JUDGMENT NO. 202 YEAR 2013

In this case the Court considered a referral order questioning the constitutionality of legislation which provided for the automatic refusal to issue or renew or revocation of the residence permit of an individual convicted of certain serious criminal offences. Whilst the legislation allowed for exceptions in cases in which the right to family reunion had been exercised, these did not apply in situations in which the person concerned was entitled to exercise such a right, but had not done so. The Court struck down the legislation as unconstitutional, holding that it was under a duty "to ensure that the automatic mechanisms put in place by Parliament strike a reasonable balance between all interests and rights of constitutional standing that are affected by the law on immigration, and cannot refrain from striking down any legislative provisions that have a disproportionate and unreasonable impact on fundamental rights". The Court also held that the legislation was in any case unconstitutional with reference to Article 8 ECHR.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 5(5) and 9 of Legislative Decree no. 286 of 25 July 1998 (Provisions governing entry into, stay in and removal from the territory of the state) initiated by the Regional Administrative Court for Veneto in the proceedings pending between S.B. and the Ministry for the Interior and another, by the referral order of 16 July 2012 registered as no. 223 in the Register of Referral Orders 2012 and published in the Official Journal of the Republic no. 41, first special series 2012.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Marta Cartabia in chambers on 22 May 2013.

[omitted]

Conclusions on points of law

1.– By the referral order mentioned in the headnote, the Regional Administrative Court for Veneto raised a question concerning the Constitutionality of Articles 5(5) and 9 of Legislative Decree no. 286 of 25 July 1998 (Provisions governing entry into, stay in and removal from the territory of the state), with reference to Articles 2, 3, 29, 30 and 31 of the Constitution and Article 117(1) of the Constitution, in the light of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955 (Ratification and implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and of the Additional Protocol to the Convention, signed in Paris on 20 March 1952), hereafter the ECHR.

1.1.– The referring court, which has been called upon to rule on the legality of an administrative decision to refuse to renew a residence permit for self-employed work, points out first and foremost that the automatic mechanism preventing a person from remaining within the country where he has been convicted, even on a non-definitive basis, of certain offences, including those relating to narcotics, which is laid down in general terms by Article 4(3) of Legislative Decree no. 286 of 1998, may be set aside exceptionally in the situations provided for under Articles 5(5) and 9 respectively for those who have exercised the right to family reunion and those who have applied for an EC residence permit for long-term residents. In these exceptional cases, the public administration must assess on a discretionary basis how dangerous the foreign national currently is. This assessment must take account of information such as the length of residence, the level of the foreign national's social and labour market inclusion and his family ties, and the administrative authority cannot automatically refuse to grant or renew a residence permit in such exceptional cases due to the sole fact of the conviction.

According to the lower court, the applicant fulfilled the substantive prerequisites for obtaining both family reunion as well as an EC long-term residence permit, but since he did not file the relative applications and did not accordingly exercise the relative rights or secure the issue of the relative measures, he does not fall under the exceptions provided for under the legislation, and should therefore be subject to the automatic bar on the renewal of his residence permit, as a result of his conviction.

The referring Regional Administrative Court thus infers that the question concerning the constitutionality of Articles 5(5) and 9 of Legislative Decree no. 286 of 1998 insofar as they do not extend the exceptions provided for thereunder to those who comply with the substantive prerequisites for obtaining family reunion or a long-term residence permit, though have not applied for the respective measures, is not manifestly groundless: in fact, this legislation creates an unreasonable difference between the treatment of similar situations, causing an unlawful restriction on protection for the family and minors, as guaranteed by the Constitution pursuant to Articles 2, 3, 29, 30 and 31 along with Article 8 ECHR, as applied by the Strasbourg Court, which supplements the principle of constitutional law laid down in Article 117(1) of the Constitution, especially in cases such as the present case involving prolonged inertia on the part of the public administration following the conviction.

1.2– As regards the question of relevance, the Regional Administrative Court asserts that, if the question raised were to be accepted, it would be necessary to accept the applicant's claim in the proceedings before the referring court, as it would have to be concluded that the individual is not currently dangerous in the present case, whilst the application would have to be rejected were the Constitutional Court to conclude that the contested provisions were not unlawful, and accordingly that the automatic mechanism provided for by law should apply.

2.– As a preliminary matter, it is necessary to examine the objection raised by the State Counsel that the question is inadmissible on the grounds that it is not relevant, in consideration of the fact that Articles 12 and 20 of Legislative Decree no. 30 of 6 February 2007 (Implementation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) – the contents of which are capable of upholding the rights claimed to have been infringed – should apply in the present case rather than the provisions of Legislative Decree no. 286 of 1998, which has been challenged by the referring court.

It must however be pointed out that Article 12 is limited to providing that a foreign national will not lose the right of residence solely due to the fact of having divorced a national of the European Union, but does not however stipulate under what conditions such a person is entitled to reside in the country; moreover, Article 20 does not regulate the "renewal" of residence permits, but rather "deportation" from the country. Thus, it is

evident that neither scenario involves a provision that is relevant in the proceedings pending before the Regional Administrative Court.

It should be added that, according to the provisions of Legislative Decree no. 30 of 2007, which has been referred to by the State Counsel, after the spouse of an Italian national (or of another Member State of the European Union) has stayed informally in the country for three months, that person is required to apply for a residence card pursuant to Article 10 of Legislative Decree no. 30 of 2007 and, unless and until such a document has been obtained – which is a prerequisite for the exercise of rights under European Union law – or if no such application is made, that person's residential status will continue to be governed by the consolidated law on immigration (see *inter alia* judgment no. 17346 of 2010 of the Civil Division of the Court of Cassation), and thus precisely by the provisions of Legislative Decree no. 286 of 1998, which have been contested by the referring court.

It is therefore the provisions of Legislative Decree no. 30 of 2007, referred to by the State Counsel, that are irrelevant for the purposes of the decision in the proceedings before the lower court, whilst the referring court has correctly argued that the provisions of the consolidated law on immigration are applicable.

3.– More specifically, the referring court has provided plausible reasons in support of the relevance of the question concerning the constitutionality of Article 5(5) of Legislative Decree no. 286 of 1998; however, the question raised with reference to Article 9 of the Decree must be ruled inadmissible.

In fact, since the Regional Administrative Court for Veneto is required to rule on an application seeking the annulment of a refusal to renew a residence permit for self-employed work, it must apply Article 5(3), which refers to Article 4(3), of Legislative Decree no. 286 of 1998.

As regards the said provisions, the referring court does not consider the automatic bar on the issue or renewal of a residence permit provided for under Article 4(3), in the event that a non-European Union national is convicted of certain offences, to be unlawful as a general matter. Mindful of the reasons on the basis of which the Constitutional Court has held that it is not manifestly unreasonable to render the entry into and stay in the country by a foreign national conditional upon the requirement that the person has not committed serious offences, the Regional Administrative Court does

not challenge Article 4(3) of Legislative Decree no. 286 of 1998 in itself. On the contrary, according to the referral order, the exceptions to the automatic bar under Article 4(3) laid down elsewhere in the legislation are claimed to be unconstitutional on the grounds that they are excessively restrictive and subject to compliance with merely formal requirements.

The first exception, laid down by Article 5(5), excludes the automatic operation of the rule against persons who have "exercised the right of family reunion" or against reunified family members: when deciding whether to refuse to issue, to revoke or to refuse to renew a residence permit for such persons, it is necessary to "take account also of the nature and efficacy of the family ties of the person concerned and of the existence of family and social ties with his country of origin and, for foreign nationals who are already in the country, also of the duration of their stay in the country". In this regard, the lower court complains that this exception to the automatic rule does not extend to those who do in fact comply with the substantive prerequisites for obtaining family reunion, but have not taken the relative formal steps.

The second exception provided for under Article 9 of Legislative Decree no. 286 of 1998, precludes the application of the automatic rule under Article 4(3) to applications for EU long-term residents' permits, the issue of which is conditional upon a case-specific assessment of the dangerousness of the foreign applicant , which must be made with reference to various information, such as "the duration of stay in the country and the foreign national's social, family and labour market inclusion".

However, it must be pointed out in relation to this latter rule – laid down in Article 9 of Legislative Decree no. 286 of 1998 – that, since in the proceedings before it the Regional Administrative Court is required to decide on the legality of a decision to refuse to renew a residence permit for self-employed work governed by Article 5 of Legislative Decree no. 286 of 1998, it cannot apply in this case. In other words: since the proceedings pending before the Regional Administrative Court relate to a residence permit for self-employed work and not an EC long-term residents' permit, the only exception to the said automatic bar that is capable of applying is that contemplated under Article 5(5) of Legislative Decree no. 286 of 1998, which lays down the general rules governing the issue, refusal or revocation of a residence permit and which, in such cases, provides for a discretionary assessment of the level of actual danger only for

foreign nationals who have exercised the right of family reunion or for their reunified family members.

Therefore, the question of constitutionality raised with reference to Article 9 of Legislative Decree no. 286 of 1998 must be ruled inadmissible on the grounds that it is not relevant in the proceedings before the lower court.

Conversely, the objection raised by the State Counsel that the question is inadmissible on the grounds that it is irrelevant must be rejected with regard solely to the question of constitutionality raised in relation to Article 5(5) of Legislative Decree no. 286, to which these proceedings must accordingly be limited.

4.– On the merits, the question concerning the constitutionality of Article 5(5) of Decree-Law no. 286 of 1998 is well founded.

4.1.– The contested provision provides that any revocation or refusal to issue or renew a residence permit for a "foreign national who has exercised the right of family reunion or for a reunited family member" must take account also of the nature and efficacy of the family ties of the person concerned and of the existence of family and social ties with his country of origin, as well as the duration of his stay in Italy. In this way, foreign nationals who have been living in Italy under the terms of a family reunion order may enjoy enhanced protection, which shelters them from the automatic application of measures liable to jeopardise their stay in the country in the event that they are convicted of the offences referred to in Article 4(3) of the consolidated law on immigration.

According to Article 5(5), that enhanced protection, which requires the authorities to assess the specific circumstances of the individual concerned, taking account of both whether he represents a danger for security and public order, as well as the duration of his stay and his family and social ties, does not extend to those who, notwithstanding that they fulfil the substantive prerequisites for family reunion, have not applied for the relative formal measure, and thus have not "exercised the right of family reunion" under the contested legislation. Accordingly, such persons must be subject to an automatic rule which requires the public authority to refuse to issue, or to revoke or refuse to renew a residence permit if the applicant has been convicted, including by non-definitive judgment, of the offences provided for under Article 4(3) of Legislative Decree no. 286 of 1998.

4.2.– The present proceedings relate precisely to the exclusion from the scope of reinforced protection under Article 5(5) of the consolidated law on immigration of persons who have not exercised their right to family reunion, even though they have fulfilled the prerequisites. As argued by the lower court, the fact that it is impossible to include within the class of beneficiaries of such enhanced protection all persons living in Italy with a family, irrespective of the type of residence permit held, leads to an unreasonable difference in treatment between similar situations, resulting in an unlawful restriction on fundamental rights protecting the family and minors, in breach not only of Articles 2, 3, 29, 30 and 31 of the Constitution, but also of Article 8 ECHR as applied by the Strasbourg Court, which constitutes an interposed rule pursuant to Article 117(1) of the Constitution.

4.3.– It is necessary to recall first and foremost the settled position of this Court according to which Parliament is granted broad discretion in regulating foreign nationals' entry into and stay within the country, in consideration of the variety of interests affected by these rules; however, it must also be stressed that the Court has regularly reasserted that this legislative discretion is not absolute, and must strike a reasonable and proportionate balance between all rights and interests at issue, above all when the provisions on immigration are liable to impinge upon fundamental rights which the Constitution protects on an equal footing for nationals and non-nationals (see judgments no. 172 of 2012, no. 245 of 2011, nos. 299 and 249 of 2010, no. 148 of 2008, no. 206 of 2006 and no. 78 of 2005).

When exercising this discretion, Parliament may also stipulate cases in which, where offences of a certain gravity have been committed, which are deemed to be particularly dangerous for security and public order, the authorities are required automatically to revoke or refuse a residence permit, without considering any other circumstances. This Court has already had the opportunity to point out that rules of this nature are not generally speaking evidently unreasonable "as automatic deportation represents the corollary of the principle of strict legality, which permeates the entire body of rules governing immigration and constitutes an inalienable safeguard for rights, including those of foreign nationals, ensuring that the administrative authorities do not act arbitrarily" (see judgment no. 148 of 2008).

Therefore, according to prior case law, the conviction of a foreign national who is not a citizen of the European Union of particular offences may indeed justify the operation of an automatic bar on the issue or renewal of a residence permit. Nevertheless, such a provision must under all circumstances strike a balance that is reasonable and proportionate pursuant to Article 3 of the Constitution between the requirement on the one hand to protect public order and the security of the state and to regulate migratory flows, and on the other hand to safeguard the rights of the foreign nationals recognised under the Constitution (see judgment no. 172 of 2012).

Therefore, this Court has been called upon to ensure that the automatic mechanisms put in place by Parliament strike a reasonable balance between all interests and rights of constitutional standing that are affected by the law on immigration, and cannot refrain from striking down any legislative provisions that have a disproportionate and unreasonable impact on fundamental rights (see judgments no. 245 of 2011, no. 299 and no. 249 of 2010). When making such assessments, the Court must also consider the fact that, since the automatically applicable procedures are based on an absolute presumption of danger, they must be deemed to be arbitrary and hence unconstitutional where they are not compatible with facts ascertained from general experience, i.e. when it is easy – as in the case under examination – to hypothesise actual situations that run contrary to the generalisation underlying the presumption (see judgments no. 57 of 2013, no. 172 and no. 110 of 2012, no. 231 of 2011, no. 265, no. 164 and no. 139 of 2010).

4.4.– In the case under examination, the contested provision delineates the scope of enhanced protection, enabling the automatic rule to be set aside only in relation to persons who have entered the country under the terms of a formal family reunion order, thereby establishing an unreasonable difference in treatment with those who have not submitted an application to that effect, even though they comply with the substantive prerequisites. Such restrictions violate Article 3 of the Constitution and are unreasonably detrimental to family relations, which should receive privileged protection under Articles 29, 30 and 31 of the Constitution, and which the very same provisions of the Constitution require the Italian state to support, *inter alia* through specific relief and benefits.

In particular, the fact that the Constitution guarantees protection to families and minors implies that all decisions relating to the issue or renewal of residence permits for persons with family ties in Italy must be based on a careful consideration of the specific and current dangerousness of the convicted foreign national, whereby residence permits cannot be refused automatically owing solely to a conviction for certain offences. In fact, in matters concerning interpersonal relations, any decision that affects one individual ends up having ramifications also on other family members and the removal of a person from his immediate family – especially in cases involving minors – is a decision which is too serious to be left in a general and automatic fashion to presumptions of absolute dangerousness provided for by law and to automatically applicable procedures, without leaving scope for a circumstantiated examination of the specific circumstances of the foreign national concerned and his family members.

In this sense, Article 5(5) of Legislative Decree no. 286 of 1998 violates Articles 2, 3, 29, 30 and 31 of the Constitution insofar as it does not extend the enhanced protection provided for thereunder to all cases in which the foreign national has family ties in the country.

5.– An examination of Article 8 ECHR, as applied by the European Court of Human Rights, and invoked as an interposed rule in these proceedings with reference to Article 117(1) of the Constitution, also results in a similar conclusion.

In fact, the Strasbourg Court has always asserted (see *inter alia* the judgment of 7 April 2009 in *Cherif and others v. Italy*) that the ECHR does not guarantee foreign nationals the right to enter into or reside in a particular country, and that states retain the power to deport foreign nationals who have been convicted of offences punished by a custodial sentence. However, when close members of the family of the foreign national liable to be deported live in the country, a proportionate balance must be struck between the right of the applicant and his family to a family life and the legal interest in public safety and the need to prevent threats to public order pursuant to Article 81(1) ECHR.

According to the European Court (see *inter alia* the judgment of 7 April 2009 in *Cherif and others v. Italy*), the requirement that the balance mandated by Article 8 ECHR must be reasonable and proportional means that it must be possible to assess various information available from a close observation of the facts of each case, such as: the nature and seriousness of the offence committed by the applicant; the duration of the

interested party's stay in the country; the period of time since the offence was committed and the applicant's conduct during that period; the nationality of the various persons involved; the family circumstances of the applicant including specifically, where applicable, the duration of his marriage and any other factors establishing the genuine family life of the couple; whether the spouse was aware of the offence at the time the family relationship was established; whether children have been born out of the marriage and their age; the difficulties which the spouse or children would risk having to deal with in the event of deportation; the interest and welfare of the children; and the strength of social, cultural and family ties with the host country.

This level of attention to the specific circumstances of the foreign national and his family, guaranteed by Article 8 ECHR as applied by the European Court of Human Rights, is an expression of a level of protection for family relations which is equivalent, insofar as is relevant in the case under examination, to the protection granted to the family under Italian constitutional law. Consequently, the contested provision must be ruled unconstitutional also on this basis, due to the violation of Article 8 ECHR, in accordance with constitutional case law which assigns this Court the task, when carrying out its unique role, of making a "systemic and unitary" assessment of fundamental rights such as to ensure the "fullest extent of the guarantees" available for all relevant rights and principles under constitutional and supranational law, considered overall, which are at all times inter-related with one another (see judgments no. 170 and no. 85 of 2013, and no. 264 of 2012).

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

1) rules that Article 5(5) of Legislative Decree no. 286 of 25 July 1998 (Provisions governing entry into, stay in and removal from the territory of the state) is unconstitutional insofar as it provides that the discretionary assessment provided for thereunder shall only apply to a foreign national who "has exercised the right to family reunion" or to the "reunified family" and not also to a foreign national "who has family ties within the territory of the state";

2) rules that the question of constitutionality raised by the referral order mentioned in the headnote in relation to Article 9 of Legislative Decree no. 286 of 1998 is inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 July 2013.