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## ITALIAN SUPREME COURT, ANNUAL REPORT 2022 SELECTED CASE-LAW

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### Abstract

*The annual report of the Italian Court of Cassation on the 2022 judicial activity does highlight how indissolubly domestic and European jurisprudence interact and relate between each other. The constant dialogue with the courts of Strasbourg and Luxembourg is evident in their application and interpretation of the law, increasingly adhering to the principles contained in the ECHR and the Charter of Nice. Nevertheless, this is a path traced over the recent years on the basis of art. 267 TFEU and the so-called 'twin judgments' delivered by the Italian Constitutional Court (nos. 348 and 349 of 2007). The logical consequence of the above orientation is that the Supreme Court – in dealing with cases of crimes of slavery, mistreatment and persecutory acts – was particularly sensitive in the protection of right to life, the respect for private life and the fundamental freedoms. This was indeed affirmed through the transposition and application of the principles expressed in both international and European criminal law. On the grounds of this premise, a selection of measures issued by the Court relating to the above-mentioned issues, by their nature similar to the activities of the observatory.*

### Keywords:

*Court of Justice of the European Union; European Court of Human Rights; International and European criminal law; Italian Court of Cassation; Jurisprudential Dialogue*

### **Judg. Sec. 5, 17095 - Labour exploitation; Art. 4 ECHR**

The subject matter of the judgment is the analysis of an association aimed at the exploitation of labour. According to the dispute, the association operated through a actual reduction in slavery of non-EU irregular workers. These were forced to work in the fields for ten/twelve hours a day, without weekly rest and as undeclared workers, also reduced to living in abandoned and dilapidated farmhouses. The Court examined, in particular, Art. 600 of the Italian Criminal Code. The Court held the interpretative guidelines of legitimacy and caselaw of the Court of Strasbourg which, with reference to Art. 4 ECHR, favored an evolutionary interpretation of the literal provision, inspired by the definitions of international conventions and European Union law, Art. 4 is today an essential instrument for providing protection to the ever-increasing victims suffering from various forms of labour exploitation, often linked to the phenomenon of trafficking in human beings.

In particular, the Court of Cassation pointed out that the ECtHR has come to define concepts of "slavery" and "servitude" consistent with those declined by its own jurisprudence. In particular, the Supreme Court referred to "servitude" as an aggravated form of forced or labour under threat,



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including under Art. 4 ECHR also the definition of trafficking in human beings and situations attributable to the wider phenomenon of labor exploitation. According to the judgment, there are also forms of enslavement carried out on a contractual basis, that is, on the basis of an agreement in which a party – in a situation of considerable economical and/or social weakness – voluntarily becomes subject to the other, by lending their labour force.

**Ord. Sec. 6 . 15143 of 14/01/2022, Rv. 283145 - Private and family life; Best interests of the child**

Following a case where the right of the mother of minor children (in this case a child of about two years) and the harmonisation of European criminal justice systems were examined, the decision forwarded a preliminary ruling pursuant to Art. 267 TFEU. The queries concerned whether or not the applicant should be handed over in execution of an "executive" European arrest warrant (issued by the Prosecutor) to serve a prolonged custodial sentence in the requesting State, and possibly separated from the child. With the referral for a preliminary ruling, the Italian Court of Cassation asked the Court of Justice of the European Union to resolve the following questions: a) if Art. 1, paras. 2 and 3, as well as Arts. 3 and 4 of Framework Decision 2002/584/JHA should be interpreted as they shall not allow the executing judicial authority to refuse or in any event to postpone the surrender of the mother living together with children underage; b) if – in the event of a positive answer to the first question – Art. 1, paras. 2 and 3, and Arts. 3 and 4 of Framework Decision 2002/584/JHA are compatible with Arts. 7 and 24, para. 3, of the Charter of Fundamental Rights of the European Union, also in the light of the caselaw of the European Court of Human Rights in the matter of Art. 8 ECHR *and* the constitutional traditions common to the Member States, in so far as they require the surrender of the mother by severing the bonds with the minor children living together without considering the "best interest of the child".

**Judg. Sec. 6. 29951 of 30/06/2022, Rv. 283615 - prescription of crimes against humanity**

The Court of Cassation, in the wake of the European jurisprudence rendered a decision related to the ECtHR's judgment *Cestaro c. Italia* of 7 April 2015 (Application no. 6884/11). The Italian Supreme Court affirmed, in fact, that crimes against humanity are exempted from prescription, which cannot therefore be invoked as an obstacle to the delivery of justice. Crimes against humanity, in particular, are those that do offend transnational interests and violate *jus cogens* – that is to say the rules of "living law" considered by all States to be universally binding and placed at the top of the international legal system, prevailing over any other rule of law.

**Judg. Sec. 1, 28579 of 17/03/2022, Rv. 283510 - Legitimacy of life imprisonment; Art. 3 ECHR**

The Supreme Court has declared manifestly unfounded the question of constitutional legitimacy of Art. 22 of the Italian Criminal Code, supposedly contrary to Art. 27, para. 3 of the Italian Constitution in relation to Art. 3 ECHR. The aforementioned Art. 22 provides for the application of life



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imprisonment, an “abstract” sanction of a perpetual nature. The question was deemed unfounded by reason of the multifunctional nature of the sanction provided for by Art. 22, which features a purpose of general and special prevention, as well as of security and social rehabilitation. It is also combined with a provision regulating the execution of the sentence, that allows to exclude perpetuity in practice. In the same vein the Court expressed itself in Judg. Sec. 5, no. 20367 of 2022. Both judgments have given account of how – also in the ECtHR caselaw – the sanction of life imprisonment can be deemed compatible with the principles of Art. 3 ECHR wherever national law allows the adult to review the sentence in order to commute, suspend, terminate or grant early release: in particular, the reference was to the Grand Chamber, 9/7/2013, *Vinter c/ United Kingdom* and Second Section, 11/10/2011, *Schuchter c. Italy*).

The ECtHR has indeed established that States Parties are accorded a margin of appreciation in deciding on the appropriate duration of a custodial sentence for particularly serious offences, including perpetual penalties imposed on adult offenders, provided that they are reducible in the sense that the prisoner must be granted some prospect of release. The latter requirement is satisfied by Art. 22 of the Italian Criminal Code, precisely because the article is correlated with criminal execution tools that allow to review the perpetuity of the penalty.

#### **Judg. Sec. 5, 34794 of 2022, Rv. 283673 - Civil action; Art. 6 ECHR**

The judgement opted to extend the right of participation in the trial for an offended person not yet constituted as civil party. Such extension was however limited to the right of obtaining new terms for the valid establishment as the civil party, recalling both the constitutional caselaw and the internal legitimacy and that of the ECHR. It has been pointed out that the Strasbourg judges have admonished the interpreter to consider – albeit tendentially – that in the Italian legal system the position of the offended person in waiting of becoming a civil party does not substantially differ from that of the civil party. This is precisely because of the powers that are recognized both to the civil party and to who intends to become one, as well as for the purposes of the applicability of Art. 6 ECHR and the rules of fair trial. The reference is to a case different from the one under examination but very similar in logic (ECHR judgment, *Arnoldi v. Italy* of 7 December 2017). The Court of Cassation has continued to develop the criteria to arrive at a sentence “conventionally legitimate”, although based on declarations of securities, in line with the established jurisprudence of the Court of Justice (the judgments of 15 December 2011, *Al Khawaja and Tahery c. United Kingdom* and 15 December 2015, *Schatschaachwili c. Germany*), pointing out the peculiarity of the case of pre-trial paper declarations, acquired with the consent of the parties, which, according to Sec. 2, No. 22 of 2022, Rv. 282509, may constitute an “exclusive and decisive” basis for the assessment of liability, regardless of compliance with the “adequate procedural guarantees” indicated by the ECHR, in relation to the thorough examination of the credibility of the accusing contents and the compatibility of the statements with the context data, as this acquisition stems from the renunciation of the parties to the right to examine a witness, which is allowed by Art. 6 of the ECHR, under the only conditions that it is aware, informed



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and unequivocal, is assisted by a minimum of guarantees proportionate to its relevance and is not manifested in conflict with any important public interest.

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*In drawing up the report, the Court decided to devote a paragraph to the rights of the person, from which many interesting insights can be drawn.*

*In particular:*

### **Ord. 23805 - International Protection**

The hereby order established that the notion of religious freedom includes the freedom of the citizen to practice religious beliefs not admitted by the State, without being subjected to intimidation and constraints that, as such, can be configured as acts of persecution, pursuant to Arts. 7 and 8, para. 1, let. b), of Legislative Decree No. 251 of 2007, even when implemented by State authorities or by legislative, administrative, judicial or police measures. In the present case, the Supreme Court annulled a judgment on the merits which had ruled out the existence of religious persecution of a Chinese citizen belonging to the Church of Almighty God. The judgment at the lower level of jurisdiction reasoned on the sole ground that, since the Church of Almighty God is a clandestine and prohibited religious association in China, she could have expressed her religious freedom by adhering to a permitted or non-secret cult.

In fact, in the face of the allegation by the foreign citizen to have suffered persecutory acts because of his/her religious faith, the verification of the existence of the *cd. intrinsic* (or subjective) condition of credibility must be carried out in the context of the so-called *extrinsic* (or objective) condition of the same individual. The extrinsic condition consists of the *actual existence* of persecution of the applicant for manifesting his/her faith. Also by eventually giving course to the duty of cooperation in investigation, such assessment should happen through the verification of the *concrete* treatment carried out by the authorities of the country of belonging against him/her (regardless of the legality of the cult).

### **Ord. 19815 - Expulsion of foreign citizen**

The order at issue ruled that, in accordance with the provisions of Art. 8 ECHR, right to private life, and not only to family life, should be granted with autonomous protection – thus taking into account, for the purpose of the decision on validation, the social relations that the foreign citizen proves to have had on the national territory.

### **Ord. 4562 - illegal detention of migrants**

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The decision affirmed that *unlawful* (administrative) detention at a Centre for the Identification and Expulsion of a foreign national produces damage from *unjust* detention. In fact, unlawful detention results in the violation of a constitutionally guaranteed inviolable right such as personal freedom. It follows that, for the purposes of redress, Art. 315 of the Italian Criminal Procedure Code can be applied. The article is meant for *unjust* detention and can be still used due to the evident analogy between criminal detention and administrative detention for the execution of expulsion, both of which involve deprivation of liberty, as already recognised by the European Court of Human Rights, *Seferovic v. Italy*.

### **Judg. 18626 - Political refugee status**

The Supreme Court quashed the judgment under appeal by a decision on the substance, affirming the principle that the status of political refugee must be granted to the conscientious objector who refuses to perform military service in the State of origin (in this case Ukraine). Specifically, this shall occur at two conditions. The first one requires the recruitment for the international armed conflict taking place throughout the territory to entail a high risk of involvement, including indirect involvement, in the commission of war crimes and crimes against humanity. Secondly, the penal sanction foreseen by the foreign law for the renunciation to the draft has to constitute, in that context, an act of persecution according to Art. 7, para. 2, let. e) of Legislative Decree no. 251 of 2007 and Art. 9, para. 2, let. e), of Directive No. 2004/83/EC, as interpreted by CJEU in the judgment of 26 February 2015 Case C-472/13, *Shepherd v. Germany*. The second requirement can be met regardless of any consideration regarding the proportionality of the penalty.

### **Judg. 5144 - Female genital mutilation practices**

The judgment cleared that the risk of subjection to practices of female genital mutilation (so-called infibulation) is an important element for the granting of humanitarian protection and for the recognition of subsidiary international protection, pursuant to Art. 14, let. b) of Legislative Decree no. 251 of 2007. Female genital mutilation is considered an objectively inhuman and degrading treatment for the person who suffers from it or is likely to do so. In addition, in cases where it is established that the phenomenon is diffusely practiced in the social and cultural context of the country of origin, the conditions for granting refugee status may also exist under Art. 7, lets. a) and f) of Legislative Decree No. 251. According to the Court, the judge must additionally recognize such kind of protection when, as in the present case, the applicant is exposed to the risk of religious persecution for trying to relieve a family member from mutilation.

### **Ord. 20856 - Residence permit; Family unity**

The order maintained that Art. 10 of Legislative Decree No. 30 of 2007 (“*on residence permits for family members of EU citizens who are not nationals of an EU Member State*”) must be interpreted



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in accordance with EU legislation. The latter substantially aims at ensuring the right to family unity. Consequently, when discussing the right of the foreigner to family unity, and therefore the infringement of an actual individual right, the ordinary judge is not evaluating the legal acts *per se*, but instead the individual's relationship. Therefore, following a ritual request before the court, the judge must grant the applicant the right to obtain the residence permit in question if the requirements laid down by law are met – even if there is no specific application towards the administrative authorities to obtain a residence permit in particular. As a general rule, in judgments on international protection, the ordinary court may confer the form of protection which it deems appropriate to the facts annexed by the person concerned. That possibility is also found in the administrative stage of a procedure, on the basis of the active role of investigative cooperation that the various authorities – administrative and judicial – are called upon to play in identifying the type of protection measure to be taken in practice. It might occur a circumstance of not being able to recognize a fundamental and self-determined right, such as the one at issue, unduly excluded by giving priority to mere formalisms.

For a deeper analysis *see*: [2022 Report on the administration of justice](#)

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