Corte costituzionale

JUDGMENT NO. 306 OF 2008

FRANCO BILE, PRESIDENT
FRANCESCO AMIRANTE, AUTHOR OF THE JUDGMENT

JUDGMENT No. 306 YEAR 2008

In this case the Court considered a rule that rendered the award of a carer's allowance for the incapacitated subject to the requirement of possession of a residence card for foreign nationals, which in turn was subject to income requirements. The Court found "that it is manifestly unreasonable to render the award of a social security benefit such as the carer's allowance – the prerequisites for which are, as mentioned above, the complete inability to work, as well as the inability to walk unaided or to carry out everyday acts alone – subject to the possession of the right to reside lawfully in Italy which requires for its conferral, amongst other things, the receipt of an income". It was also found to violate "Article 10(1) of the Constitution since the generally recognised norms 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". The Court therefore declared the provisions unconstitutional as challenged.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,
gives the following

JUDGMENT

in proceedings concerning the constitutionality of the combined provisions of Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners), as amended by Article 9 of law No. 189 of 30 July 2002, with regard to Article 1 of law No. 18 of 11

February 1980, raised by the *Tribunale di Brescia* in relation to the civil proceedings pending between S. T. and the National Institute for Social Security [*Istituto Nazionale della Previdenza Sociale*] (INPS) and another, by the referral order of 15 January 2007, registered as No. 615 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 36, first special series 2007.

Considering the entry of appearance by the INPS as well as the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Francesco Amirante in the public hearing of 24 June 2008;

having heard Nicola Valente, barrister, for the INPS and the *Avvocato dello Stato* Pierluigi Di Palma for the President of the Council of Ministers.

The facts of the case

1.— During the course of a dispute concerning a social security benefit, commenced by an Albanian citizen against the National Institute for Social Security (INPS) and the Ministry for the Economy and Finance, the employment law section of the *Tribunale di Brescia* raised, with reference to Articles 2, 3, 10, 11, 32, 35, 38 and 117(1) of the Constitution, questions concerning the constitutionality of the combined provisions of Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners), as amended by Article 9 of law No. 189 of 30 July 2002, with regard to Article 1 of law No. 18 of 11 February 1980: a) insofar as it prevents the award of social security benefits, and in particular the carer's allowance, to foreign citizens stably and lawfully present in Italy, but who do not hold a residence card, since their state of health renders them totally incapable of working and hence prevent them from generating sufficient income to maintain themselves and their family; b) in the alternative, insofar as it makes awards to foreigners – who have been lawfully resident in Italy for at least six years and who possess a residence permit on grounds which permit an indeterminate

number of renewals – subject to the income requirements stipulated for the residence card.

The lower court states that since the plaintiff, who is married with two children and has lived in Italy for more than six years, has been in a vegetative state following a road accident, she accordingly filed an application on 24 March 2005 for the recognition of the right to a carer's allowance. This was rejected by the administrative authorities on the grounds that, although she had been found to satisfy the medical prerequisites, the applicant was not a holder of a residence card (which cannot be issued to her due to failure to satisfy the income requirements) which, as of 1 January 2001, the contested Article 80(19) of law No. 388 of 2000 requires for the award of the benefit concerned.

She thus pursued her application before the courts, raising the question of the constitutionality of the provision concerned, and also requested the adoption of an urgent measure pursuant to Article 700 of the Code of Civil Procedure passing an interim order of specific performance against the INPS to award the benefit concerned, starting from the date on which the application was submitted to the administrative authorities.

After having found on the facts that the applicant complied with the medical prerequisites and that her current stay in a healthcare facility entailed a significant financial burden (the cost of which is borne by the patient's family), the court seized accepted the interim application and, through the same measure, raised the questions of constitutionality concerned.

Regarding the question of relevance, the referring court notes that, in the case before it, the refusal of the benefit constitutes an institutionally required act under the terms of the contested Article 80(19) of law No. 388 of 2000, which means that the plaintiff's case can only be accepted if this provision is declared unconstitutional.

As far as the merits of the questions are concerned, the lower court argues, in the first place, that the contested legislation violates Articles 2, 3 and 38 of the Constitution, since it stipulates that the enjoyment of benefits of a universal nature, provided as protection for the fundamental rights of the person – such as social security rights, which include the carer's allowance – are subject to fulfilment of a prerequisite – the possession of a residence card – which is unsuitable for use as a decisive criterion. In

fact, the main difference between the residence card and the residence permit consists in the requirement – which applies to the former only, pursuant to Article 9 of legislative decree No. 286 of 1998, as amended by Article 9 of law No. 189 of 2002 – incumbent upon the foreign national to establish that he has sufficient income to support himself and his family. This means that Parliament's choice appears not only to disregard the principle of solidarity enshrined in Article 2 of the Constitution, but also undermine, and contradict in logical terms, the goals pursued by social security in accordance with Article 38 of the Constitution, since it entails the award of the benefits concerned to financially self-sufficient individuals, whilst it precludes it precisely in those cases in which the situation of need is more acute.

Moreover, this choice cannot be grounded on the principle of reciprocity in international relations, since the Italian Parliament has adopted the principle of the universal status of human rights, under the terms of Article 10(1) of the Constitution (which states that the Italian legal order shall comply with the generally recognised norms of international law), Article 11 of the Constitution (which provides that the Republic shall promote and support the organisations which pursue the goal of the establishment of an international order which may ensure peace and justice between nations) and Article 35 of the Constitution (according to which the Republic shall promote and support agreements and international organisations which seek to affirm and regulate employment rights). It should follow from these three principles – and in particular from the last two – that Parliament is prevented from introducing legislation which prevents the exercise of rights recognised under international conventions relating to employment, pension provision and social security. However, this is precisely what occurred in the case before the court, since Article 6 of International Labour Organisation (ILO) Convention No. 97 of 1949 (ratified and implemented by law No. 1305 2 August 1952) obliges the contracting states to guarantee social security treatment to immigrants that is not less favourable that that recognised to their own nationals, and Article 10 of ILO Convention No. 143 of 1975 (ratified and implemented by law No. 158 of 10 April 1981) guarantees migrant workers equality of opportunity and treatment also in relation to social security.

It must also be remembered that, in accordance with Article 2(1)-(3) and Article 41 of legislative decree No. 286 of 1998 – and as is the case for non-military incapacity governed by Article 12 of law No. 118 of 30 March 1971 – the carer's allowance governed by Article 1 of law No. 18 of 1980 falls under those benefits which must be awarded to any person who fulfils the relevant medical requirements, provided that they are lawfully and stably resident in Italy.

2.— The National Institute for Social Security (INPS) entered an appearance before this Court, asking that the question be ruled inadmissible or groundless.

The Institute points out that Article 41 of legislative decree No. 286 of 1998 had provided that foreigners in possession of a residence card or residence permit with a duration of no less than one year should be treated equally to Italian nationals for the purposes of the receipt of pensions and social security benefits, including those provided for in favour of the blind, deaf-mute and non-military invalids. Subsequently, Article 80(19) of law No. 388 of 2000 provided that financial benefits for the non-military disabled should only be granted to foreigners in possession of a residence card, whilst as far as foreigners in possession of a residence permit are concerned, they only have the right to receive other social security benefits, including maternity benefit. Parliament thereby took steps, starting from the entry into force of law No. 388 of 2000, to restrict the conditions for access to particular social security benefits and to remove, on the basis of a clear frame of reference, the rule that foreigners in possession of a residence permit be treated equally to Italian nationals.

According to the INPS, this choice is not *per se* unconstitutional because, as found by this Court, Parliament is entitled to enact legislation which amends the rules governing ongoing relationships to the detriment of those affected (judgment No. 324 of 2006), and therefore to modify the prerequisites for the receipt of pensions or social security benefits, especially as the very passage of time offers suitable grounds for justifying the recourse to different treatment, at different moments in time, of the same class of individuals.

Moreover, it would not be unlawful to differentiate between the above benefits by adopting as a criterion that of favouring individuals who are more stably resident in our

country, all the more so because Article 80(19), in dispute before this Court, was enacted clearly with a view to limiting public spending.

3.— The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*, arguing that the question was inadmissible and groundless.

The question is argued to be inadmissible in the first place on the grounds that the referral order does not contain any arguments addressing the issue of relevance, since the facts at issue before the lower court are not described thoroughly. In fact, the lower court fails to mention: a) whether the plaintiff has any right – other than the residence card – to stay in Italy; b) whether or not the plaintiff's spouse possesses a residence permit or card; c) and whether accordingly the plaintiff is in a position to obtain the benefit requested as a result of her status as the spouse of an individual lawfully resident in Italy, applying a provision different from that covered by the question raised (namely Article 30 of legislative decree No. 286 of 1998).

This conclusion may also be inferred from the fact that the referring court failed to consider the possibility of awarding the benefit on the basis of a different interpretation of the contested legislation, as has been done for identical and similar benefits by other merits courts.

Furthermore, the reasons given for the non-manifest groundlessness are also inadequate, since the reference to the constitutional principles invoked is generic. Therefore, also for this reason, the Court should rule the question inadmissible.

In any case, the question is argued to be groundless on the merits.

Generally speaking, it is a matter for Parliament to establish the prerequisites for entitlement to the benefit concerned, and the discretionary choices of Parliament in this matter are not amenable to review before this Court, since they are not manifestly unreasonable.

Besides, Parliament is allowed to limit access by non-Community nationals to specific benefits granted to Italian nationals – even if this could in theory entail a partial infringement of rights guaranteed under the Constitution – whenever it may be necessary – principally due to the scarcity of available resources – to establish priorities between competing legal interests, all equally protected under the Constitution. Against

this background, it is entirely understandable that the class of recipients has in this case been limited to Italian nationals and foreigners who have a serious and durable relationship with the Italian state, a relationship today manifesting itself through circumstances which allow for the issue of a residence permit for long-term residents.

In any case, the reference to Article 2 of the Constitution is claimed – by the intervener – to be entirely inconclusive, given that the recognition of the benefit concerned is certainly not one of the inviolable rights of the person, nor is it a mandatory duty of social solidarity, nor further does it raise the issue of any supposed right of reciprocity, since it is a benefit specific to Italian law and which has no equivalent in the legislation of many other countries.

The reference to Article 3 of the Constitution is equally inappropriate, because a difference in treatment between different categories of non-Community nationals may indeed be justified by the possession of different residence rights, "as the expression of a different *affectio societatis*".

The referring court also errs in invoking Articles 32 and 35 of the Constitution which concern rights different from those in dispute, whilst the reference to Article 38 of the Constitution (which is however not contained in the operative part of the referral order) is generic and in any case without foundation, since that provision, which is of a programmatic nature, does not embrace claims to social security benefits *tout court*, but limits itself to guaranteeing a minimum level of protection (still nonetheless adequate for day-to-day requirements) which would not appear to include the carer's allowance.

Finally, the reference to the constitutional provisions governing the adaptation of Italian law with international agreements and, in particular, with ILO Conventions is not persuasive since these instruments do not give rise to individual rights directly enforceable before the national courts.

Conclusions on points of law

1.— The *Tribunale di Brescia* questions, with reference to Articles 2, 3, 10, 11, 32, 35, 38 and 117(1) of the Constitution, the constitutionality of Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2001) and Article 9(1) of legislative decree

No. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners), as amended by Article 9 of law No. 189 of 30 July 2002, with regard to Article 1 of law No. 18 of 11 February 1980 (Carer's allowance for totally incapacitated non-military invalids).

The referring court states that it was seized by an Albanian citizen, lawfully resident in Italy for more than six years, married with two children and completely incapacitated for work – having been in a vegetative state following a road accident – requesting it to order the INPS, the defendant along with the Ministry for the Economy and Finance, to pay to her the carer's allowance.

The referring court found on the facts that all the prerequisites for the award of the benefit to the plaintiff have been satisfied with the exception of possession of a residence card, and that she is not able to obtain the said card solely due to failure to satisfy the income requirements for supporting herself and her family.

2.— Having given the above reasons in support of the relevance of the question, the referring court asserts in the first place that the rules which provide for the unjustified difference in treatment, relating to a social security benefit, between non-Community citizens compared and Community citizens are illogical, and therefore that the provisions breach Articles 2 and 3, with regard also to Articles 32 and 38, of the Constitution.

It also challenges the above provisions on the grounds that they violate Articles 10, 11 and 117(1) of the Constitution, in particular with reference to ILO Conventions No. 97 of 1949 (ratified and implemented by law No. 1305 of 2 August 1952) and No. 143 of 1975 (ratified and implemented by law No. 158 of 10 April 1981), which guarantee migrant workers equal treatment in relation to social security, and hence the receipt of pension and social security benefits; it also claims that Article 10(1) of the Constitution has been violated, which provides for the automatic adaptation of national law with the generally recognised norms of international law.

In the alternative, for the same reasons, the referring court challenges the provisions concerned insofar as they render the award of the carer's allowance to non-Community citizens “lawfully resident in Italy for more than six years and in possession of a

residence permit which may be subject to an indeterminate number of renewals subject to the prerequisite of availability of the income required for the residence card".

3.— The INPS entered an appearance and argued that the question was inadmissible or groundless because, according to the case law of this Court, Parliament may pass legislation governing ongoing relationships, enacting rules which are more detrimental for the individuals affected thereby, invoking, on this point, judgment No. 324 of 2006.

4.— The *Avvocatura dello Stato* in turn argued that the question was inadmissible because the referring court did not specifically establish that the applicant had the right to reside in Italy, nor that it was impossible for her to obtain a residence card as the spouse of a person who could be the holder of a residence card.

5.— The claims that the question is inadmissible cannot be accepted.

The claim made by the INPS is not based on any arguments, whilst that of the *Avvocatura dello Stato* does not take into account first the fact that the referral order expressly asserts that the invalid has been lawfully resident in Italy for more than six years and that a residence card cannot be issued to her solely due to failure to comply with the income requirements – findings not specifically contested in the proceedings before the lower court – and secondly that the provision granting the right to a residence card for the spouses of holders of the card was repealed by Article 2(1) of legislative decree No. 3 of 8 January 2007 (Implementation of directive 2003/109/EC concerning the status of third country nationals who are long-term residents), even disregarding the claim which is not made, but only generically assumed, that the plaintiff's husband is the holder of a residence card.

6.— As a preliminary matter, it must be pointed out that the referring court formally raises two questions, the second of which depends on the failure to accept the first, whilst in actual fact, due to the identical nature of the contested provisions and the principles invoked, it raises only one question; the court limits itself exclusively to raising two possible issues differing only in their hypothesised literal formulation, but not in substantive terms, since they are in actual fact both aimed at challenging – in order to draw the legislation within the ambit of constitutional review on the same grounds – the prerequisite for the conferral of the right to a carer's allowance, that the interested person receive an income capable of supporting himself and his family.

7.— Again as a preliminary matter, the Court finds that the reasons given for the relevance of the question are not implausible.

No question of Community law or its direct applicability arises, since the case does not involve more than one Member State, as specifically required pursuant to Article 1 of Council Regulation (EC) No. 859/2003 of 14 May 2003.

Therefore, regardless of the issue over whether the question is well founded, the argument – nonetheless followed by certain merits courts – that the provisions of the ECHR which outlaw discrimination between nationals and foreigners with regard to the application of social security legislation (which include rules providing for social security benefits) have become part of Community law and are therefore directly applicable, is not relevant.

On the other hand, the provisions of the ECHR cannot be directly applied as such, as found by this Court in judgments No. 348 and No. 349 of 2007, as well as No. 39 of 2008.

Similarly, the result would not be different were one to consider the provisions of the ILO Conventions to be directly applicable, since this presupposes that the foreigner concerned is a worker (or at least a person seeking employment, as found in judgment No. 454 of 1998, cited, or a member of a worker's family), whilst by contrast the referral order of the *Tribunale di Brescia* contains no reference to such conditions.

8.— To conclude the examination of the preliminary issues, it must be pointed out that the enactment subsequent to the referral order – filed in the court registry on 15 January 2007 – of legislative decree No. 3 of 2007, published in the *Official Journal* No. 24 of 30 January 2007, has not substantively changed the terms of the question, nor has it impinged upon its relevance in the proceedings before the lower court.

In fact, insofar as is of interest here, by amending Article 9 of legislative decree No. 286 of 1998, legislative decree No. 3 of 2007 replaced – with general and immediate effect pursuant to Article 2(3) thereof – the EC residence permit for long-term residents with the residence card, reducing from six to five years the relevant period of stay in Italy and specifying, as income prerequisites, the receipt of an income not lower than the annual amount payable as the old age pension and the availability of suitable housing “which satisfies the minimum requirements provided for under regional

legislation for public residential housing or which complies with the hygienic and sanitary requirements certified by the local health authority with territorial competence" (Article 9(1), cited above).

Since, on the basis of the facts described in the referral order, the receipt of such an income by the applicant for the social security benefit may be excluded, it is not necessary to order the remittal of the case file to the merits court for a new examination of the relevance and terms of the question.

9.— The question raised, which must hence be reviewed on the merits, is well founded.

It is important to point out that the carer's allowance – awarded to disabled persons not capable of walking unaided, or who are not in a position to carry out everyday activities alone, solely by virtue of the fact that they are disabled, and therefore irrespective of any income requirement – falls within the ambit of social security provision and, more generally, also in the terms adopted by the Strasbourg court, pertains to "social security or assistance".

Within this context, this Court has held that "the choices relating to the identification of the categories of beneficiaries – which must necessarily be restricted due to the limited extent of financial resources – must be carried out, always and in any case, in accordance with the principle of reasonableness", but also that Parliament is permitted "to introduce differentiated arrangements concerning the treatment granted to individual recipients only in the presence of a legislative 'cause' which is not manifestly irrational or, worse still, arbitrary" (judgment No. 432 of 2005).

10.— In the light of the above, the Court finds that it is manifestly unreasonable to render the award of a social security benefit such as the carer's allowance – the prerequisites for which are, as mentioned above, the complete inability to work, as well as the inability to walk unaided or to carry out everyday acts alone – subject to the possession of the right to reside lawfully in Italy which requires for its conferral, amongst other things, the receipt of an income.

This unreasonable requirement 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. It follows that the contested provisions breach not only Article 3

of the Constitution but also Articles 32 and 38 of the Constitution, as well as – taking account of the fact that the right to good health is a fundamental right of the person (see on all points judgments No. 252 of 2001 and No. 432 of 2005) – Article 2 of the Constitution.

Given the above, and for the same reasons, the contested legislation violates Article 10(1) of the Constitution since the generally recognised norms 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.

The Italian Parliament is without doubt entitled to enact legislation regulating the entry into and residence in Italy of non-Community citizens, provided that it is not manifestly unreasonable and does not breach international law obligations (see most recently, judgment No. 148 of 2008). Furthermore, Parliament may stipulate, provided that it is not unreasonable, that the award of certain benefits – not however relating to serious and urgent situations – be subject to the fact that the foreigner's right to stay in Italy demonstrates that it is not intermittent or ephemeral; however, where the right to stay subject to the above conditions is not in doubt, there can be no discrimination against foreigners which requires that they be subject to particular restrictions for the enjoyment of fundamental rights of the person, which are by contrast guaranteed to Italian citizens.

The contested provisions are therefore unconstitutional insofar as – in addition to the medical, length of residence and other requirements relating to the person, formerly required for the issue of the residence card and now (pursuant to legislative decree No. 3 of 2007) of the EC residence permit for long-term residents, the constitutionality of which is not questioned by the referring court – for the purposes of the award of the carer's allowance they also stipulate income requirements, including the availability of housing which satisfies the characteristics set out in the amended text of Article 9(1) of legislative decree No. 286 of 1998.

On those grounds

THE CONSTITUTIONAL COURT

declares that Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners) – as amended by Article 9(1) of law No. 189 of 30 July 2002 and as subsequently replaced by Article 1(1) of legislative decree 8 January 2007, n. 3 – are unconstitutional insofar as they provide that the carer's allowance, governed by Article l of law No. 18 of 11 February 1980, may not be awarded to non-Community citizens on the sole grounds that they do not comply with the income requirements previously in force for the residence card and now provided for, pursuant to legislative decree No. 3 of 8 January 2007 (Implementation of directive 2003/109/EC concerning the status of third country nationals who are long-term residents) in relation to EC residence permits for long-term residents.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta* on 29 July 2008.

Signed:

Franco BILE, President

Francesco AMIRANTE, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 30 July 2008.

The Director of the Registry

Signed: DI PAOLA