



Corte costituzionale



JUDGMENT NO. 187 OF 2010

Francesco AMIRANTE, President

Paolo GROSSI, Author of the Judgment

JUDGMENT NO. 187 YEAR 2010

In this case the Court considered a referral questioning the constitutionality of legislation that subjected the award of incapacity benefit to the possession of a residence card on the grounds that it was discriminatory against the classes of foreign national that did not meet that prerequisite. Making broad reference to the case law of the European Court of Human Rights, the Court struck down the contested legislation as unconstitutional, holding that since the contested provision amounted to 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, it had to be granted to Italians and foreign nationals under equal conditions.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 80(19) of Law no. 388 of 23 December 2000 (Provisions governing the formation of the annual and long-term budget of the State – Finance Law 2001), referred by the Turin Court of Appeal in the proceedings pending between O.M. and the Ministry of the Economy and Finance and others by the referral order of 27 February 2009, registered as no. 144 in the Register of Orders 2009 and published in the Official Journal of the Republic no. 21, first special series 2009.

Considering the entry of appearance by the National Institute for Social Security (*Istituto nazionale della previdenza sociale, INPS*), as well as the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Paolo Grossi in the public hearing of 23 March 2010;

having heard Counsel Nicola Valente for the *INPS* and the *Avvocato dello Stato* Diana Ranucci for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – The Turin Court of Appeal raised a question concerning the constitutionality of Article 80(19) of Law no. 388 of 28 December 2000 (Provisions governing the formation of the annual and long-term budget of the State - Finance Law 2001) insofar as in stipulating that “pursuant to Article 41 of Legislative Decree no. 286 of 25 July 1998, incapacity benefit and financial entitlements that are available as individual rights under the legislation applicable to social services may be granted, subject to the conditions specified in the legislation, to foreign nationals who possess a residence card”, that provision subjects the award of monthly incapacity benefit pursuant to Article 13 of Law no. 118 of 30 March 1971 (Conversion into Law of Decree-Law no. 5 of 30 January 1931 and new provisions in favour of the civilian disabled or invalids) to foreign nationals legally resident within the territory of the State to the requirement of possession of a residence card.

In the opinion of the referring court in fact, in subjecting the right to social security benefits available as individual rights, which must certainly include the incapacity benefit provided for under Article 13 of Law no. 118 del 1971, to the requirement of possession of a residence card, and therefore the requirement of a stay within the territory of the State of at least five years, the contested provision is claimed to introduce a further prerequisite that is liable to result in discrimination against foreign nationals compared to Italian citizens, in breach of the principles set forth under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 1 of the Additional Protocol to the Convention adopted in Paris on 20 March 1952, as interpreted by the European Court of Human Rights. This means that Article 117(1) of the Constitution has been violated, in accordance with the principles asserted by this Court in judgments no. 348 and no. 349 of 2007.

2. – The question is well-founded.

The case law of the European Court of Human Rights has had the opportunity on various occasions to emphasise that the Convention does not impose a duty on the Member States to create a system of social protection or to ensure a particular level of social security benefits. However, once these benefits have been established and awarded, the legislation regulating them cannot fail to be subject to a review as to its compatibility with the Convention provisions, including in particular Article 14 which

prohibits the provision for discriminatory treatment (to this effect, see *Stec and others v. United Kingdom*, decision on admissibility of 6 July 2005; *Koua Poirrez v. France*, judgment of 30 September 2003; *Gaygusuz v. Austria*, judgment of 16 September 1996; and *Salesi v. Italy*, judgment of 26 February 1993). At the same time, the Strasbourg Court also stressed the broad margin of appreciation which the Member States enjoy in matters relating to social security benefits, holding in particular that due to their direct knowledge of the special features that characterise the respective societies and their related needs, the individual national authorities are in principle in a privileged position compared to that of the international court when determining to the extent to which a matter relating to economic and social provision is in the public interest. On this basis the Court concluded that it would, as a matter of principle, respect the choices made regarding such matters by the national legislature, unless the assessment concerned turned out to be manifestly unreasonable (*Carson and others v. United Kingdom*, judgment of 16 March 2010; and *Luczak v. Poland*, judgment of 27 November 2007). Moreover, as far as the limits within which the prohibition on discrimination set forth under Article 14 of the Convention operates is concerned, the Court did not fail to point out the relational status which characterises the principle, 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 protects individuals in analogous situations from discrimination in the enjoyment of the rights guaranteed under other provisions” (see most recently *Oršuš and others v. Croatia*, judgment of 16 March 2010). As specified in the case law of the Court, treatment becomes discriminatory where it does not have an objective and reasonable justification: that is there it does not strike a proportional balance between the means used and the objective pursued (e.g. *Niedzwiecki v. Germany*, judgment of 25 October 2005). And this is not without the further specification that only “very strong considerations may lead to the conclusion that a difference in treatment based exclusively on nationality is compatible with the Convention” (see most recently, *Si Amer v. France*, judgment of 29 October 2009 and the precedents cited).

Constitutional review will therefore have to be carried out in the light of the interpretative findings noted above, which the Strasbourg Court reached when examining the scope of the principle of non-discrimination enshrined under Article 14

of the Convention, which has been adopted by the referring court in this case as an interposed provision, along with Article 1 of the First Additional Protocol, which Strasbourg case law itself has held to be associated with the principle referred to above in matters relating to social security provision (see in particular on this point, the admissibility decision in *Stec and others v. United Kingdom*).

It should be noted as a preliminary point on this matter that the contested provision without doubt pursues the goal of restricting the award of social security benefits to non-Community nationals. In fact, Article 80(19) of Law no. 388 of 2000 provides, insofar as is of interest for our present purposes, that “income support and the financial benefits available as individual rights on the basis of legislation applicable to social service shall be awarded, subject to the conditions specified under such legislation, to foreign nations who possess a residence card” (now an EC residence permit for long-term residence). Therefore, the provision was enacted to regulate the prerequisites themselves for entitlement to the award of social security benefits and limited the class of recipients, as far as non-Community nationals are concerned, to those in possession of a residence card, the issue of which requires, *inter alia*, lawful residence within the territory of the State for at least five years, according to the original provision of Article 9 of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of provisions regulating immigration and provisions governing the status of foreigners). This period was increased to six years, following the amendments made to Article 9 of Law no. 189 of 30 July 2002 (Amendments to the legislation on immigration and asylum), whilst it was again reduced to five years with the new legislation contained in Article 9, introduced by 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 essence, after the entry into force of the contested legislation, the previous equal treatment between Italian nationals and non-Community nationals with a regular residence permit no longer applied for the purposes of determining the individuals entitled to receive social security benefits available as individual rights.

However, precisely when considering the legislation in question, this Court did not fail to stress that the Italian legislature is without doubt permitted to enact legislation intended to regulate the entry of non-Community nationals and their stay in Italy, provided that this is not manifestly unreasonable or in breach of international law

obligations. It also added that “it is also possible to subject the award of particular benefits – not intended to remedy serious urgent situations – to the requirement that the legal basis entitling the foreign national to reside within the territory of the State demonstrates its non-occasional nature and that it will not have a short duration, provided that this is not unreasonable; however – this Court went on – once the right to reside under the aforementioned conditions is not under discussion, it is not possible to discriminate against foreign nationals by imposing upon them particular restrictions on the exercise of fundamental human rights, which are on the other hand granted guaranteed to Italian nationals” (judgment no. 306 of 2008).

Therefore, for the purposes of this constitutional review, it is not so much the “nominalist” conception of the specific social security benefit that may come into consideration which takes on decisive significance as rather its concrete operation against the backdrop of social security benefits, which makes it possible to verify whether it is “essential” in order to protect the values involved. In other words, it is necessary to ascertain whether or not, in the light of its legislative conception and the social function that it is required to perform within the overall system, the specific “benefit” at issue here amounts to a remedy intended to enable the actual satisfaction of “primary needs” pertaining to the sphere of protection of individuals, which it is the task of the Republic to promote and safeguard – a remedy which therefore amounts to a fundamental right in that it is a guarantee for the individual’s very survival. On the other hand, the case law of the Strasbourg Court has stressed that, “within a modern democratic State, many individuals can only ensure their own support for all or part of their life through social security benefits”. This means that “it is recognised under numerous national legal systems that these individuals require a certain level of security, and therefore provision is made for the automatic payment of benefits, provided that the prerequisites laid down for the granting of the rights in question are met” (see the decision on admissibility of 6 July 2005 in *Staic and others v. United Kingdom* [sic.], cited above). Therefore, where the situation is one involving benefits intended to provide “support” for an individual, any discrimination between Italian nationals and foreigners lawfully resident within the territory of the State that is based on prerequisites other than their individual circumstances would end up violating the principle enshrined in Article 14 of the European Convention on Human Rights, having

regard to the interpretation which, as mentioned above, has been provided on various occasions by the Strasbourg Court.

In this regard it may be of significance that the original text of Article 13 of Law no. 118 of 30 March 1971 provided for the payment of a monthly benefit for thirteen months per year “to the civilian disabled or invalids aged between eighteen and sixty five years in respect of whom a reduced capacity to work exceeding two thirds has been ascertained and who are unemployed, for as long as such conditions persist”, subject to the same prerequisites and procedures as those laid down for the award of a disability allowance pursuant to Article 12 of the same Law. Article 13(2) then went on to provide that the incapacity benefit could “be revoked, following a report from the provincial labour and employment offices, should the beneficiaries not accept employment suitable for their physical conditions”.

Article 13 was then replaced by Article 1(35) of Law no. 247 of 24 December 2007 (Provisions implementing the Protocol of 23 July 2007 on social security, work and competitiveness to favour fairness and sustainable growth, as well as additional provisions on work and social security). The new text of the provision stipulates that “civil invalids aged between eighteen and sixty four years in respect of whom a reduced capacity to work equal to or exceeding 74 percent has been ascertained and who are not in employment shall, for as long as such conditions persist, be awarded a monthly allowance of Euro 242.84 for thirteen months per year by the State, which shall be disbursed by the *INPS*, according to the same prerequisites and procedures as those laid down for the award of the allowance provided for under Article 12”. Paragraph 2 of the same Article goes on to provide that the recipient of the benefit shall make a statement to the *INPS* that he is not in employment and shall be obliged to inform the Institute promptly should that condition no longer obtain.

Therefore, according to the legislation referred to above, the allowance concerned may only be awarded to civil invalids in respect of whom a significant reduction in their capacity to work has been ascertained. Moreover, the benefit may only be awarded if the invalid is not in employment, and finally if the interested party has a low income as specified under Article 12 of Law no. 118 of 1971 on the award of a disability allowance.

Accordingly, this evidently amounts to 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. It is therefore an institution which must be deemed to remain subject to the limits and to further the essential purposes to which this Court has pointed – including in the light of the judgments of the Strasbourg Court – as a principle of ineluctable equality of treatment between Italian nationals and foreign nationals lawfully resident within the territory of the State.

The contested provision must therefore be struck down as unconstitutional insofar as it subjects the award of monthly incapacity benefit pursuant to Article 13 of Law no. 118 of 30 March 1971 to foreign nationals legally resident within the territory of the State to the requirement of possession of a residence card.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 80(19) of Law no. 388 of 23 December 2000 (Provisions governing the formation of the annual and long-term budget of the State - Finance Law 2001) is unconstitutional insofar as it subjects the award of monthly incapacity benefit pursuant to Article 13 of Law no. 118 of 30 March 1971 (Conversion into Law of Decree-Law no. 5 of 30 January 1931 and new provisions in favour of the civilian disabled or invalids) to foreign nationals legally resident within the territory of the State to the requirement of possession of a residence card.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 26 May 2010.

(omitted)