JUDGMENT NO. 40 YEAR 2013

In this case the Court considered a referral order objecting to legislation which rendered the award of a carer's allowance or a disability pension to non-Community nationals conditional upon the issue of a residence card. The same provision had previously been struck down by the Court in relation to other benefits. The Court ruled the legislation unconstitutional, referring to the general principle previously asserted that it is "manifestly unreasonable to subject the award of benefits (which presuppose a situation or invalidity or disability) to the holding of entitlement to stay in the country, the issue of which is besides conditional upon receipt of a particular level of income", noting also that any discrimination between Italian and foreign nationals in this area would breach Article 14 of the ECHR.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 80(19) 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), initiated by the *Tribunale di Urbino* by the referral order of 31 May 2011 and the *Tribunale di Cuneo* by the referral order of 27 September 2011, registered as no. 213 in the Register of Referral Orders 2011 and as no. 35 in the Register of Referral Orders 2012 and published in the Official Journal of the Republic no. 44, first special series 2011 and no. 12, first special series 2012.

Considering the entries of appearance by the National Institute for Social Security (INPS);

having heard the Judge Rapporteur Paolo Grossi at the public hearing of 12 February 2013;

having heard Counsel Clementina Pulli for the INPS.

[omitted]

Conclusions on points of law

1.— The *Tribunale di Urbino* raises a question concerning the constitutionality of Article 80(19) 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) with reference to Articles 3, 32 and 117(1) of the Constitution insofar as it subjects the award of the carer's allowance to possession of a residence card, and thus also to the prerequisite of a certain length of stay in the country. In the opinion of the lower court, the principles laid down by this Court in judgments no. 187 of 2010 and no. 11 of 2009 concerning the same provision (albeit in relation to monthly incapacity benefit and disability pensions), which is now contested once again, should also apply to the carer's allowance, having regard to the specific nature and function of that benefit; since it is premised on a state of health that is so severe as to prevent the assisted person from carrying out everyday acts, the benefit is an indispensable instrument in assuring minimum everyday living requirements, even more so than the benefits already reviewed by the Court. Thus, insofar as it subjects the award of that benefit to the possession of a long-term residence card, the contested provision is claimed to violate Article 3 of the Constitution by unreasonably discriminating against foreign nationals in relation to the exercise of fundamental human rights, and Article 32 of the Constitution in that protection of the right to health under conditions of equality would be denied to foreign nationals staying legally in the country. Finally, the contested provision is claimed to violate Article 117(1) of the Constitution, with reference to the interposed rule laid down by Article 14 of the European Convention on Human Rights (ECHR), as interpreted by the Strasbourg Court.

2.— The *Tribunale di Cuneo* also raised a question concerning the constitutionality of Article 80(19) of Law no. 388 of 2000, alleging that it violates Article 117 of the Constitution "insofar as it subjects the award to foreign nationals staying legally in the country of non-military disability pensions pursuant to Article 12 of Law no. 118 of 30 March 1971 and of the carer's allowance pursuant to Article 1 of Law no. 18 of 11 February 1980 to the requirement of possession of a residence card" and with Articles 2, 3, 29, 32 and 38 of the Constitution "insofar as it subjects the award to foreign nationals staying legally in the country of the carer's allowance pursuant to Article 1 of Law no. 18 of 11 February 1980 to the requirement of possession of a residence card".

In relation to the disability pension, the referring court observed that the statements made *obiter dicta* by this Court in judgment no. 187 of 2010 – which ruled unconstitutional Article 80(19) of Law no. 388 of 2000 insofar as it subjected the award of monthly incapacity benefit pursuant to Article 13 of Law no. 118 of 20 March 1971 (Conversion into Law of Decree-Law no. 5 of 30 January 1971 and new provisions in favour of the non-military disabled or invalids) to foreign nationals staying legally in the country to the requirement of possession of a residence card – apply all the more so in relation to the disability pension, since that benefit is conditional upon the recipient's complete inability to work, compared to the less severe state of health required for the award of incapacity benefit. The contested exclusionary rule is thus claimed to introduce a discriminatory factor, in breach of the ECHR and hence of Article 117(1) of the Constitution.

As regards the carer's allowance, which is conditional upon complete disability and is not even subject to any income requirements, arguments not dissimilar to those already highlighted in the judgment of this Court referred to on various occasions apply. Thus, alongside the violation of Article 117 of the Constitution, the referring court asserts that Articles 2, 3 and 29 have also been breached, given the function as an aid for the invalid's immediate family which the carer's allowance is intended to perform and the related unjustified discrimination that the families of foreign invalids who do not hold a residence card would suffer; it is finally claimed to violate Articles 32 and 38 of the Constitution, in view of the serious nature of the state of health necessary in order for the benefit to be awarded, which is claimed to have implications also for the principles enshrined in Article 2 of the Constitution, "as the right to health is a fundamental human right".

3.— The National Institute for Social Security (INPS) entered an appearance in both proceedings, asking that the questions be ruled groundless.

In the opinion of the Institute, a norm - such as the contested provision - which limits access to public assistance to persons who "have demonstrated the intention to remain stably in Italy, as well as the conditions for doing so, by virtue of their non-ephemeral participation in the administrative system, with the duties and benefits that this entails" cannot be deemed to be unreasonable or discriminatory.

4. — The referral orders raise questions which are entirely analogous and relate to the same provision: the relative proceedings must therefore be joined for decision in a single judgment.

5. — The questions are well founded.

The questions of constitutionality are focused on the restrictions introduced by Article 80(19) of the Finance Law 2001 – which has been reviewed several times by this Court, as mentioned above and as will be specified shortly – on the award of social benefits to foreign nationals, which provides that the benefits comprising individual rights under the legislation currently in force in relation to social services shall only be granted to foreign nationals in possession of a residence card; with effect from 2007, the residence card has now been replaced by the EC long-term residents' permit pursuant to Article 2(3) of Legislative Decree no. 3 of 8 January 2007 3 (Implementation of Directive 2003/109/EC concerning the status of third country nationals who are long-term residents), the award of which is in turn conditional upon the fulfilment of certain prerequisites. In fact, in order to obtain this permit it is necessary for the foreign national to demonstrate: a) receipt of income not lower than the annual amount of income support payments and, in cases involving applications for family members, of income sufficient according to the parameters laid down by Article 29(3)(b) of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners); b) access to appropriate housing that complies with the minimum standards provided for under the regional law on public residential accommodation or that complies with health and hygiene suitability prerequisites ascertained by the competent local health authority; and c) possession for at least five years of a currently valid residence permit (Article 9 of the consolidated text on immigration). The prerequisites thus range from parameters related exclusively to income to others pertaining to general living conditions, through to a merely time-related requirement, consisting in the period of stay in Italy with a valid residence permit.

The contested provision thus proves to be highly restrictive – and in many senses to have inherently derogatory effect – compared to the general rule laid down in the area of social benefits and assistance payments to non-Community citizens by Article 41 of Legislative Decree no. 286 of 1998, which by contrast provides that "Foreign nationals

holding a residence card or residence permit of a duration not shorter than one year, and the minors registered on their residence card or permit shall be treated in an equivalent manner to Italian nationals for the purpose of receipt of benefits and services, including financial payments, and social assistance, including those in place for persons suffering from Hansen's disease or tuberculosis, the deaf-mute, the non-military blind, non-military invalids and indigent persons".

The Finance Law 2001 - which relates precisely to benefits that, according to law, are conceived of as "subjective rights" vested precisely in persons suffering from serious illnesses or disability, and who thus have a particular need for specific forms of assistance - thus ended up subjecting foreign nationals, including those staying legally in the country, to a whole range of restrictions consisting in the various prerequisites to which other legislation (enacted moreover against a backdrop of compliance with the provisions of Directive 2003/109/EC, which were dictated by requirements entirely extraneous to the matter at issue here) has subjected the EC long-term residents' permit. This led to an undoubted difference in treatment between foreign nationals and Italian nationals, which is particularly serious not only due to the direct effect on fundamental human rights, but also because it will end up having automatic implications for the members of the immediate families of the potential recipients of the benefits – who are not infrequently also minors.

The Court has had the opportunity to address repeatedly the same provision now contested in relation to disability pensions (judgment no. 11 of 2009 and judgment no. 324 of 2006) and the carer's allowance (judgment no. 306 of 2008), that is, the same benefits at issue here, and has ruled unconstitutional also Article 9 of the consolidated text on immigration insofar as foreign nationals who did not comply with the prescribed income requirements were ineligible for these benefits. Within that context, the Court held that it was manifestly unreasonable to subject the award of benefits (which presuppose a situation of invalidity or disability) to the holding of an entitlement to stay in the country, the issue of which is conditional *inter alia* upon receipt of a particular level of income.

The more general rule requiring possession of the EC long-term residents' permit – laid down by the contested provision as a prerequisite for the award of social benefits to foreign nationals staying lawfully in the country – was by contrast scrutinised, with

regard to possession of a residence permit for at least five years, in judgments no. 187 of 2010 (on monthly incapacity benefits pursuant to Article 13 of Law no. 118 of 1971) and no. 329 of 2011 (on the attendance allowance pursuant to Article 1 of Law no. 289 of 11 October 1990 laying down "Amendments to the rules on the carer's allowance pursuant to Law no. 508 of 21 November 1988, laying down supplementary provisions on economic assistance to non-military invalids, the non-military blind and the deaf-mute and establishment of an attendance allowance for minors affected by disability"). On both occasions, in ruling unconstitutional the contested legislation, the Court held in particular that – where the benefits were intended, as in the cases previously ruled upon, to provide support to individuals and to safeguard acceptable living conditions for the disabled person's family – any discrimination between Italian nationals and foreign nationals staying legally in the country based on prerequisites other than those applicable to the population as a whole will ultimately breach the principle of non-discrimination laid down by Article 14 ECHR, having regard to the strict interpretation of that rule within the case law of the European Court.

Moreover, if the principles asserted in particular in judgment no, 329 of 2011 are considered, it is evident that identical arguments may and must be invoked – *mutatis mutandis* – also in the present case, having regard to the nature and rationale of the benefits at issue here.

Owing to the serious state of health of the relevant persons, who suffer from seriously debilitating handicaps (in one of the two cases before the referring courts the person is a minor), a range of values of essential significance are at issue – such as in particular the safeguarding of health, the requirements of solidarity for situations of heightened social hardship, and the duties to provide assistance to families – all of which have constitutional status with reference to the principles invoked, including first and foremost Article 2 of the Constitution – in the light also of the various international law instruments also applicable in this area. This means that the provision for a restrictive regime (both *ratione temporis* and *ratione census*) for non-Community nationals staying legally in the country for a significant period of time and on a non-occasionral basis, such as in the present cases, lacks any justification whatsoever.

The contested legislation must therefore be ruled unconstitutional insofar as it subjects the award to non-Community nationals staying legally in the country of the

carer's allowance and the disability pension to the requirement of possession of a residence card – now the EC long-term residents' permit.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules that Article 80(19) 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) is unconstitutional insofar as it subjects the award to foreign nationals staying legally in the country of the carer's allowance pursuant to Article 1 of Law no. 18 of 11 February 1980 (Carer's allowance for totally incapacitated non-military invalids) and the disability pension pursuant to Article 12 of Law no. 118 of 30 March 1971 (Conversion into Law of Decree-Law no. 5 of 30 January 1971 and new provisions in favour of the non-military disabled or invalids) to the requirement of possession of a residence card.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 March 2013.