



Progetto “Orientarsi nella nebbia” Finanziato da Regione Lombardia

Pathways to citizenship

Card 1

LEGAL FRAMEWORK AND STAKEHOLDERS (INSTITUTIONAL AND NON-INSTITUTIONAL) INVOLVED

This sheet has been elaborated on the basis of what was said by the lawyer Alberto Guariso in the video conference held on 04.09.2021 within the training course provided by the project "Orientarsi nella nebbia" and the document "Stranieri e accesso alle prestazioni sociali e servizi" edited by Alberto Guariso and the ASGI Antidiscrimination Service.

The issue of foreign nationals' access to social security benefits and services is one of the most sensitive issues in immigration law.

There are two broad approaches to equal participation in welfare for foreign nationals:

- The first one considers that the 'guest' cannot be entitled to equal participation in welfare with the 'hosts', who would have a right of precedence over public intervention;
- The second is the one that affirms the **universality of rights** and thus aims at a wider equality.

The debate thus involves the very notion of citizenship and should take into account that the legal system now knows a real notion of "**second citizenship**", understood as "*participation of legally resident foreigners in a community of rights, broader and more inclusive than that based on citizenship in the strict sense*" according to the notion adopted by Cass. sez.unite 20661/14 on the subject of foreigners' access to civil service¹.

This "second citizenship" groups together all those who, sharing the fate of a territory by the mere fact of living there, are bound together by bonds of rights and duties, including therefore the duty of

¹ Judgment of the Court of Cassation, unified section 20661/14

- "The defence of the homeland is a sacred duty of **the citizen**" Article 52 of the Constitution.
- The ban on access to community service "*precludes legally resident non-citizens from the full enjoyment of their freedom and equality, which is **to be understood as a vehicle for belonging in the ethical sense of being together in our community, for welcoming and building social relationships and links between people in a perspective of solidarity, peace and openness to confrontation, within a pluralistic coexistence***".
- The participation of **legally resident** foreigners in a **community of rights that is broader and more inclusive than that based on citizenship in the strict sense of the term**, presupposes that they too, without discrimination on the grounds of nationality, are legitimised, on a voluntary basis, to return a commitment of service in favour of that same community, experiencing the inclusive potential that arises from the dimension of solidarity and responsible action in favour of others and **in defence of the values enshrined in the Republican Charter**.



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solidarity under Article 2 of the Constitution and the right to be helped in need under Article 38 of the Constitution.

The Constitutional Court reaffirmed this concept in two judgments: Corte Cost. 172/1999² and Const. 119/2015 . Const. 119/2015³ .

THE PRINCIPLE OF EQUAL TREATMENT BETWEEN ITALIAN AND FOREIGN CITIZENS IN THE CURRENT LEGAL FRAMEWORK

There are three fundamental texts in which to place the equal treatment of Italian and foreign citizens: the Italian Constitution, the Charter of Fundamental Rights of the European Union and the Consolidation Act on Immigration.

1. Italian Constitution

Article 2 recognises the inviolable rights of **man** and **not of the citizen**. Therefore, rights are not linked to the possession of citizenship.

- **Art. 2** The Republic recognises and guarantees the inviolable rights of **man**, both as an individual and in the social groups where his personality takes place, and requires the fulfillment of the mandatory duties of political, economic and social solidarity.

Article 3 refers to 'citizens', but case law has for many years stated that the term 'citizens' means all those who belong to the territorial community.

- **Art. 3** All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.

² Constitutional Court ruling 172/1999

- There is a "*community of rights and duties, broader and more comprehensive than that based on the criterion of citizenship in the strict sense of the word, which welcomes and unites all those who, **almost as in a second citizenship, receive rights and return duties**, according to what emerges from Article 2 of the Constitution where, speaking of inviolable human rights and requiring the fulfillment of the corresponding duties of solidarity, it completely disregards, precisely, the strict link of citizenship.*

³ Constitutional Court ruling 119/2015

- *The activity of social commitment that the person is called upon to carry out in the context of community service must be included among the founding values of the legal system, recognised, together with the inviolable rights of man, as the basis of social coexistence as set out in the legislation of the Constitutional Treaty*
- *The enjoyment of 'the **rights in civil matters** attributed to the Italian citizen' is recognised for foreigners legally residing in the territory of the State*



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There are other articles that talk about the protection of rights without referring to the citizen (Art. 10, Art. 31, Art. 32, Art. 35).

- **ART. 10.** (...) The legal status of foreigners is regulated by law in accordance with international regulations and treaties.
- **ART. 31.** The Republic facilitates through economic measures and other provisions the formation of **the family** and the fulfillment of its duties, with particular regard to large families. It protects **motherhood**, childhood and youth, encouraging the institutions necessary for this purpose.
- **ART. 32.** The Republic protects **health** as a fundamental right of the individual and an interest of the community, and guarantees free care to the indigent.
- **ART. 35.** The Republic protects **work** in all its forms and applications.

Thus, the benefits provided in Article 31 are for all *families* and protection is for *all mothers*, just as everyone is entitled to health and employment protection (Articles 32 and 33).

In Article 38, reference is again made to the citizen and the reintroduction of this term poses some problems with regard to the issue of equal treatment of foreign nationals.

- **ART. 38.** Every **citizen** unable to work and without the necessary means to live has the right to maintenance and social assistance. **Workers** have the right to be provided and insured with adequate means for their living needs in the event of injury, illness, invalidity and old age, involuntary unemployment.

2. Charter of Fundamental Rights of the European Union

Article 1 of the European Charter, which can be defined as the Constitution at European level, says:

- **Article 1** Human dignity Human dignity is inviolable. It must be respected and protected.

So the concept of dignity must be the basis of any reasoning. Dignity also means living well and therefore having minimum social rights. Dignity is not only due to citizens but also to "fellow citizens", i.e. all those who are part of the first and second citizenships.

3. Consolidation Act on Immigration (Legislative Decree 286/98)

The Consolidated Immigration Act had a strongly equal footing, enshrined in Article 2.

Paragraph 1 of Article 2 recognises *the fundamental rights of the human person to the foreigner*, and it is the Constitution that guarantees this coverage.

Paragraph 1: *A foreigner, however present at the border or in the territory of the State, shall be recognised as having the fundamental human rights provided for by the rules of domestic law, the international conventions in force and the generally recognised principles of international law.*



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Subsequent articles of the Consolidated Act specify certain fundamental rights that must also be guaranteed to foreigners without a residence permit; for example:

- **Right to health** Article 35 guarantees health care to foreigners who are not registered with the National Health Service (therefore also to those without a residence permit) and lists a number of services (including vaccinations);
- **Right to education** Article 38 guarantees the right to education for minors present on the territory (therefore also for those without a residence permit);

In addition, Constitutional Court sentence 245/2011 guaranteed the right to marry to irregular foreigners in the territory, as a fundamental personal right, and European Directive 2009/52 guarantees (Art. 13) the obligation of Member States to allow irregular foreigners to take legal action to enforce their labour rights.

Paragraph 2 of Article 2 affirms a broader equality, which concerns not only fundamental rights, but all "civil rights" (and therefore also social rights), but which is nevertheless conditional on the regularity of residence: therefore, the principle of equality always applies to legal foreigners in any sphere of social life, **unless the law provides otherwise**.

Paragraph 2: *A foreigner residing legally in the territory of the State shall enjoy the rights in civil matters attributed to an Italian citizen, unless the international conventions in force for Italy and the present Consolidated Text provide otherwise. In cases where the present Consolidated Act or international conventions provide for reciprocity, this shall be ascertained in accordance with the criteria and modalities laid down by the implementing regulation.*

Paragraph 3 of Article 2 has essentially the same content as paragraph 2, but refers it to workers, guaranteeing equality to foreign workers and their families in implementation of OIL Convention 143/75.

Paragraph 3: *The Italian Republic, in implementation of OIL Convention No. 143 of 24 June 1975, ratified by Law No. 158 of 10 April 1981, guarantees all foreign workers legally residing in its territory and their families equal treatment and full equality of rights with respect to Italian workers.*

Paragraph 5 of Article 2 recognises equal treatment with regard to judicial protection and relations with the public administration (i.e. procedures for obtaining a document, etc.).

Paragraph 5 *Foreigners shall be accorded equal treatment with citizens in relation to the judicial protection of their rights and legitimate interests, in relations with the public administration and in access to public services, within the limits and in the manner laid down by law.*

&&&



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Let us therefore see if and when the equal treatment of legal residents in the field of "civil rights" guaranteed by Article 2(2) can be considered derogated or not derogated from by other provisions of the same Consolidated Act or other laws.

There are many cases, but let's take two examples:

- The "civil right" (and constitutional right: cfr. Art. 120 of the Constitution) to mobility **has no limitations**, so everyone should be able to move freely within the national territory. However, social benefits (access to social housing, social contributions, etc.) are often conditional on long-term residence (5 years, 3 years or other) in a given region or place. This constitutes an indirect obstacle to mobility because it disadvantages those who move with respect to those who do not migrate from one part of Italy to another: and since statistics tell us that foreigners move more than Italians (the internal mobility rate of foreigners is double that of Italians) these requirements, even if they apply to everyone, indirectly disadvantage foreigners more. This issue is usually defined with the theme of "territorial rootedness" for the purposes of access to a benefit and on the principle of territorial rootedness the Constitutional Court has sometimes made conflicting statements⁴. But we will come back to this issue later.
- In other cases, the requirement of long residence concerns the presence on the national territory (10 years for the citizenship income, 10 years for the social allowance, 2 years for the new universal child allowance) and also in this case the equality of treatment is not respected because while the Italian, except for limited cases of returning emigrants, is resident in Italy since birth, the migrant is obviously not.
- The 'civil right' to equal treatment in the stipulation of contracts **knows no limitations**; everyone must have the same opportunity to enter into a given contract, i.e. they must not be excluded **beforehand** because of a personal characteristic (such as nationality or ethnicity). So in Italy you cannot communicate to the public:
 - «rent only to italians»
 - «I only open current accounts for Italians».
 - «I offer cheaper car insurance if you are Italian».
 - «Italian workers wanted» (there are, however, restrictions on access to public employment)

⁴ Two judgments of the Constitutional Court with conflicting statements on territorial roots are reported.

- Corte Cost. 40/11; 2/13) "... **the requirement of prolonged residence** *does not comply with the principles of reasonableness and equality, inasmuch as it introduces arbitrary elements of distinction into the regulatory framework, there being no reasonable correlation between the duration of residence and the situations of need or hardship, directly referable to the person as such, which constitute the prerequisite for eligibility for the benefits in question*".
- (Corte Cost. 222/13) "the legislature's aim is to enhance, with measures exceeding the essential levels of services, **the contribution offered to the community by the family unit**, with adequate constancy, so that it is not manifestly unreasonable to direct its efforts in favour of units that have already been active for an appreciable length of time, and are therefore themselves **vital parts of the community**."



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In the case of **social rights**, the situation is more complicated. The general rule is still the equality provided for in the former Art. 2, c. 2 of the Consolidated Act, but a first limitation was introduced in 1998 with Art. 41 of the Consolidated Act: only foreigners with a residence permit of at least one year are entitled to equal treatment in economic social assistance. This limitation, however, has a very limited effect because there are very few residence permits that last less than a year, so if we base ourselves on this provision, we can say that equal treatment has been achieved.

Also because the same principle of equality is confirmed by **Law no. 328 of 8 November 2000 - Framework law for the implementation of the integrated system of interventions and social services**, which is still in force. In fact, art. 2, paragraph 1 provides that *"the right to use the services of the integrated system of interventions and social services is enjoyed by Italian citizens and, in compliance with international agreements, with the modalities and within the limits defined by regional laws, also by citizens of States belonging to the European Union and their family members, as well as by foreigners, identified pursuant to art. 41 of Legislative Decree 286/98..."*.

For access to public housing, the rule is different: Art. 40, par. 6 of the Consolidated Act provides that the right to access public housing is granted to *"legally residing foreigners who have a residence permit valid for at least two years and are regularly employed"*.

Unfortunately, one month after the approval of Law no. 328 of 8.11.2000, **Law no. 388 of 23.12.2000** was approved. Unfortunately, one month after the approval of Law no. 328 of 8 November 2000, Law no. 388 of 23 December 2000 was passed, Article 80 of which states: *"pursuant to Article 41 of Legislative Decree no. 286/98, social allowances and economic benefits constituting subjective rights under current legislation on social services are granted, under the conditions laid down by the same legislation, to foreigners who hold a residence card; for other social services and benefits, equivalence with Italian citizens is allowed in favour of foreigners who hold at least a residence permit valid for at least one year"*.

Therefore, Law 388/00, contradicts Art. 41 of the Consolidated Act, introduced a much more restrictive rule: only foreigners who have a residence card (now called Long-Term Residence Permit - PSLP) can access social benefits.

The issue came before the Constitutional Court, which ruled that:

- It is unreasonable (and therefore unconstitutional) for an income support benefit to be conditional on a residence permit that in turn presupposes an income (**Corte Cost. 306/08 and 11/09**). In fact, we recall that the PSLP requires a minimum income and suitable housing, in addition to 5 years of residence.
- **Any limitation** (even of long-term residence) in the enjoyment of **social rights** aimed at meeting the **essential needs of the person is unconstitutional** (e.g. **Const. 187/10**).

What are the essential social rights that cannot be restricted?

The Constitutional Court offers some definitions in its judgments:

- *"Provisions intended to provide for the support of the person"* (Corte Cost. 187/10 - disability allowance)



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- *"Values of essential importance, such as ... the protection of health, the need for solidarity with respect to conditions of high social hardship, the duty of care for families"* (Corte Cost. 40/13 - accompaniment allowance and disability pension)
- *"Provisions intended to support the person and to safeguard acceptable living conditions"* (Corte Cost. 22/15 - indemnity for the blind and 230/15 - indemnity for the deaf)

Therefore, to date, and as a result of the Court's rulings and despite the fact that the law has not been amended, the following disability benefits are granted to anyone with a residence permit of at least one year:

- CIVIL INVALIDITY PENSION FOR THE DEAF AND COMMUNICATION ALLOWANCE (JUDGMENT 230/15)
- ACCOMPANIMENT ALLOWANCE FOR BLIND TWENTY-SOMETHING (22/15)
- CIVIL DISABILITY PENSION AND ACCOMPANIMENT ALLOWANCE (40/13)
- ATTENDANCE ALLOWANCE FOR DISABLED CHILDREN (329/11)
- MONTHLY DISABILITY ALLOWANCE (187/10)

They remain outside the core of essential social rights and therefore remain (for the time being) subject to the PSLP requirement:

- social allowance (Constitutional Court ruling 50/19) for which, in addition to the PSLP, residence for 10 years is also required;
- citizenship income (DL 4/19): same requirements as above;
- all family benefits, for which PSLP is required **until 31.12.2021**;
- foreigners in an irregular situation.

However, European directives have intervened in this situation (see below).

A different issue is that of the residency requirements provided for both Italians and foreigners, which - as we have already said - put foreign citizens at a much greater disadvantage. On this point, the Constitutional Court, at least until sentence no. 44 of 2020, was oriented in the sense of considering that it was possible to require a "non-episodic" residence in the territory (without specific indications of duration) and therefore a certain "territorial rootedness" as long as there was no distinction between Italians and foreigners.

The Constitutional Court's ruling no. 44 of 9 March 2020 changed the approach because it affirmed the **principle of the absolute centrality of need** over any other criterion for selecting beneficiaries.

In fact, by declaring unconstitutional the requirement of five years of continuous residence or work (for Italians and foreigners) in the Lombardy Region for access to public housing, the Court affirmed two important principles:

- The reference only to previous residence (or only to previous work in the Region) does not provide any real prognosis as to the future stability of the person concerned (who could well move shortly after the assignment even if he has been resident for 5 years) and therefore does



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not justify the exclusion of persons who, although present for a shorter period, might in fact be more in need.

- In any case, any assessment of territorial roots (even if it were admissible) must always be subordinate to the criterion of need, on which any welfare intervention must be based. On the other hand, previous residence is not *'indicative of any relevant condition in relation to the need that the service tends to satisfy'*.

This orientation was subsequently confirmed by the Constitutional Court in its **sentence 7/2021**, which declared illegitimate the requirement of five years' residence for access to a measure to combat poverty, and in its **sentence 9/2021**, which declared unconstitutional two regulations of the Abruzzo Region concerning access to public housing. The first required only foreigners to present additional documents from their country of origin in order to gain access to housing, and the second provided for an 'overestimation' of previous years of residence in the formation of rankings for council housing

Social rights of persons enjoying international protection

The holder of international protection (refugee or subsidiary protection) always has a residence permit of at least one year and therefore the rule of Art. 41 applies to him. In addition, the European Directive 2011/95 provides that the holder of international protection is entitled to the same social benefits as the national of the host State; therefore - even if the permit is of a shorter duration - the right exists under the European rule.

The legislator, in passing the citizenship income law, "forgot" to include holders of international protection. However, the Inps, knowing that the European directive exists (and in order to avoid lawsuits), included these people in the list of those who can apply for citizenship income. However, there is still the requirement of 10 years of residence, which protection holders often do not have.

The same problem exists for the new universal child benefit that will come into force in January 2022: here too, the legislator has 'forgotten' protection holders.

Social benefits for holders of residence permits for asylum seekers

Asylum seekers are not entitled to social benefits because their permit is valid for less than a year (usually 6 months). However, they are entitled to be included in the reception system which (in theory) should make it unnecessary to obtain other social benefits. They are also entitled to registration (Constitutional Court sentence 186/2020) and health care (art. 34 TU).

Social benefits for holders of residence permits for special protection

Holders of former humanitarian protection, now special protection, are entitled to social benefits because their permit must be valid for more than one year.

THE COMPATIBILITY OF ITALIAN LAW WITH EU LAW

The issue of foreigners' access to social benefits is also regulated by several European directives: the most important, from the point of view of the number of foreigners involved, are Directive 2003/109/EC, which concerns PSLP holders, and Directive 2011/98, which concerns all those who have a residence permit allowing them to work (i.e. the **single work permit, which** includes permits for work, pending employment and family).



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Both oblige Italy to ensure equal treatment in social benefits, but allow for certain limitations.

Italy (after many lawsuits) implemented Directive 2003/109 so that today, as we have seen, PSLP holders are entitled to practically all social benefits. However, it has not implemented Directive 2011/98 and this has led to many problems and lawsuits, thanks to which the issue is now being resolved.

Article 12 of Directive 2011/98/EU provides that all those who have a **single work permit** (which is the wording now written on the back of electronic residence permits) benefit from the same treatment as nationals of the Member State in which they reside. Therefore, Article 41 of the Consolidated Act should be amended to comply with Directive 2011/98. Let us therefore briefly summarize the terms of the issue.

Art 12 Directive 2011/98/EU

"Workers referred to in Article 3(1)(b) (third-country nationals who have been admitted to a Member State for purposes other than work.... who are allowed to work)(c) (third-country nationals who have been admitted to a Member State for the purpose of work) shall enjoy equal treatment with the nationals of the Member State of residence as regards:

(a) working conditions, including pay and dismissal as well as health and safety at work;

e) the social security branches as defined by Regulation EC 883/84

(g) access to and supply of goods and services available to the public, **including procedures for obtaining housing**, in accordance with national law, without prejudice to freedom of contract in accordance with EU and national law;

All family benefits fall under the aforementioned Regulation 883/84 and therefore for **all** family benefits, holders of single work permits must be guaranteed full equality of treatment (Member States are, however, allowed to exclude from equality of treatment those who have a permit of less than 6 months, but as we know in Italy there are no permits of such short duration). Some Italian benefits have already been examined by the European Court of Justice, which has confirmed the incompatibility of the Italian rules with Directive 2011/98, which means that the Italian law can no longer be applied.

The services for which this contrast exists are as follows:

- **ALLOWANCE FOR LARGE FAMILIES** (with at least 3 children) - it is granted by INPS - the application must be made to the Municipality of residence by 31.1 of the year following the year in which the right accrues - the law recognises it only to holders of PSLP but according to the sentence of the European Court *Martinez Silva* 21.6.2017 C - 449/16 it must also be recognised to holders of a single work permit.
- **BASE MATERNITY ALLOWANCE** (for unemployed mothers) is granted by INPS, but the application must be made to the Municipality of residence within one year from the birth - the law recognises it only to PSLP holders, but according to the European Court ruling 2.9.2021 C-350/20 it must also be recognised to holders of a single work permit.



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- **NATALITY ALLOWANCE (BONUS. BABY)** - monthly sum up to 1 year of age of the child - must be applied for at INPS within 90 days of the birth - if applied for afterwards, only the monthly payments from the application to the 1 year of age are obtained, therefore after the year of birth it cannot be applied for anymore - situation is identical to the basic maternity allowance: the law recognises it only to PSLP holders, but according to the European Court ruling 2.9.2021 C-350/20 it must also be recognised to holders of a single work permit.
- **BIRTH AWARD** - one-off sum paid by INPS - must be requested from INPS within one year of birth - the law does not set limits, but INPS used to recognise it only to PSLP holders - after a ruling by the Milan Court of Appeal it is now being recognised to all foreigners.
- **NURSERY BONUS** - It is a partial reimbursement of the net paid for the NURSERY BONUS - a DPCM limited it to PSLP holders only, but according to a sentence of the Court of Appeal of Milan, INPS is now recognising it to all foreigners - you have to pay in advance to the NURSERY BONUS (public or private) and then you get the reimbursement, commensurate to the family income, up to 3,500 euros per year.
- **FAMILY CARD** - It is only a card that allows you to obtain discounts in affiliated shops - the law recognised it only to Italian or European citizens but the European Court, with the sentence 28.10.2021 C -462/2020, established that it must be recognised also to foreigners holding a PSLP and holders of a single work permit.

Unfortunately, on the INPS website the information is still incorrect and many patronage offices do not allow foreigners who do not have the PSLP to apply. If the portal does not allow you to submit the application in the absence of the PSLP, **you must not force the system to "click" as if you had the PSLP** but the application must be submitted by pec or registered mail.

FAMILY ALLOWANCES (ANF)

As far as Family Allowances are concerned, there is no restriction on possession of the EU long-term resident PS: all workers, unemployment benefit (NASPI) holders and pensioners are entitled to them.

However, while the Italian applicant can include in his household the child or spouse residing abroad (thus increasing the amount of the allowance) foreigners could not do so and could only include them in the household if they were resident in Italy. The Court of Justice of the EU stated that this difference in treatment is not compatible with EU law (25.11.2020).

Therefore, a foreigner who has a single work permit or a PSLP can now apply to the INPS to obtain the allowance, including the spouse and minor children who have remained in the country; arrears can also be requested, within the limit of 5 years counted from the date of the application (e.g. application 1.12.2021 - allowances can be requested from 1.12.2016).

THE NEW 'UNIVERSAL SINGLE CHEQUE'.

From January 2022, the Universal Single Allowance (monthly amount modulated according to family income) replaces all family benefits (except for the crèche bonus and the family card).



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Foreign nationals are no longer required to have a PSLP for this benefit. A regulation has been introduced that is certainly an improvement in the past, but which still has its shortcomings. In particular:

- It is sufficient to have a single work permit (family, work, pending employment) of at least 6 months
- You must have been resident in Italy for at least two years, but if you have an open-ended or fixed-term employment contract of at least six months, there is no residency requirement.

For the time being, therefore, holders of international and special protection and holders of permits for self-employment are excluded. But it is hoped that before the deadline for applications expires, INPS will remedy these errors. If this does not happen, it will be necessary to go back to the Courts.