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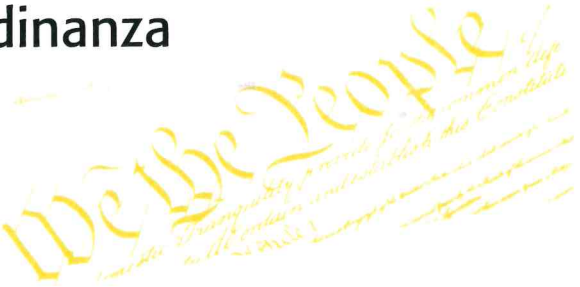

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OSSERVATORIO

PASSATO E PRESENTE

SILVANA SCIARRA

MIGRANTS, CITIZENS AND 'PERSONS' ACCESS TO SOCIAL SECURITY BENEFITS ACCORDING TO THE ITALIAN CONSTITUTIONAL COURT AND THE COURT OF JUSTICE OF THE EUROPEAN UNION*

1. *Market integration and free movement of migrants*

The background to this paper is constituted by some recent decisions of the Court of Justice of the European Union (CJEU). They show a problematic relationship between the principle of free movement of persons and access to social security systems, both for European citizens and third-country nationals. In general, they reveal a growing tension between guarantees for the circulation of migrants and principles of social solidarity, more evident than ever in the aftermath of the economic and financial crisis.

It is well known that freedom to move and reside has been one of the main tools through which the centrality of persons and their rights were asserted in the European Union (EU), especially by the CJEU. In this perspective, equal access to social rights, recognised by national welfare systems, has been viewed as a necessary condition to free movement and to the enforcement of equal treatment among migrants and host states residents.

According to Art. 18 TFEU, every Union citizen may rely on

* A shorter version of this paper in Italian was delivered at the Consiglio di Stato, on the occasion of a meeting held in Rome to celebrate the 60th anniversary of the Rome Treaties: *https://www.cortecostituzionale.it/documenti/interventi_presidente/Sciarra% 20CdS%2026%20maggio%202017.pdf*.

the prohibition of discrimination on grounds of nationality, within the scope of application of EU law *ratione materiae*. The right to move and reside freely within the territory of the Member States is granted to every citizen of the Union (Art. 21 TFUE).

Art. 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) and Art. 4 of Regulation (EC) No. 833/2004 of the European Parliament and of the Council of 29 April 2004 (on the coordination of social security systems) further specify the content of this right.

Nevertheless, limits for accessing social benefits have been progressively introduced in host Member States, in view of accomplishing the integration of migrants, while, at the same time, taking into account national budgetary constraints.

Some rulings delivered by the CJEU can demonstrate this point clearly.

In *Dano*[1] the right to move and reside freely, which applies to family members, is questioned as the basis for granting access to social benefits, in particular child benefit.

Ms. Dano and her son, who was born in Germany, are both Romanian nationals. She moved to Germany to stay with her sister. The Court indulges in a scrupulous description of this migrant, with a view to establishing criteria of integration in the host member state: «she understands German orally and can express herself simply in German», «cannot write in German and her ability to read texts in that language is only limited». The Court emphasises that she «has not been trained in a profession and, to date, has not worked in Germany or Romania»[2]. Furthermore, «there is nothing to indicate that she has looked for a job»[3], though she had been residing in Germany for more than three months. She was «inactive» and therefore she did «not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38»[4] and could not claim the right to access to child benefit.

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[1] Judgment of the Court (Grand Chamber), 11 November 2014, Case C-333/13 *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*.

[2] *Dano*, para. 34.

[3] *Dano*, para. 47.

[4] *Dano*, para. 84.

The right of residence (and of free movement) – the Court argues – must be subject to the conditions set out in Article 7(1) of Directive 2004/38, «intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State»[5], «to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence»[6]. Therefore, a «Member State must […] have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence»[7].

In another case, the CJEU goes even further.

In *Nieto*[8] the Court ruled that there is nothing to prevent benefits of social assistance being refused to nationals of other Member States «who do not have the status of workers or self-employed persons or persons who retain such status during the first three months of residence in the host Member State»[9].

In this case, the Court deals with a Spanish family, described as an "economic unity", since the couple was not married nor engaged in a civil partnership. Ms García-Nieto entered Germany with her daughter and started working. Mr Peña Cuevas and his son moved to Germany and joined his partner. Mr. Peña Cuevas applied to the Employment Centre for subsistence benefits, but the Employment Centre refused to grant those benefits, on account (based on point 1 of the second sentence of Paragraph 7(1) of Book II of the Social Code) of the fact that, at the time of the application, Mr Peña Cuevas and his son had resided in Germany for less than three months and that, moreover, Mr Peña Cuevas did not have the status of worker or self-employed person.

The Court argues that the Union citizen's right of residence on the territory of another Member State, provided by Art. 6 para. 1 of

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[5] Judgment of the Court (Grand Chamber), 21 December 2011, Case C-424/10 and C-425/10, *Tomasz and Barbara Szeja and Others v. Land Berlin*, para. 40.

[6] *Dano*, para. 76.

[7] *Dano*, para. 76.

[8] Judgement of the Court, 25 February 2016, Case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna Garcìa Nieto*.

[9] *Nieto*, para. 52.

Directive 2004/38 for a period of up to three months without any conditions, is retained – as for Art. 14 of the same Directive – «as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State»[10]. Therefore, «the host Member State may refuse to grant persons other than workers, self-employed persons or those who retain that status any social assistance during the first three months of residence». It is «consistent with the objective of maintaining the financial equilibrium of the social assistance system of the Member States pursued by Directive 2004/38». According to the Court, «since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a period of residence of a maximum of three months in their respective territories, it is legitimate not to require those Member States to be responsible for those citizens during that period»[11].

With regard to third country nationals, the general objective of facilitating the integration of third country nationals in Member States, pursued by several directives (such as the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, and the Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents), is even more conditioned by the economic resources of those nationals.

In *Khachab*[12], the issue is family reunification. Here the Court finds that national authorities were correct in rejecting the request of Mr Khachab, a third country national residing in Spain, who applied to the Spanish authorities for a temporary residence permit for his spouse, Ms Aghadar, on grounds of family reunification. The national authority refused Mr Khachab's application on the ground that he had not provided evidence that he had sufficient resources to maintain his family, once reunited. The Court maintains that Member States are to authorise the entry and residence of the sponsor's spouse for the purpose of family reunification, only if «the sponsor has stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse

[10] *Dano*, para. 70; *Nieto*, para. 42; *Ziolkowski*, para. 39.

[11] *Nieto*, para. 45.

[12] Judgment of the Court, 21 April 2016, Case C-558/14, *Mimoun Khachab v. Subdelegación del Gobierno en Álava*.

to the social assistance system of the Member State concerned»[13], according to Art. 7(1)(c) of Directive 2003/86. It means that «Member States are to assess those resources by reference to, *inter alia*, their 'regularity', which entails a periodic analysis of the pattern of those resources»[14] in order «to ensure that, once the family reunification has taken place, neither the sponsor nor the members of his family are likely to become a burden on the social assistance system of the Member State concerned during their period of residence (see, to that effect, judgment in *Chakroun*, C 578/08, EU:C:2010:117, paragraph 46)»[15].

The same concern, namely that non-nationals who are inactive and do not have sufficient financial resources, can become «an unreasonable burden on the social assistance system of the host member State», is expressed by the CJEU in *European Commission v. U.K.*[16].

In this decision the Court finds that there is nothing to prevent, in principle, the grant of social benefits to non-nationals who are not economically active, as long as those citizens fulfil the condition of possessing a right to reside lawfully in the host Member State. This right is subject to a test, which forms an integral part of the conditions for granting the social benefit. According to the Court, this test does not amount to discrimination prohibited under Art. 4 of Regulation (EC) No. 883/2004 of the European Parliament and the Council. The Court finds «not inappropriate for securing the attainment of the objective of protecting public finances of the host Member State» checking whether residence is lawful «when a social benefit is granted in particular to non-nationals who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by the State»[17].

In this perspective lawful residence, connected with requisites to access social benefits, is meant to be a sign of "belonging" to the community of the host State. The emphasis is on sustainability of public spending in order to prioritise the expectations of residents who are economically active.

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[13] *Kachab*, para. 24.

[14] *Kachab*, para. 30.

[15] *Kachab*, para. 39.

[16] Judgment of the Court, 14 June 2016, Case C-308/14, *European Commission v. United Kingdom*.

[17] *European Commission v. United Kingdom*, paras. 85 and 80.

The same point is made in another recent case, *Martinez Silva*[18]. The Court deals with a third-country national, Mrs Martinez Silva, who resides in the municipality of Genoa and is the holder of a single work permit valid for longer than six months. Since she is the mother of three children under 18 and her income is below the limit laid down by Law No. 448/1998, she applied in 2014 to be granted a «cash benefit intended, by means of a public contribution to a family's budget, to alleviate the financial burdens involved in the maintenance of children», which was refused on the ground that she did not have a long-term EC residence permit. Mrs. Martinez Silva thereupon brought a civil action before the *Tribunale* of Genova (District Court, Genoa, Italy) against the Municipality of Genoa and INPS, arguing that the refusal was contrary to Art. 12 of Directive 2011/98/EU of the European Parliament and of the Council, which recognises the right to equal treatment.

Those claims were dismissed. The Court of Appeal of Genoa, before which an appeal was brought, doubted that Art. 65, Law No. 448/1998 was compatible with EU law, as that provision does not allow a third-country national holding a single permit to receive ANF, and is therefore in contrast with the principle of equal treatment set out in Art. 12 of Directive 2011/98. Hence, the question was referred to the CJEU for a preliminary ruling. The Court stated that «it is apparent from Article 12(1)(e), read in conjunction with Article 3(1)(c) of Directive 2011/98, that the equal treatment provided for in the former provision must be enjoyed in particular by third-country nationals who have been admitted to a Member State for the purpose of work in accordance with EU or national law. That is the case of a third-country national holding a single permit within the meaning of Article 2(c) of that directive, since under that provision the permit allows such a national to reside lawfully in the territory of the Member State which has issued it, in order to work there»[19]. Therefore, «a third-country national holding a single permit within the meaning of Article 2(c) of Directive 2011/98 may not be excluded from receiving a benefit such as ANF by such national legislation»[20].

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[18] Judgment of the Court, 21 June 2017, Case C-449/16, *Martinez Silva v. Istituto nazionale della previdenza sociale (INPS) and Comune di Genova*.

[19] *Martinez Silva*, para. 27.

[20] *Martinez Silva*, para. 31.

In other words, the CJEU accepts that there is an "equality issue", whereby third-country nationals cannot be treated differently in applying for the benefits, but only so long as they reside lawfully.

The status of "legal residence" only – both for European citizens and for third-country nationals – would allow access to social benefits under the specific conditions of equal treatment with the nationals of the host Member State. Legal residence is subject to the condition that non-nationals have sufficient means of subsistence, in order to prevent economically inactive citizens – individuals who have not made any contribution to financing the national security schemes – from accessing the host Member States' welfare system (in order to avoid "welfare tourism"), thus becoming an unreasonable burden for the receiving State.

This detailed – albeit incomplete – review of some judgments delivered by the CJEU is meant to provide the main elements of a still developing case law, which has been fiercely criticised, up to the point of arguing that the right to free movement is under attack and social integration of migrants is consequently undermined, as well as the principle of solidarity, which should have accompanied market integration[21].

The case law examined reveals an on going tension underlying the CJEU's attempts to interpret EU principles in the light of growing financial constraints on national welfare states. The Court elaborates on concepts – such as a stable connection with labour markets of the host states and an active search of employment for those who are unemployed – which are not completely new. They are part of a rational approach to active employment policies left to the competence of national legislators, within the framework of common supranational interests.

It is, however, a much more complex matter to apply all such criteria to migrants and to their family members, whenever fundamental rights are at stake. In the following sections some paramount examples of judgments delivered by the Italian Constitutional Court (ICC) will be offered, in order to appreciate a different cultural background, as well as a different legal approach[22].

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[21] See S. Giubboni, 'EU Internal Migration Law and Social Assistance in Times of Crisis', (2016) 16 *Riv. dir. sic. soc.*, 247.

[22] M. Savino, La *Corte Costituzionale e l'immigrazione: quale paradigma?*, in *Per i Sessanta anni della Corte Costituzionale*, Milano 2017, 165 ff. This chapter covers a

2. *Questions of constitutionality raised before the Italian Constitutional Court under different procedures*

Within this picture made of lights and shades, one can appreciate the peculiarity of the case law that the ICC has developed over the years, with regard to access of third-country nationals to social benefits and assistance.

It is worth pointing to the fact that the ICC argued its cases along two procedural lines, which generated two different sets of decisions.

The first set of decisions delivered by the ICC regards cases dealing with litigation among private parties, during which a judge raises the question of constitutionality and addresses the ICC. This is the "place" where, more frequently, the Court elaborates constitutional standards of social protection, intervening on specific benefits to be granted to third-country nationals.

The second one is related to litigation among State and Regions. Such litigation has been growing in correspondence, on one hand, with the gradual expansion of migration towards Italy, to the point that Regions have adopted their own legislation to regulate, in different ways, access of third-country nationals to social benefits. Following the constitutional reform of Title V of the second part of the Constitution (Constitutional Law No. 3/2001), competences to deal with measures of social integration were allocated to the Regions, whereas the State kept the competence for «planning of entry flows and residence of foreigners in the national territory». This allocation of competences generated widespread legal disputes.

The Court decides each single case, in order to verify whether each single regional law is in accordance with the distribution of competences and other principles of the Constitution, while, at the same time, appreciating regional autonomy in the enforcement of regional laws. Furthermore, when state laws are challenged by one of the Regions, the Court must verify whether there are infringements of regional competences, without entering the adjudication on rights.

broader field than access to social security benefits and is part of the proceedings of a conference for the sixtieth anniversary of the Constitutional Court.

A difficulty follows from the fact that the statute on immigration (Legislative Decree No. 286/1998) preceded the 2001 reform of Title V. After that reform, such a statute had to be interpreted in conformity with the Constitution, namely assigning some competences to the State (for example, basic level of care) and others – like social services and education – to the Regions. In practice, all such competences are often strictly connected and offer yet another opportunity to the ICC to adjudicate on rights within an overall perspective[23].

In both sets of cases and in both procedures 'persons' are at the centre of the Court's decisions; they carry with themselves immediate needs, as well as aspirations. Dignity is the value frequently put at the core of the Court's judgments, together with other fundamental rights, such as health and education.

The ICC focuses its attention on "unreasonable" solutions adopted by the legislator, that is solutions establishing a balance of constitutional interests, which patently contrasts with the Constitution. This is a delicate interpretation because the ICC must stay within the borders of its own competence, without impinging on Parliament's discretionary powers.

Furthermore, the ICC never refers to Art. 34 of the Charter of Fundamental Rights of the European Union. The latter recognizes to «everyone residing and moving legally within the European Union» (para. 2) access to "social security benefits and social advantages in accordance with Union Law and national laws and practise". Art. 34 also guarantees «the right to social and housing assistance» «in order to combat social exclusion and poverty» and «to ensure a decent existence for all those who lack sufficient resources» (para. 3). Reluctance to refer to the Charter may reflect the uncertainties of the CJEU's case law in ascertaining its direct effect. Furthermore, Art. 51 clearly indicates that the provisions of the Charter are addressed to Member States only when they are implementing EU law.

In a different context, the Italian Court of Cassation made explicit reference to Art. 34 (para. 3), in a case concerning "collective

[23] See generally F. Biondi Dal Monte, 'Lo stato sociale di fronte alle migrazioni. Diritti sociali, appartenenza e dignità della persona', (2012) 3 *Riv. GdP*, *https://www.gruppodipisa.it/images/rivista/pdf/Francesca_Biondi_Dal_Monte_-_Lo_Stato_sociale_di_fronte_alle_migrazioni_diritti_sociali_appartenenza_e_dignita.pdf*.

discrimination" with regard to third country nationals[24]. In this case foreign long-term residents (as for Art. 65 law n. 48/1998) were denied the family allowance (ANF), because of the lack of Italian or European nationality. In this decision the Court of Cassation adopts the point of view of European law in applying Art. 11 of Directive 2003/109/CE. The family allowance (ANF) has been extended by the Italian legislator (Legislative Decree No. 3/2017) to third-country nationals in possession of a long stay residence permit. The ANF is related to households in a situation of poverty with at least three minor children. As an essential benefit it must be granted to third-country nationals in order to enforce the principle of equal treatment. In this regard, the Court of Cassation refers to the CJEU's ruling *Kamberaj* and points out that, in compliance with Art. 34, para. 3, of the Charter, the right to social assistance in order to guarantee a "decent existence for all those who lack sufficient resources" (para. 3) must be recognised.

In the same decision the Court of Cassation states that collective entities – organizations representing migrants – have a right to lodge complaints in order to prevent "collective discrimination" related to conducts potentially harmful for migrants. With reference to the CJEU's case law, principles of equivalence and effectiveness in the protection of interests must be established.

Before the ICC, within a different scenario, migrants are treated as individuals and as 'persons'. It is worth noting that there is hardly any sign in the facts – those traditionally described before entering the merit of the cases – of the active assistance provided by organizations in defence of their rights. It is well known, though, that in Italy there is no lack of associations carrying legal aid and that civil society is equally generous in providing assistance.

Among the sources invoked before the ICC it is worth noting Art. 14 of the European Convention of Human Rights (ECHR), as interpreted by the Strasbourg Court, which prohibits discrimination in all its forms. Art. 14 – the ICC maintains – has a "relational status", in the sense «that it does not have self-standing significance, but plays an important role in completing the other provisions of the Convention and its protocols, because it provides protection for individuals in analogous situations from discrimination

[24] Cass., Labour Chamber, judgment 11165/2017.

in the enjoyment of the rights guaranteed under other provisions (see most recently *Oršuš and others v. Croatia*, judgment of 16 March 2010)»[25].

Art. 14 ECHR – the violation of which involves Art. 117 para. 1 of the Constitution as well, in accordance with the principles asserted by the Constitutional Court in judgments Nos. 348 and 349 of 2007 – does not stand by itself, but is strictly connected with other provisions to combat discrimination, such as Article 1 of the First Additional Protocol, which the Strasbourg Court itself has held to be associated with the principle referred to above, in matters relating to social security provisions.

The "relational character" of Art. 14 ECHR, moreover, extends to an international level the scope of the prohibition of discriminations based on Art. 3 of the Italian Constitution, which is frequently jointly invoked. Art. 3 plays a similar role in complementing other constitutional provisions, ensuring the enjoyment of fundamental rights, such as Arts. 32 and 38, the former related to health, the latter to social security. And that is why these provisions are more often invoked together.

2.1. *Questions raised by private parties*

It is now time to look at some ICC's decisions regarding access of third country nationals to social benefits. It is worth noting straight away that this case law is concerned with marginal and weak people, in search of their own identity and in need of protection and care. In most cases they are also afflicted by disabilities.

In the case of the judgment No. 432/2005, the Administrative Court of Lombardia raised a question concerning the constitutionally of a provision of a regional law, according to which a bus permit for free public transport was denied to a disabled third-country national. The CC declared that provision unconstitutional, arguing that it excluded non-Italian citizens from receiving a bus permit. It clarified that Italian citizenship cannot be a "pre-requirement" for access to the benefit, when the right to health is at stake. The underlying *ratio* in granting a bus permit is to promote the use of public transport among people with serious disabilities, in order to im-

[25] Judgment 187/2010, para. 2.

prove their quality of life. This benefit – not included among essential and urgent ones –which are the core of the right to health and human dignity, belonging to all persons including illegal third-country nationals[26] – is, however, an expression of social solidarity. The exclusion of non-Italian citizens from such a benefit – the CC argues – must be deemed "unreasonable" because difference in treatment is not grounded on any justification. No correlation can be established between Italian citizenship and a severe disability, requested as a condition to access the benefit.

In several cases an article in the 2001 budget law was challenged (Art. 80, para. 19, Law No. 388/2000). It introduced stricter rules on access to social security, an issue that has been object of the review of constitutionality. It provided that benefits comprising individual rights under the legislation currently in force in relation to social services should only be granted to foreign nationals in possession of a residence card, then replaced by the EC long-term residents' permit (pursuant to Art. 2(3) of Legislative Decree No. 3/2007 (Implementation of Directive 2003/109/EC concerning the status of third country nationals who are long-term residents), the award of which is in turn conditional upon the fulfilment of certain prerequisites, related to income.

That provision was considered highly restrictive – and in many senses to have inherently derogatory effect – compared to the general rule that Art. 41 of Legislative Decree No. 286/ 1998 lays down in the area of social benefits and assistance payments to non-Community citizens. The latter by contrast provides that «foreign nationals holding a residence card or residence permit of a duration not shorter than one year, and the minors registered on their residence card or permit shall be treated in an equivalent manner to Italian nationals for the purpose of receipt of benefits and services, including financial payments, and social assistance, including those in place for persons suffering from Hansen's disease or tuberculosis, the deaf-mute, the non-military blind, non-military invalids and indigent persons».

The Court held that it was manifestly unreasonable to subject the award of benefits, which presuppose a situation of invalidity or disability, to the holding of an entitlement to stay in the country, the

[26] Judgment 252/2001.

issuing of which is conditional *inter alia* upon receipt of a particular level of income.

In one of the cases[27], the carer's allowance was denied to a foreign citizen, married with two children, living in Italy for more than six years, who, as a consequence of a road accident was in an unconscious state. The reason for the denial was the lack of a residence card, which could not be issued due to failure to satisfy income requirements. The Court argued that it «was manifestly unreasonable to render the award of the care's allowance – the prerequisites for which are the complete inability to work, as well as the inability to walk unaided or to carry out daily acts alone – subject to the possession of the right to reside lawfully in Italy, which requires for its conferral, among others things, the receipt of an income». «This unreasonable requirement» – the ICC argues – «impinges upon the right to good health, understood also as the right to possible or, as in this case, partial remedies for handicaps resulting from serious illnesses». Therefore the ICC ruled the contested provisions unconstitutional, with regard to Arts. 3, 32 and 38, but also in relation to Art. 10 para. 1 of the Constitution «since the generally recognized norm of international law include those which, in guaranteeing the fundamental rights of the person irrespective of their membership of particular political entities, outlaw discrimination against foreigners lawfully resident in the State»[28].

On the same ground, the unconstitutionality of the provisions cited above was ruled, insofar as the award to foreign nationals of a measure of income support for disability was made subject to possession of a residence card or an EC permit for long-term residents[29]. In this case, having to do once more with a person seriously disabled, the CC argued for the «inherent unreasonableness of the body of legislation under review».

In all these cases the attention of the ICC is focused on the links to be established between social benefits and the right to health. The latter occupies a crucial position in the Court's reasoning and is recognised to foreign citizens as a coherent follow up to the principle of reasonableness.

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[27] Judgment 306/2008.
[28] Para. 10.
[29] Judgment 11/2009.

It is worth noting that in a previous decision[30] the ICC, in reiterating the centrality of health's protection, ruled that "essential health services", granted to enhance human dignity, are all the ones considered necessary to take care of illnesses and injuries, regardless of urgency. The Court went as far as ruling that the expulsion of an unlawful third country national should be postponed, for the incumbent need to protect his health.

The case law examined so far reveals an evolving interpretation, framed by the ICC within an expanded notion of "essential" needs of third country nationals and, consequently, arguing for an expanded access to social security benefits. This is, in the Court's view, preliminary to all forms of control exercised by the State: a positive control, when third country nationals enter the State and must be granted a permit to stay and reside, and a negative one, when there must be expulsions.

This rationale lies behind decisions in which the ICC invoked Art. 14 ECHR, as interpreted by the Strasbourg Court.

A disabled Romanian citizen submitted an application for the award of a monthly benefit pursuant to Art. 13 of Law No. 118/1971 (Conversion into Law of Decree-Law No. 5 1931 and new provisions in favour of disabled or invalid civilians). The request had been rejected for the lack of a residence card.

The ICC – following the Strasbourg Court – argued that it is necessary to ascertain whether or not a specific benefit amounts to a remedy intended to enable the satisfaction of "primary needs" pertaining to the sphere of protection of individuals. The task of the Republic is to promote and safeguard such needs. A remedy coincides with a fundamental right in as much as it is a guarantee for the individual's survival. The allowance at stake – the ICC argues – may only be awarded to invalid civilians whose significantly reduced capacity to work has been ascertained. Moreover, the benefit may only be awarded if the invalid person is not in employment and has a low income. Therefore, the specific benefit is «a payment not to supplement low income which is dependent upon individual circumstances, but rather to provide the person with a minimum level of "support" in order to ensure his survival»[31]. This is the rea-

[30] Judgment 252/2001.
[31] Judgment 187/2010, para. 2.

son why the Court enforces this measure furthering the principle of equal treatment between Italian and lawfully resident foreign nationals, in the light of the Strasbourg Court's case law.

Even for disabled unaccompanied minors residing in Italy, the ICC expands its vision and discusses measures which are described as «multifunctional». Such are the ones not focused solely on health and the related loss or reduction in earning capacity, but also oriented to satisfy educational aspirations and assistance requirements for minors suffering from debilitating illnesses. The context within which such allowances operate – the ICC maintains – «is therefore extremely varied and covers a range of social goals impinging upon interests and values, all of which are of primary standing within the context of fundamental human rights». Multifunctional allowances are meant to facilitate the future entry of the minor into the world of employment and his or her active participation in social life.

Thus, the "prerequisite" consisting in a residence card and in a five years residence requirement is ruled unconstitutional, because it is incompatible with the requirement of "effectiveness" in granting fundamental rights. Having to wait until the expiry of the five-year residence requirement could cause significant detriment to the immediate needs of care and assistance of individuals. Such a requirement «violates the principle of equality and the right to education, health and access to employment in a manner which is heightened in that these rights are those of minors who are disabled»[32]. Difference in the treatment of such minors is unreasonable, that is without a reasonable justification at a constitutional level.

The same concern emerges from another decision[33], in which the ICC ruled unconstitutional a provision which makes the award of allowances to lawful foreign nationals conditional on the possession of a residence card (now the EU long-term residents' permit), the issue of which is conditional *inter alia* upon the possession of a residence permit for at least five years.

Even in this case, the ICC argued on the ground of the serious disabilities of the relevant persons and explored a range of essential values in particular the safeguarding of health, but also the enhancing of solidarity for situations of heightened social hardship, and

[32] Judgment 329/2011, para. 5.
[33] Judgment 40/2013.

the duties to provide assistance to families. Reference, first and foremost, is to Art. 2 of the Constitution and to various international law sources. Provisions introducing a restrictive regime (both *ratione temporis* and *ratione census*) for non-EU nationals staying legally in the country for a significant period of time, on a non-occasional basis, lack a justification.

Along this path, the ICC has further expanded the range of allowances to be granted to third country nationals, for example including allowance for partially blind[34] and for deaf people[35].

In the latter decision, in an *obiter dictum* the Court calls for a coherent intervention of the legislator in view of pursuing "substantial equality" and avoid that all such different declarations of unconstitutionality could paradoxically end up generating more inequalities[36].

The ICC is fully aware of the uneven consequences, which may arise in applying a case-by-case approach. However, it cannot expand its own scope too far and take the place of the legislator. The latter should be attentive in reading through the lines of the Court's judgments and use properly its own powers. Mutual institutional respect, although not an easy task to pursue, is a precondition for the rule of law.

2.2. *Questions raised in conflicts between State and Regions*

The ICC adopts similar arguments in a second set of cases, which will now be examined. The context is different and so is the procedure, since the ICC is, in such cases, dealing with litigation among State and Regions. In most cases, it is the State lodging complaints against regional laws, often alleging a breach of its own competence, especially on migration. Having in mind the guarantee of fundamental rights to third country nationals the ICC held unconstitutional regional laws, which excluded migrants (unlawful ones as well) from access to essential services, with regard in particular to health and human dignity, the latter typically associated to health[37].

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[34] Judgment 22/2015.

[35] Judgment 230/2015.

[36] Para. 2.2.

[37] An overview in S. Sciarra & W. Chiaromonte, *Migration Status in Labour and Social Security Law. Between inclusion and exclusion in Italy*, in C. Costello and M. Freedland (eds.), *Migrants at work*, OUP 2014, 121 ff.

The ICC underlines that «there is an irreducible core of the right to health protected by the Constitution as an inviolable sphere of human dignity». This requires preventive measures also for foreigners, irrespective of provisions regulating entry into and residence in the State, notwithstanding that Parliament may exercise its own power and intervene in such fields. The Court includes all such migrants within system of social security, including programmes for preventive health care. In this case a regional law enacted in Tuscany was held constitutional[38].

In the same way, the ICC has rejected challenges addressed to a law of Puglia, extending urgent essential and continuing care to unlawful foreign citizens present in the regional territory[39] and to a law of Campania, promoting «the social, economic and cultural inclusion of foreign nationals», including those, "present" but not lawful. In the latter case, the Court ruled that «foreign nationals have an irreducible core of protection for the right to healthcare, as guaranteed under the Constitution as an inviolable sphere of human dignity, even if they do not have a valid legal basis for residence». Furthermore, «the fact that legislative powers over immigration as such are vested in the national Parliament does not preclude the regional legislatures from enacting legislation within other areas, such as the right to education, healthcare or social assistance, which also creates rights for foreign nationals»[40].

In some decisions the ICC ruled on social benefits not related to health protection, as in the case in which a regional law of Trentino-Alto Adige was challenged. The latter made the award of an allowance to provide family support subject to a five years residence requirement. The ICC held the provision unconstitutional, on grounds of unreasonableness. No correlation can be established between length of residence and situations of need or distress, requested as a condition to access the benefit. So, even in this case, the resulting difference in treatment is without justification.

Along similar lines, a regional law of Valle d'Aosta was held unconstitutional, since it subjected access to public housing to an eight years residence requirement in that region. Not only the equality principle, dealt with in Art. 3 Constitution, was infringed; there was

[38] Judgment 269/2010, para. 4.1, recallig judgments 148/2008 and 252/2001.
[39] Judgment 299/2010.
[40] Judgment 61/2011.

also a violation of the right to free movement and to reside (Art. 21 TFEU and European directives 2004/38 and 2003/109, concerning nationals of other Member States and third country nationals long-term residents).

Following some CJEU's decisions, the ICC argued that the requirement of a long period of residence was not a reasonable provision, neither a proportionate one, when it prohibited the assignment of houses to those who had not lived in that region. It was, furthermore, inconsistent with the goals of public housing policies, which should facilitate people in greatest difficulty.

In one of its most articulate decisions[41], the Court explores in more concrete terms criteria that should be adopted when deciding on "reasonableness" of measures adopted, even when they regard benefits beyond the ones considered essential. In particular, the Court looks at the connection between social benefits and citizenship, on one hand, and, on the other hand, at the even stronger link established with the community, in a stable perspective of working, affective and family life, regardless of the length of residence.

In the scrutiny of reasonableness of measures restricting access to social benefits all elements suitable to witness a stable link between persons and the community they live in, in the light of Art. 8 ECHR, should be taken into account. The absolute exclusion of entire cohorts of persons, based on the fact that those individuals had not been resident for a long period, infringes the principle of equality since it introduces arbitrary grounds for distinctions.

In this perspective, reasonableness is a principle running parallel to equality and going even further. It is based on a complex balance of all constitutional principles related to human dignity, as well as to social and cultural values. These are pillars supporting the Italian Constitution and a fertile ground for interpreters.

The rationale of the cited judgment is that access of migrants to social benefits has to be consistent with such constitutional values. Human dignity is directly connected to health and education and to solidarity. In this context the legislator can (sometimes has to) balance social benefits with limited financial resources. This balance must give precedence to marginal and weak persons who seek support for the enforcement of their fundamental rights.

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[41] Judgment 222/2013.

Abstract

L'articolo si sofferma sulla recente giurisprudenza della Corte di Giustizia dell'Unione Europea (CGUE), in materia di libera circolazione delle persone e di accesso ai sistemi di sicurezza sociale, per i cittadini europei e per quelli di paesi terzi. Si percepisce una tensione nel connettere tali diritti con il principio di solidarietà, alla luce dei crescenti vincoli finanziari in capo agli Stati sociali. Una originale giurisprudenza della Corte costituzionale italiana mostra soluzioni alternative.

This paper deals with a recent case law of the Court of Justice of the European Union on free movement and access to social security, both for European citizens and third-country nationals. There is a tension underlying this case law when the CJEU attempts to connect all such issues with the principle of solidarity in the light of growing financial constraints on welfare states. Building on an original case law of the Italian Constitutional Court alternative solutions are portrayed.