JUDGMENT NO. 203 YEAR 2013

In this case the Court heard a referral from the administrative courts challenging legislation which granted entitlement to a leave of absence only to a restricted class of relative. The Court struck down the legislation as unconstitutional, holding that "the limitation of the range of persons to which the legislation currently applies may in fact be detrimental for the provision of assistance to the seriously disabled within the family context where none of these persons is willing or able to care for that person."

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 42(5) of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity, enacted pursuant to Article 15 of Law no. 53 of 8 March 2000), initiated by the Regional Administrative Court for Calabria, Reggio Calabria division, in the proceedings pending between F.U. and the Ministry of Justice, by the referral order of 7 November 2012, registered as no. 5 in the Register of Referral Orders 2013 and published in the Official Journal of the Republic no. 5, first special series 2013.

Having heard the Judge Rapporteur Marta Cartabia in chambers on 5 June 2013.

[omitted]

Conclusions on points of law

1.– The Regional Administrative Court for Calabria, Reggio Calabria division, questions the constitutionality of Article 42(5) of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity, enacted pursuant to Article 15 of Law no. 53 of 8 March 2000) "insofar as, if there are no other appropriate persons, it does not permit another cohabitant related by birth or marriage to a person with a duly certified severe disability to benefit from an extraordinary leave of absence" or, in the alternative, "insofar as it

does not include within the class of persons entitled to benefit from the leave of absence provided for thereunder a person related by marriage in the third degree, if there are no other suitable persons to care for the person" with a duly certified severe disability, on the grounds that it breaches Articles 2, 3, 29, 32, 118(4) and 4 and 35 of the Constitution.

In the opinion of the referring court, the contested provision violates Article 32 of the Constitution since the protection of the right to health must be construed to include the provision of instruments necessary to ensure that the most appropriate care and assistance is possible; it is claimed to violate Article 2 of the Constitution in that, in requiring compliance with inderogable duties of solidarity, it implies that measures enabling such duties to be complied with must be put in place; it is claimed to violate Article 29 of the Constitution since assistance also amounts to a form of protection for families and the individuals eligible to benefit from a leave of absence are all related to the person suffering from illness. Moreover, the assistance provided by cohabitants related by birth or marriage enables the person requiring care to be integrated fully into the family unit in a lasting manner. In the opinion of the lower court, according to the combined reading of Articles 2, 29 and 32 of the Constitution, the family is a preferred locus for providing assistance to the disabled, also in the light of the combined provisions of Articles 29 and 118(4) of the Constitution, according to which the family, understood as an "instrument for the implementation of the general interest, including the wellbeing of individuals and social assistance", is to be promoted. The provision in question is also claimed to violate Articles 4 and 35 of the Constitution since, if he or she is to be able to guarantee care and assistance to the disabled person, the latter's relative is forced to give up his or her work or to reduce the number of hours, or to choose a different job compatible with that goal; finally, Article 3 of the Constitution is also claimed to have been violated since, in situations involving a cohabiting relative – which are substantially identical to those involving the other persons provided for under the provision – and an identical need to protect the mental and physical health of the severely disabled person and to promote his or her integration into the family, the failure to include further grounds appears to be unjustifiably discriminatory.

2.– The referring regional administrative court has referred to this Court for examination a request for an expansive ruling seeking to fill a gap in the law, which is

deemed to violate the principles of constitutional law invoked. Two questions have been raised by the lower court, the second in the alternative to the first.

2.1.– The first seeks to obtain a ruling that the contested provision is unconstitutional "insofar as, if there are no other appropriate persons, it does not permit another cohabitant related by birth or marriage of a disabled person with a duly certified severe disability to benefit from an extraordinary leave of absence".

This question cannot be deemed to be admissible due to the fact that it would require the Court to make a ruling introducing final regulations into the contested provision, which would have broad and indeterminate scope in that it would seek to extend the availability of an extraordinary leave of absence to an indefinite range of persons.

The question must therefore be ruled inadmissible.

As this Court has pointed out in other proceedings with analogous subject matter, such a question not only exceeds the bounds of relevance in the present case, but also seeks an indeterminate remedy in asking the Court to make an expansive ruling, given the absence of any solution required under constitutional law (see judgment no. 251 of 2008 concerning a different subject matter, *inter alia*, judgments no. 301 and no. 134 of 2012, no. 16 of 2011, no. 271 of 2010, and orders no. 138 and no. 113 of 2012).

2.2.– The second question, which also relates to Article 42(5) of Legislative Decree no. 151 of 2001 insofar as it does not include within the class of persons entitled to benefit from the leave of absence provided for thereunder a person related by marriage in the third degree, if there are no other suitable persons to care for the person with a duly certified severe disability, is well founded.

3.– In order to classify the question raised adequately, it is necessary as a preliminary matter to consider the *ratio legis* of the institution of extraordinary leave of absence pursuant to Article 42(5) of Legislative Decree no. 151 of 2001, in the light of its prerequisites along with the legislation and case law relating to it.

3.1.– The extraordinary leave of absence now placed before this Court for examination amounts to a development of, or rather a new creation out of, a similar benefit originally provided for under Article 4 of Law no. 53 of 8 March 2000 (Provisions to support maternity and paternity, on the right to care and education and on the coordination of public service hours in cities). Paragraph 2 of that provision allowed

public and private sector employees for the first time to apply for a continuous or segmented leave of absence, due to serious documented family reasons, of up to two years, during which the employee would retain his or her job without pay. This provision is still in force.

Subsequently, Article 80(2) of Law no. 388 of 23 December 2000 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2001), introduced paragraph 4-bis into Article 4 of Law no. 53 of 2000, according to which biological or adoptive parents, or following their death a cohabitant brother or sister of the disabled person with a duly certified severe disability, are entitled to take a leave of absence pursuant to Article 4(2), and to receive an allowance corresponding to their last salary payment.

In this way, the general provision for an unpaid extraordinary leave of absence for serious family reasons pursuant to Article 4(2) of Law no. 53 of 2000 was taken as a basis for inferring a similar but self-standing leave of absence in order to provide assistance to severely disabled people, along with the right to receive an allowance corresponding to the last salary payment and notional social insurance cover, which could be used by a parent (including an adoptive parent, or after the death of the parents, by a cohabiting brother or sister) who is a public or private sector employee, where the child has been severely disabled for at least five years pursuant to Articles 3 and 4 of Law no. 104 of 5 February 1992 (Framework law on assistance to, the social integration of and the rights of the disabled).

Following the adoption of Legislative Decree no. 151 of 2001, the institute of an extraordinary leave of absence was introduced into Article 42(5), entitled “Breaks and time off for severely disabled children” and, following amendment by Article 3(106) of Law no. 350 of 24 December 2003 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2004), the benefit was awarded irrespective of whether the prerequisite of at least five years of serious disability was met.

3.2.– It must also be recalled that the extraordinary leave of absence to provide assistance to severely disabled persons, as structured following the successive enactment of legislation referred to above, has been brought before this Court for

examination on various occasions, and that through these judgments the Court has gradually expanded the range of persons entitled to receive the benefit.

When first considering the issue, this Court ruled unconstitutional Article 42(5) of Legislative Decree no. 151 of 2001 insofar as it did not entitle any cohabiting brothers or sisters of a severely disabled person to benefit from the extraordinary leave of absence provided for thereunder in the event that the parents were unable to assist the disabled child on the grounds that they were entirely incapacitated (see judgment no. 233 of 2005).

In a second judgment, the provision was then declared unconstitutional on the grounds that it did not indicate the cohabiting spouse of the severely disabled person on a priority basis over the other relatives referred to by the provision (see judgment no. 158 of 2007).

Finally, the same provision was ruled unconstitutional insofar as it did not include a cohabiting child within the class of beneficiaries, even where this is the only person able to provide assistance to the severely disabled person (see judgment no. 19 of 2009).

3.3.– After these judgments were issued by the Constitutional Court, Parliament once again made provision in the area of leaves of absence granted in order to provide assistance to severely disabled persons in the regulations issued in accordance with the delegation contained in Article 23 of Law no. 183 of 4 November 2010 (Delegations to the Government in relation to arduous work, social benefits, leaves of absence, extended leave and time off work, social benefits, employment services, incentives relating to employment, apprenticeships and female employment and measures to combat undeclared work and provisions on public sector work and employment disputes). This delegation was implemented by Legislative Decree no. 119 of 18 July 2011 (Implementation of Article 23 of Law no. 183 of 4 November 2010 laying down a delegation to the Government on the rearrangement of legislation on leaves of absence, extended leave and time off work), including in particular Articles 3 and 4.

The version currently in force of Article 42(5) of Legislative Decree no. 151 of 2001, as amended by Legislative Decree no. 119 of 2011, expanded the class of persons to whom that right is granted, implementing the various rulings of the Constitutional Court over the years (referred to above) but also setting out the possible beneficiaries in a rigid hierarchical order, which cannot be altered at the disabled person’s choosing.

It must be recalled that Legislative Decree no. 119 of 2011 also made provision in relation to indirect elements of remuneration, which had previously been allowed also during leaves of absence, stipulating that any extraordinary leave of absence is not to be taken into account for the purposes of accrual of leave, the thirteenth-month salary payment and the end-of-service lump sum. The legislation also stipulated a maximum limit on the allowance due to the worker and the relative notional contribution. Furthermore, private employers may deduct the amount of the allowance from the social security contributions due.

In this way, the State indirectly pays a social benefit by bearing the costs of the paid extraordinary leave of absence, thereby enabling the worker to provide assistance to a severely disabled relative whilst receiving an allowance proportionate with his or her salary.

3.4.– It may be observed on the basis of the above that the institute of the leave of absence in order to assist severely disabled family members has undergone a deep-seated transformation in two senses: first financially and secondly as regards the beneficiaries of the rule.

As regards the financial aspect, the contested provision, as currently in force, sets out a benefit which guarantees the worker income for the entire period of absence from work; this allowance is proportionate to the last salary received, though not exactly identical to it, is subject to a maximum annual limit, and may not be paid for more than two years out of the entire working life; moreover, the financial burden is not borne in full by the employer, including specifically the private sector employer, which in turn deducts it from its social security payments. In this way the legislation has established an indirect form of assistance for the severely disabled based on the operation of forms of solidarity existing within civil society, and in particular within the family, in accordance with the letter and spirit of the Constitution, starting from the principles of solidarity and subsidiarity laid down by Articles 2 and 118(4) of the Constitution. Parliament thus intended to shoulder the burden for persons in a serious state of need, providing also the necessary financial resources, by granting a right to a leave of absence for a family member, who may use that leave to the benefit both of the person cared for and the general interest. Extraordinary paid leave is therefore a manifestation of the welfare state which consists not in the more prevalent direct provision of services

or the payment of financial benefits, but rather in facilitations and incentives to express solidarity towards a relative.

As regards the beneficiaries of the rule, whilst the extraordinary leave of absence was originally conceived as an instrument for providing enhanced protection for the mothers of severely disabled children, and is still incorporated into legislation dedicated to the protection of and support for maternity and paternity (as stipulated by the title of Legislative Decree no. 151 of 2001), its scope has now become broader. The gradual extension of the class of persons entitled to request a leave of absence mandated above all by this Court has extended its scope beyond parents to include also the children of disabled parents, and also relations with spouses or brothers and sisters.

In order to bring the forms of assistance into line with emerging situations of need and the growing requests for care owing, amongst other things, to ongoing demographic changes, this Court concluded that Parliament had unlawfully disregarded disabilities that may be caused by events subsequent to birth or as a result of illnesses with progressive effects, or again due to the natural passage of time. Also in these situations, as is the case for disabled children, the governing principle is that care for the disabled person within the family is preferable under all circumstances and, more importantly, is most compliant with principles of constitutional law, irrespective of the age of the assisted person and whether or not he or she is a child (see judgment no. 158 of 2007).

Therefore, in its current form, an extraordinary leave of absence pursuant to Article 42(5) of Legislative Decree no. 151 of 2001, which may be used in order to care for severely disabled persons, is a socio-welfare instrument based both on the recognition of the care provided by relatives as well as the exploitation of relations of interpersonal and intergenerational solidarity, of which the family is a primary manifestation, as implementation of Articles 2, 3, 29, 32 and 118(4) of the Constitution.

3.5.– Moreover, this development is in keeping with the principles asserted in the case law of this Court, which has for some time been clear in its view that protection for the mental and physical health of the disabled is also premised on the provision of supplementary financial benefits to families, “the role of which remains fundamental in the provision of care and assistance to the disabled” (see judgments no. 19 of 2009, no. 158 of 2007 and no. 233 of 2005), which also include the leave of absence under examination.

Stressing the essential role of the family in the provision of assistance to and socialisation of the disabled (see *inter alia* judgment no. 233 of 2005, which refers to principles previously asserted since judgments no. 215 of 1987 and no. 350 of 2003), the Court wishes to highlight the fact that in order to ensure full protection for the weak it is necessary to provide not only healthcare services and rehabilitation, but also care and social inclusion and above all to ensure continuity within the constitutive relationships of the human personality.

4.– In the light of developments in the legislation and case law set out above, the resulting rationale for the legislation and above all the constitutional principles which the extraordinary leave of absence contributes to implement, it follows that the question concerning the constitutionality of Article 42(5) of Legislative Decree no. 151 of 2001, insofar as it does not include, within the class of persons entitled to benefit from the leave of absence provided for thereunder, a person related by marriage in the third degree – and, due to evident reasons of coherence and reasonableness, other cohabitants more closely related to the disabled person by birth or marriage up to and including the third degree – in the event that there are no other persons, as identified by law according to an order of priority as being suitable for caring for the severely disabled person, in the event of the death of such persons, or should they suffer from debilitating illness, due to violation of Articles 2, 3, 29, 32 and 118(4) of the Constitution, is well founded.

The limitation of the range of persons to which the legislation currently applies may in fact be detrimental for the provision of assistance to the severely disabled within the family context where none of these persons is willing or able to care for that person. The ruling of unconstitutionality is intended precisely to enable a cohabitant with the disabled person who is related by birth or marriage up to and including the third degree to attend to the latter’s care requirements, stopping work for a set period of time and benefiting from adequate financial peace of mind, in the event that there are no other persons, as identified by the contested provision according to the strict order of priority specified thereunder, in the event of the death of such persons, or should they suffer from debilitating illness.

On the other hand, it must be recalled that the extraordinary leave of absence under discussion may only be used in order to provide assistance to persons with a serious disability that has been duly certified pursuant to Articles 3 and 4 of Law no. 104 of

1992, that is to those with an impairment such as to "require permanent, ongoing and complete assistance individually or with regard to relationships".

Finally, it is not superfluous to recall that Parliament has already recognised the role of relatives by birth and marriage up to and including the third degree precisely in relation to care for the severely disabled in granting them the right to three days of paid leave each month, pursuant to Article 33(3) of Law no. 104 of 1992.

Consequently, the legal order already affords legal significance to ties by birth or marriage up to and including the third degree for specific purposes associated with the provision of care and assistance to the severely disabled where certain requirements are met, which are entirely equivalent to those laid down by the legislation on the use of extraordinary paid leaves of absence pursuant to Article 42(5) of Legislative Decree no. 151 of 2001, that is that the person must have been certified as severely disabled, must not have been admitted to a full-time care facility, and exclusively where there are no closer relatives by birth or marriage, or such relatives have died or suffer from debilitating illnesses. Moreover, it is not clear why recognition of the contribution to the care of the severely disabled by relatives by birth or marriage up to and including the third degree must be limited to time off work pursuant to Article 33(3) of Law no. 104 of 1992; this legislative asymmetry provides a further argument in support of the ruling that the failure to mention such persons amongst those entitled to apply for an extraordinary leave of absence under the contested provision is unconstitutional.

5.– The other grounds for challenge do not require discussion.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

1) declares that Article 42(5) of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity, enacted pursuant to Article 15 of Law no. 53 of 8 March 2000) is unconstitutional insofar as it does not include within the class of persons entitled to benefit from the leave provided for thereunder, and subject to the conditions set forth thereunder, a cohabitant related by birth or marriage up to and including the third degree in the event that there are no other persons who are identified by the contested provision as being suitable for caring for the severely disabled person, in the event of the death of such persons, or should they suffer from debilitating illness.

2) rules that the question concerning the constitutionality of Article 42(5) of Legislative Decree no. 151 of 26 March 2001, raised with reference to Articles 2, 3, 4, 29, 32, 35 and 118(4) of the Constitution by the Regional Administrative Court for Calabria, Reggio Calabria division, insofar as "if there are no other appropriate persons, it does not permit another cohabitant related by birth or marriage to a person with a duly certified severe disability to benefit from an extraordinary leave of absence", by the referral order mentioned in the headnote, is inadmissible.

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