For the kind attention
Of the members of the Senate's Commission on Constitutional Affairs

Of the members of the Senate's Justice Commission

F.A.O the members of the parliamentary Commission on childhood

27 October 2008

Subject: Observations about the amendments to draft law A.S. 733 concerning foreign unaccompanied minors who are EU country nationals

1) Issuing of residence permits to unaccompanied foreign minors when they come of age

Amendment 18.22 to draft law A.S. 733 modifies points 1 and 1-bis of art. 32 of Single Text no. 286/98 [on immigration and the status of foreigners]. As a consequence of this amendment, the issuing of a residence permit to the minor unaccompanied foreigner who turns 18 years of age would only be possible on condition that, simultaneously (and no longer alternatively), the following requirements are met, namely that the minor a) is entrusted under the terms of law no. 184/1983 or placed under care and b) entered Italy at least 3 years earlier and has participated in an integration project for at least 2 years.

Hence, a residence permit could no longer be issued to minors who, although they have been entrusted or placed under care, entered Italy after having turned 15 years old and/or are unable to demonstrate that they have taken part in an integration project for at least 2 years. These children, even in cases in which they are enrolled in school or have an employment contract, would be expelled when they come of age or they would stay in Italy as irregular foreigners.

The exclusion of unaccompanied minors who have entered after having turned 15 years old from the possibility of obtaining a residence permit when they come of age would introduce a **disparity of treatment** between foreign minors present in Italy that does not find a reasonable basis in the rinciples of the Italian legal system, constituting a violation of the principle of non-discrimination established by art. 3 of our Constitution and by art. 2 of the UN Convention on the rights of infancy and adolescence.

Moreover, the effects of such a normative modification would be extremely negative, both with regards to the safeguard of minors' rights and to the very goals of promoting security that the Government seeks to pursue.

In fact, the exclusion of unaccompanied minors who have entered Italy after their 15th birthday from any prospect of legal insertion **would discourage these youths from emerging and from following an integration project**. If the proposed norm will come into force, these minors will be aware of the fact that, even if they undergo a schooling programme with dedication, they will nonetheless be unable to obtain a residence permit when they come of age and will become expellable: hence, they will be made to remain in illegality, outside of the reception circuit, forced to live in absolutely inadequate housing conditions (in the streets, in shacks, in abandoned factories, etc.), they will not go to school, nor will they have access to health and social services, and they will very easily end up being exploited in illegal employment, begging, illegal activities or minors' prostitution.

The practical consequences of such a provision would thus entail some serious **violations of the rights** recognised by the UN Convention on the rights of infancy and adolescence to all minors who are on Italian territory, regardless of nationality and their position with regards to residence (art. 2 of the Convention): the rights to reception, education, health and protection from exploitation and, more generally, to the principle on the basis of which the superior interest of the minor must be a prevalent consideration in any decision concerning minors (art. 3 of the Convention).

Furthermore, such a normative modification would have very negative effects, not only with regards to the safeguard of minors' rights, but also for Italian society, as it would be very likely that there would be an increase in the number of minors who are exploited or used for **illegal activities** in any way.

Secondly, the integration processes of all those minors who will have chosen to nonetheless remain in reception communities and to follow projects for insertion into schooling and training, in spite of not fulfilling the requirement of having entered at least three years earlier, would be abruptly interrupted when they come of age: for the Italian State, this would represent an absurd **waste of economic and human resources** invested for the integration of these minors.

Finally, such a norm may constitute an incentive for immigration at an **ever-decreasing age**: if entry into Italy at least 3 years earlier will be a requirement to stay regularly after coming of age, many children and parents may probably be pushed to bring forward their migration before the [children] are 15 years old. According to the testimony of several operators, when such a requirement was introduced by law no. 189/02 and for a certain period the interpretation whereby minors that had entered Italy less than 3 years earlier could not, under any circumstance, obtain a residence permit when they came of age was prevalent, there was in fact a decrease in the average age of those who arrived.

This would have serious consequences with regards to the respect of the safeguard of minors' rights, as finding oneself without one's parents in a foreign country is obviously a source of far more serious detriment for a child that is under 15 years old than for an older child.

The goal of the proposed modification appears to be that of discouraging the entry of unaccompanied minors. However, from available data, it turns out that the number of unaccompanied minors in Italy has not undergone considerable variations in the last decade, in spite of modifications in a direction that has been more or less restrictive of norms and of practices concerning the issuing of residence permits when they turn 18 years old: between the periods when the issuing of residence permits when they come of age was substantially blocked and the times when a less restrictive interpretation of the law has prevailed, significant changes in the numbers of unaccompanied minors that arrived in our country were not recorded[1].

From the experience of these years, it is now clear that such modifications do not have as much impact on the choice of whether to emigrate to Italy or not, but rather, on the age at which they leave and particularly on their trajectory in Italy. Should the proposed norm be approved, there will probably **not be a real decrease in the number of unaccompanied minors** that will arrive in Italy, but a lowering of the average age will be recorded, with a higher proportion of minors who are under-15s among the new arrivals. Also, most of all, there will be a large increase in the number of minors who will remain underground, exploited in circuits of marginality and illegality, and without access to those rights (to reception, to health, to education, etc.) that the UN Convention recognises to all minors.

[1] The data provided by the Committee on foreign minors concerning the number of unaccompanied foreign minors present in Italy, at the end of each year that was taken into account, was the following:

Year	2000	2001	2002	2003	2004	2005	2006
N. ufms	8,307	8,146	7,040	8,194	8,100	7,583	6,453

(ANCI, *Minori stranieri non accompagnati - Secondo Rapporto 2007*, Rome, 2008)

Therefore, we hope that amendment 18.22 will not be approved, and that the provisions that are laid out in art. 32 of Single Text no. 286/98 be fully applied, in accordance with jurisprudence in the field by the Constitutional Court and the State Council.

2) Assisted repatriation of foreign unaccompanied minors from EU countries

Amendment 18.0.100 to draft law A.S. 733 envisages the application of provisions concerning assisted repatriation laid out in art. 33, point 2-bis of the Single Text no. 286/98 to unaccompanied minors who are citizens of the European Union who exercise prostitution, hence attributing competence in this field to the Committee for foreign minors.

This provision contravenes what is envisaged by **Regulation (EC) no. 2201/2003** of the Council of 27 November 2003 concerning the competence, recognition and execution of decisions in matrimonial field and on the subject of parental responsibility, that disciplines the field concerning parental responsibility, including the right of custody – defined as the totality of "rights and duties concerning the care of the person of a minor, particularly the right to intervene in the decision regarding their place of residence" – and the placement of the minor in a foster family or in an institute (arts. 1 and 2). The Regulation also sets specific provisions on the matter of the return of the minor in cases of unlawful transfer or failure to return (art. 11).

As established by art. 8 of the Regulation, the competence to adopt decisions on the matter of parental responsibility (including decisions on the matter of the minors' return) is attributed to a jurisdictional authority. On the basis of the criteria of vicinity, the Regulation establishes that **the competent jurisdictional authority is generally that of the State of habitual residence** (a concept that is not defined by the Regulation, but must be determined by the judge on a case-by-case basis in the concrete case on the basis of factual elements), except for provisions laid out in articles 9, 10 and 12.

The provision that generically attributes competence on the repatriation of unaccompanied minors who are citizens of EU countries and practise prostitution to the Committee for foreign minors is, hence, obviously contrary to what is envisaged in EC Regulation no. 2201/2003 because, in cases in which the minor's State of habitual residence is another EU member State, the competence will generally be (apart from exceptions envisaged in the Regulation itself) under the jurisdictional authority of that State, and not of Italy: for example, in the case of a minor who is habitually resident in Romania, it will be up to the **Romanian jurisdictional authority** to decide about the return of the minor him/herself.

Granted that the Regulation, as it is a Community norm, cannot be derogated by ordinary legislation, the provision in question must be deemed unlawful.

Therefore, we hope that amendment 18.0.100 will not be approved, and that Regulation (EC) no. 2201/2003 will be fully applied.

[unofficial translation by Statewatch]

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