right to special protection in many cases in which applicants carried out working activities, even though in precarious circumstances, or undocumented.<sup>43</sup>

Moreover, case law has established that a duty of protection and a prohibition of expulsion under Article 19, paragraph 1.1, of the Consolidated Immigration Act also derives from the constitutional duty to protect labour under Article 35 of the Italian Constitution. Case law has thus recognised the existence of the prohibition of expulsion and the consequent need to issue a residence permit for special protection where an employment contract is defined.<sup>44</sup>

This broad relevance of work performance for the recognition of “special protection” could have been an opportunity to convene new prospects of protection, particularly interesting for foreign nationals working on the territory but with an irregular status.

Indeed, the valorisation of Article 35 of the Constitution, jointly read with Article 19, paragraph 1.1 of the Consolidated Immigration Act, could have laid the foundations for a further extension of protection to undocumented workers forced into the underground economy because of their illegal status.

On the one hand, Article 19 of the Consolidated Immigration Act inevitably applies to *sans papiers* by introducing a ban on expulsion,<sup>45</sup> thus extending the need to protect private and family life to any undeclared worker. On the other hand, the need for an extension of protection in the hypothesis that worker are irregularly employed also comes from the case law on the subject of *de facto* work under Article 2126 of the Italian Civil Code, which has always recognized remuneration and contribution rights of undeclared migrant workers,<sup>46</sup> as

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<sup>42</sup> Cass., S.U., 9 September 2021, n. 24414, in *Questione Giustizia*, 2021.

<sup>43</sup> For an analysis of relevant case law, see Colamartino O., «Non ho paura. Ma ormai vivo qui». *La protezione speciale e il diritto alla vita privata e familiare nell'applicazione della giurisprudenza (con qualche spunto di riflessione sul dl n. 20/2023)*, in *Questione Giustizia*, 3, 2023, 23 ff., available at: [https://www.questionegiustizia.it/data/rivista/articoli/1103/3\\_2023\\_qg\\_colamartino.pdf](https://www.questionegiustizia.it/data/rivista/articoli/1103/3_2023_qg_colamartino.pdf).

<sup>44</sup> Trib. Lecce, 17 September 2021, in <https://www.melingpot.org/>.

<sup>45</sup> Zorzella N., *La nuova protezione speciale introdotta dal D.L. 130/2020. Tra principio di flessibilità, resistenze amministrative e problematiche applicative*, in *Diritto, immigrazione e cittadinanza*, 2, 2021, 150 ff., available at <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2021-1/763-la-nuova-protezione-speciale-introdotta-dal-d-l-130-2020-tra-principio-di-flessibilita-resistenze-amministrative-e-problematiche-applicative>.

<sup>46</sup> Cass., sez. lav., 26 March 2010, n. 7380, in *Rivista italiana di diritto del lavoro*, 4, 2010, 778 ff.

well as from Article 35 of the Constitution itself, which expresses a universal rule and is, therefore, suitable to be applied also to irregularly resident foreign nationals.<sup>47</sup>

Thus, the relevance of both the protection of private life and the obligation under Article 35 of the Constitution could have made the special protection a “permanent” and no longer exceptional emergency mechanism able to regularise undocumented migrants,<sup>48</sup> considering their work performance and following an individual assessment.<sup>49</sup>

This would have been possible since, according to the regulatory framework established by the Decreto Legge 130/2020, access to special protection was guaranteed also upon a direct request by any foreign national to the *Questore*, under Article 19, paragraph 1.2.

Nevertheless, compared to this broad scope, the Decreto Legge 10 March 2023, n. 20 (so-called “Cutro Decree”) has marked a significant step backwards.

## 7. The “Cutro Decree” and the new reform of the special protection: another lost opportunity.

The “Cutro Decree”, named after the shipwreck that occurred off the coast of Crotone between 25<sup>th</sup> and 26<sup>th</sup> February 2023, led to a deep reform of the special protection aimed at narrowing its scope.

On the one hand, the decree deleted the reference to private and family life in Article 19, paragraph 1.1, d.lgs. 25 July 1998, n. 286. On the other, the decree has removed the possibility of applying directly to the *Questore* for the recognition of special protection, limiting the application of this form of protection to the hypothesis of an application for international protection.

According to scholars<sup>50</sup> and case law,<sup>51</sup> the obligation to protect private and family life should remain relevant as per the joint reading of Article 8 ECHR, and Article 5, paragraph 6 and Article 19 of the Consolidated Immigration Act, as a constitutional and international

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<sup>47</sup> Viscomi A., nt. (2), 64 ff.; Napoli M., *Le norme costituzionali sul lavoro alla luce dell'evoluzione del diritto del lavoro*, in *Jus*, 2008, 73.

<sup>48</sup> Scholars talked about a permanent mechanism of regularisation; Bonetti P., *Il permesso di soggiorno per protezione speciale dopo il decreto legge n. 130/2020: una importante innovazione nel diritto degli stranieri*, in Molfetta M., Marchetti C. (eds), *Il diritto d'asilo. Report 2021. Gli ostacoli verso un noi sempre più grande*, Tau, Todi, 2021, 268; Neri L., *Si fa presto a dire speciale. La protezione speciale a due anni dal decreto legge 130/2020: un istituto unitario ancora in cerca di una disciplina, un permesso di soggiorno che non può non essere convertibile*, in *Diritto, immigrazione e cittadinanza*, 3, 2022, 125, available at <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-3-2022/1010-si-fa-presto-a-dire-speciale-la-protezione-speciale-a-due-anni-dal-decreto-legge-130-2020-un-istituto-unitario-ancora-in-cerca-di-una-disciplina-un-permesso-di-soggiorno-che-non-puo-non-essere-convertibile>.

<sup>49</sup> The issue has already been addressed by the author in Costa R.D., *La tutela del lavoratore straniero “irregolare” dopo il decreto n. 130/2020*, in *Il Lavoro nella Giurisprudenza*, 11, 2022, 1027 ff.

<sup>50</sup> Tonolo S., *La rilevanza degli obblighi internazionali ai fini della tutela della vita privata e familiare dei richiedenti protezione internazionale nella l. 5 maggio 2023, n. 50*, in *Diritti umani e diritto internazionale*, 17, 2, 2023, 359, doi: 10.12829/108063; Starita M., *Le protezioni complementari in Italia e i trattati in materia di diritti umani dopo la l. 5 maggio 2023, n. 50: una questione d'interpretazione*, in *Diritti umani e diritto internazionale*, 17, 2, 2023, 343 ff, doi: 10.12829/108062.

<sup>51</sup> Cass., Sez. I, 6 October 2023, n. 28162, available at <https://onelegale.wolterskluwer.it>; Trib. Milano 13 November 2023, in *Diritto, immigrazione e cittadinanza*, 1, 2024.

obligation to which Italy is subject. Indeed, it was the existence of the obligation to protect private and family life as an international obligation under Article 8 ECHR that had allowed the case-law to recognise protection for social integration under the old humanitarian protection, even though there was no reference to private and family life in the text of Article 5, paragraph 6, of the Consolidated Immigration Act.<sup>52</sup>

But it is precisely the second mentioned innovation that severely limits the potential application of special protection as a regularisation mechanism. Indeed, if it is always possible to give relevance to the work of foreign nationals within the framework of Article 35 of the Constitution or the framework of private and family life; it is clear that the limitation of the channels of access to this form of protection marks a significant deterrent to the request for its recognition. At the theoretical level, various interpretations have been suggested in support of the possibility of still applying directly to the *Questore* for special protection,<sup>53</sup> but it cannot be forgotten that, in the previous legal framework, Italian administrations applied a restrictive interpretation of Article 19, paragraph 1.2, eventually preventing foreign nationals from applying directly to the *Questore* to get the recognition of the special protection, despite the existence of a proper legislative provision.<sup>54</sup> The same is even more likely to happen in the current legal framework, where the expressed provision of a right to apply directly to the *Questore* is not included.

Moreover, the contextual reform of expulsion rules<sup>55</sup> exposes those migrants wishing to apply for special protection to a real risk of expulsion, making it more dangerous for them to submit any request to the Italian administrations.

But these are just a few examples of circumstances which may constitute a deterrent to a practical application of the interpretations supporting the possibility of applying to the *Questore* for a special protection permit.

Lastly, the Cutro Decree has also limited the length of the special protection permit, together with the possibility of renewing or changing it for a work permit.<sup>56</sup> Therefore, even if foreign nationals manage to obtain special protection, it cannot be ignored that any regularization obtained through this instrument would be much less effective than in the past.

As a result, after the 2020 reform, if special protection could be a way of overcoming the limitations of the Relaunch Decree, following the Cutro Decree special protection became

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<sup>52</sup> Please see nt. (40).

<sup>53</sup> ASGI, *La riforma della protezione speciale a seguito del D.L. n. 20 del 10 marzo 2023 e le modifiche in materia di conversione di tale permesso e di quelli per cure mediche e calamità*, June 2023, 7, available at <https://www.asgi.it/wp-content/uploads/2023/06/1-Scheda-su-riforma-della-protezione-speciale-DEF.pdf>; Zorzella N., *La riforma 2023 della protezione speciale: eterogenesi dei fini?*, in *Questione Giustizia*, 3, 2023, 83, available at [https://www.questionegiustizia.it/data/rivista/articoli/1112/3\\_2023\\_qg\\_zorzella.pdf](https://www.questionegiustizia.it/data/rivista/articoli/1112/3_2023_qg_zorzella.pdf); Morozzo della Rocca P., *La protezione umanitaria in Italia, a seguito della 'mutilazione' della protezione speciale*, in *Diritti umani e diritto internazionale*, 17, 3, 2023, 564 ff, doi: 10.12829/109407.

<sup>54</sup> Zorzella N., nt. (45), 140.

<sup>55</sup> See Savio G., *Le (apparentemente) minime modifiche alle disposizioni in materia di espulsioni apportate dal dl n. 20/2023*, in *Questione Giustizia*, 3, 2023, 98-100, available at: [https://www.questionegiustizia.it/data/rivista/articoli/1110/3\\_2023\\_qg\\_savio.pdf](https://www.questionegiustizia.it/data/rivista/articoli/1110/3_2023_qg_savio.pdf).

<sup>56</sup> See ASGI, nt. (53), 9 ff.

another missed opportunity to provide an effective and individualised channel to regularise undocumented foreign nationals who are living and working in our country.

It is to be hoped that the Constitutional Court shall intervene to uphold the unconstitutionality of many aspects of this reform. In the meantime, however, people who until recently would have enjoyed special protection will instead be confined to the margins of their own invisibility, even though they live and work in Italy and their private lives are established here.

In other words, a shipwreck has represented the political opportunity to increase migrants invisibility and vulnerability, rather than to rethink immigration policies.

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