ORDER NO. 182 YEAR 2020

In this case the Court considered a referral from the Court of Cassation questioning the constitutionality of the rule stipulating that the eligibility of third-country nationals for the childbirth allowance and the maternity allowance is conditional upon the holding of a long-term resident's EU residence permit, and not for instance on the holding of a residence and work permit for at least one year. Although other types of family allowance had already been considered by the Court of Justice, the allowances at issue in these proceedings differed in that they did not pertain exclusively to the branch of social security but also performed the function of an incentive (specifically, incentivising childbirth). At the same time, the allowance is payable in different amounts depending upon the income bracket of the recipient, and thus on the different level of need on the part of the parents. Since opinions differed between the courts and the administration competent to grant the benefits as to whether Article 12 of Directive 2011/98/EU is directly applicable, the Court decided to make a reference for a preliminary ruling to the European Court of Justice.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

ORDER

within proceedings concerning the constitutionality of Article 1(125) of Law No. 190 of 23 December 2014 laying down "Provisions on the formation of the annual and multi-year budget of the state (Stability Law 2015)" and of Article 74 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 Supreme Court of Cassation with the referral orders of 17 June 2019, registered as Nos. 175, 177 to 182 and 188 to 190 in the Register of Referral Orders 2019 and published in the *Official Journal* of the Republic Nos. 44 and 45, first special series 2019.

Considering the entries of appearance by O. D., R.I. H.V., B. O., F. G., M.K.F. B., E. S., N. P., the National Institute for Social Security [*Istituto nazionale della previdenza sociale*, INPS] and S. E.A., and the interventions filed by the President of the Council of Ministers;

having heard Judge Rapporteur Silvana Sciarra at the public hearing of 7 July 2020 and in chambers on 8 July 2020;

having heard Counsel Alberto Guariso for O. D. and others, Counsel Amos Andreoni for N. P., Counsel Mauro Sferrazza and Counsel Vincenzo Stumpo for the INPS and State Counsel [*Avvocato dello Stato*] Paolo Gentili for the President of the Council of Ministers;

having deliberated in chambers on 8 July 2020.

The facts of the case

1.– With eight referral orders of similar content (Register of Referral Orders Nos. 175, 178, 180, 181, 182, 188, 189 and 190 of 2019), the Supreme Court of Cassation raised a question concerning the constitutionality of Article 1(125) of Law No. 190 of 23 December 2014, laying down "Provisions on the formation of the annual and multi-year budget of the state (Stability Law 2015)", insofar as it subjects the award of the childbirth allowance to foreign nationals to the holding of a long-term resident's EU residence permit, and does not consider the holding of a residence and work permit for at least one year to be sufficient.

1.1.– Certain nationals of third countries, who are lawfully resident in Italy and who only hold a single work permit, filed applications for the childbirth allowance, which the National Institute for Social Security (INPS) rejected due to the fact that they did not hold the long-term residence permit. The refusal was challenged on the grounds of discrimination, following which the merits courts accepted the claimants' objections, directly applying the principle of equal treatment between nationals of third countries and nationals of the Member States where they reside, as enshrined with regard to the branch of social security by point (e) of Article 12(1) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

The Court of Cassation was called upon to rule on the appeals filed against the judgments of the Milan and Brescia Courts of Appeal, which had held that the refusal of the childbirth allowance to foreign nationals who do not hold a long-term resident's EU residence permit was discriminatory.

The referring court argues that, in requiring that foreign nationals must hold a long-term residence permit, the legislation governing the childbirth allowance violates first and foremost the principles of equality and reasonableness enshrined in Article 3 of the Constitution. Specifically, it is argued that the selective criterion laid down by the law as a prerequisite for the receipt of a benefit intended to satisfy the "immediate and non-deferrable" needs of "less wealthy families" precludes "entire categories of persons selected not on the basis of the extent or nature of the need, but rather a criterion that has no relationship with need, specifically the holding of a long-term residence permit, which is conditional upon prior residence of at least five years, income that is in any case at least equal to the figure paid as income support, a suitable home and knowledge of the Italian language". It is stated that the criterion imposed is detrimental precisely for "those in a situation of greatest need".

It is argued that Article 31 of the Constitution has also been violated, which requires the Republic to promote "the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits", and to protect maternity and young children. The contested provision is claimed to discriminate against those families that, whilst being comprised of persons who do not have a long-term residence permit, reside within the national territory "in a manner that is not ephemeral or temporary" and whose financial circumstances are "the same, if not worse".

Finally, the provisions on the childbirth allowance are claimed to violate also Article 117(1) of the Constitution, in relation to Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007. The Court of Cassation objects to the violation of "the principle of equality and the prohibition on discrimination, also on the grounds of nationality" and the violation of the right of the child to the protection and care necessary for his or her wellbeing, the protection of the family in legal, economic and social terms and the right to access social security benefits and social services that guarantee protection.

1.2.– The parties that entered appearances in the proceedings launched pursuant to Referral Orders Nos. 175, 178, 181, 182, 188 and 190 of 2019 asked that the question of constitutionality be accepted.

In their view, the selective criteria specified by the legislator not only violate the constitutional provisions invoked by the Court of Cassation, but also violate Article 12

of Directive 2011/98/EC, which, it is asserted, have direct effect.

1.3.– The INPS entered an appearance in all proceedings, asking that the question be rejected as unfounded.

It is asserted that the fact that the childbirth allowance is an incentive means that it does not pertain to the branch of social security. It is in fact argued to constitute a benefit that is not intended to satisfy the primary and non-deferrable needs of the individual.

As regards Directive 2011/98/EU, it is stated to recognise "the discretionary power of the Member States to refuse the benefits in question to workers from third countries who do not have the status of long-term residents", taking account of the limited financial resources available.

1.4.– The President of the Council of Ministers intervened in all proceedings, asking that the question be declared inadmissible or otherwise manifestly unfounded.

It is asserted that the childbirth allowance is not intended to satisfy the essential needs of the individual. Also under EU law, "only status as a long-term resident enables substantially full equivalence between the treatment of nationals of third countries and that provided to Union citizens in the area of social security".

2.– For the same reasons, and on the basis of the same constitutional provisions, with the orders registered as Nos. 177 and 179 in the Register of Referral Orders 2019, the Court of Cassation has challenged Article 74 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 it renders the award of the maternity allowance to foreign nationals conditional upon the holding of a long-term resident's EU residence permit, and not the holding only of a residence and work permit for at least one year.

The referring court has clarified that the facts at issue in the proceedings that are relevant for that benefit occurred prior to the deadline of 25 December 2013 stipulated for the transposition of Directive 2011/98/EU.

2.1.– The party that entered an appearance in the proceedings launched pursuant to Referral Order No. 177 of 2019 asked that the question be accepted for the reasons set out by the referring court.

2.2.– The President of the Council of Ministers intervened also in these proceedings, asking that the question be declared inadmissible or, in the alternative, manifestly unfounded.

Conclusions on points of law

1.– This Court has been called upon to rule on the compatibility of Article 1(125) of Law No. 190 of 23 December 2014 laying down "Provisions on the formation of the annual and multi-year budget of the state (Stability Law 2015)" and of Article 74 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) with Articles 3, 31 and 117(1) of the Constitution, the last-mentioned in relation to Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007 (hereafter, also the Charter).

The Court of Cassation questions the constitutionality of the provisions cited above insofar as they stipulate the requirement of a long-term resident's EU residence permit for the grant to foreign nationals, respectively, of the childbirth allowance and the maternity allowance.

2.– Whilst taking account of the specific characteristics of the benefits examined

and the difference between the rules applicable to each of them, since the challenges are similar, it is appropriate for them to be considered together before this Court, such that both of the questions can be framed within the broader perspective of the provision of social benefits to foreign nationals, also in the light of the directions provided under EU law. The proceedings must therefore be joined in order to be dealt with together.

3.– It should be pointed out at the outset that the Court of Cassation refers, in support of the objections, both to provisions of national law and at the same time various provisions of the CFREU, which has the same legal status as the treaties according to Article 6(1) of the Treaty on European Union (TEU), as consolidated by the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009.

3.1.– This Court has also recently reiterated its competence to rule on any aspects of national provisions that contrast with the principles laid down in the Charter (Order No. 117 of 2019, point 2 of the *Conclusions on points of law*).

Where a referring court raises a question of constitutionality that also touches upon the provisions of the Charter, this Court cannot avoid assessing whether the contested provision at the same time violates both the principles of Italian constitutional law and the guarantees enshrined in the Charter (Judgment No. 63 of 2019, point 4.3 of the *Conclusions on points of law*). In fact, as the guarantees laid down in the Constitution are supplemented by those enshrined in the Charter, this "generates more legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction" (Judgment No. 20 of 2019, point 2.3 of the *Conclusions on points of law*).

As a "court or tribunal of a Member State" pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), as amended by Article 2 of the Treaty of Lisbon of 13 December 2007, ratified by Law No. 130 of 2 August 2008, this Court – as recently asserted when making a reference for a preliminary ruling to the Court of Justice – submits a request for a preliminary ruling "whenever that proves necessary to clarify the meaning and the effects of the Charter's rules. At the outcome of that assessment, this Court may find the contested provision to be unconstitutional, thus removing it from the national legal system with *erga omnes* effects" (Order No. 117 of 2019, point 2 of the *Conclusions on points of law*).

A reference for a preliminary ruling is made "within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the [Court of Justice] […], in order that the maximum protection of rights is assured at the system-wide level (Article 53 [CFREU])" (Judgment No. 269 of 2017, point 5.2 of the *Conclusions on points of law*). The clarification sought from the Court of Justice is also conducive to ensuring a guarantee of the uniform interpretation of rights and obligations under EU law.

3.2.– Therefore, before ruling on the questions of constitutionality raised by the Court of Cassation, it is considered necessary to question the Court of Justice concerning the precise interpretation of the relevant provisions of EU law that impinge upon national law.

In fact, this Court takes the view that there is an inseparable link between the constitutional principles and rights invoked by the Court of Cassation and those recognised by the Charter, as enriched by secondary law, which bodies of law complement each other and operate in harmony. It therefore falls to this Court to safeguard them, whilst ensuring their broadest scope.

Within an area that is marked by the growing influence of EU law, it is inconceivable not to promote a dialogue with the Court of Justice, which is charged

with ensuring "that in the interpretation and application of the Treaties the law is observed" (Article 19(1) TEU). The prohibition on arbitrary discrimination and the guarantee of protection for maternity and young children, as enshrined in the Italian Constitution (Articles 3(1) and 31 of the Constitution) must in fact be interpreted also in the light of the binding requirements resulting from EU law (pursuant to Articles 11 and 117(1) of the Constitution). The questions referred for a preliminary ruling that it is considered appropriate to submit to the Court of Justice in these proceedings are focused on the scope and depth of those guarantees, which have implications for the constant evolution of constitutional principles, as part of a dynamic of mutual implication and fruitful supplementation.

4.– It is necessary, as a first step, to set out the salient characteristics of the applicable national legislation along with the relevant provisions of EU law that interact with the national legislation.

5.– The following clarifications must be made as regards the national law.

5.1.– As far as the childbirth allowance is concerned, the relevant provision is first and foremost Article 1(125) of Law No. 190 of 2014.

The contested provision stipulates that "an allowance equal to 960 euros per year shall be paid each month starting from the month of birth or adoption" for each child born or adopted between 1 January 2015 and 31 December 2017. This allowance "shall be paid until the child reaches the age of three or for a period of three years after the child became part of the family unit following adoption" and pursues the purpose "of providing incentives for childbirth and contributing to the costs of the maintenance of children".

The allowance is paid by the National Institute for Social Security (INPS) "upon condition that the annual income of the family unit of the parent applying for the allowance does not exceed 25,000 euros per annum, according to the score under the ISEE [Indicator of Equivalent Economic Condition, *indicatore della situazione economica equivalente*], established pursuant to the regulations laid down by Decree of the President of the Council of Ministers No. 159 of 5 December 2013".

Where "the annual income of the family unit of the parent applying for the allowance does not exceed 7,000 euros, according to the score under the ISEE, established pursuant to the above-mentioned regulations laid down by President of the Council of Ministers No. 159 of 2013", the annual amount of 960.00 euros shall be doubled.

The allowance has also been granted "for each child born or adopted between 1 January 2018 and 31 December 2018" for the shorter period of one year, "until the child reaches the age of one or for a period of one year after the child became part of the family unit following adoption" (Article 1(248) of Law No. 205 of 27 December 2017 laying down the "State budget for financial year 2018 and multi-year budget for the three-year period 2018-2020").

The provision was extended to "every child born or adopted between 1 January 2019 and 31 December 2019", again for a period of one year, "until the child reaches the age of one or for a period of one year after the child became part of the family unit following adoption", and is increased by 20 percent for each child born after the first (Article 23-*quater*(1) of Decree-Law No. 119 of 23 October 2018 laying down "Urgent provisions on tax and financial matters" converted, with amendments, into Law No. 136 of 17 December 2018).

Finally, entitlement to the childbirth allowance was recognised for "every child born or adopted between 1 January 2020 and 31 December 2020", again "until the child reaches the age of one or for a period of one year after the child became part of the

family unit following adoption". The benefit, as described above, varies in terms of its amount in line with the financial circumstances of the family unit: "*a*) 1,920 euros where the annual income of the family unit of the parent applying for the allowance does not exceed 7,000 euros per annum, according to the score under the ISEE, established pursuant to the regulations laid down by Decree of the President of the Council of Ministers No. 159 of 5 December 2013"; *b*) 1,440 euros where the annual income of the family unit of the parent applying for the allowance is higher than the threshold referred to in letter a) but does not exceed 40,000 euros, according to the score under the ISEE; *c*) 960 euros where the annual income of the family unit of the parent applying for the allowance exceeds 40,000 euros, according to the score under the ISEE". The amount of the allowance is increased by 20 percent for each child after the first (Article 1(340) of Law No. 160 of 27 December 2019 laying down the "State budget for financial year 2020 and multi-year budget for the three-year period 2020-2022").

This Court is also considering the extensions to the childbirth allowance, provided for under legislation enacted after that objected to by the Court of Cassation. Despite the enactment of different legislative provisions over time, which point to the non-structural status of the benefit, the prerequisite – contested by the referring court – of a long-term resident's EU residence permit for third-country nationals has remained unchanged. According to the version originally enacted, as well as the extensions subsequently ordered by the legislator, the childbirth allowance is in fact granted "for the children of an Italian national or a national of a Member State of the European Union or a national of a third country who holds a residence permit pursuant to Article 9 of the Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners enacted by Legislative Decree No. 286 of 25 July 1998, as amended and supplemented, who must under all circumstances be resident in Italy".

The long-term resident's EU residence permit provided for under Article 9 of Legislative Decree No. 286 of 1998 is permanent, is issued by the provincial chief of police [*questore*] within ninety days of the application and is conditional upon "the holding of a valid residence permit for at least five years" and the furnishing of proof concerning "receipt of income not lower than the annual figure paid as income support and, for applications relating to family members, income that is sufficient according to the parameters laid down by Article 29(3)(b) and suitable housing that is compliant with the minimum parameters laid down under regional legislation on public residential housing or that fulfils the prerequisites for health and hygiene suitability as certified by the local health board with territorial competence".

The applicant must also have passed a test establishing his or her knowledge of the Italian language and must not represent a danger for public order or national security.

5.2.– The maternity allowance is governed by Article 74 of Legislative Decree No. 151 of 2001.

The allowance is paid for each child born after 1 January 2001 or for each child placed in pre-adoption foster care or adopted without a previous period in foster care from that date, "to resident women who are Italian or EU nationals or who hold a residence permit", now a long-term resident's EU residence permit.

The allowance is granted to women who do not receive the maternity allowance associated with employed or self-employed gainful activity or the practice of a regulated profession (Articles 22, 66 and 70 of Legislative Decree No. 151 of 2001) and is conditional upon the receipt, by the family unit of the mother, of financial resources not exceeding "the scores for the Indicator of Economic Condition [*indicatore della*

situazione economica, ISE] pursuant to table 1 of Legislative Decree No. 109 of 31 March 1998, equivalent to 50 million lire per annum for family units comprised of three members".

6.– Numerous provisions of EU law are relevant within these proceedings.

6.1.– Amongst the various provisions of the Charter, the Court of Cassation has also invoked Article 34. This provision guarantees entitlement to social security benefits, such as maternity benefits (paragraph 1), and the right of "[e]veryone residing and moving legally within the European Union […] to social security benefits and social advantages", in accordance with EU law and national laws and practices (paragraph 2).

6.2.– As far as the provision of social security benefits to third country nationals is concerned, Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, as transposed 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) guarantees to long-term residents equal treatment with nationals as regards, in particular, "social security, social assistance and social protection as defined by national law" (point (d) of Article 11(1)).

6.3.– Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals extends those benefits to foreign nationals who hold a single work permit.

6.3.1.– The legal basis for that Directive is Article 79(2), points (a) and (b) TFEU, and must be brought within the ambit of Article 34 of the Charter. As is clarified in recital 8, "[t]hird-country nationals who have acquired long-term resident status in accordance with Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents should not be covered", as such nationals, who hold a specific type of residence permit, can assert "more privileged status".

The aim of Directive 2011/98/EU is to "ensure fair treatment of third-country nationals who are legally residing in the territory of the Member States" (recital 2), to develop further "a coherent immigration policy" and to narrow "the rights gap between citizens of the Union and third-country nationals legally working in a Member State" (recital 19), establishing the prerequisites for the economic integration of third-country nationals in that way too.

Within this perspective, it has been chosen to lay down a set of rights, "in particular, to specify the fields in which equal treatment between a Member State's own nationals and such third-country nationals who are not yet long-term residents", so as "to establish a minimum level playing field within the Union" and "to recognise that such third-country nationals contribute to the Union economy through their work and tax payments" (recital 19).

This Court's scrutiny concerns the right to equal treatment in the branch of social security, as defined "in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems" (recital 24 to the Directive). The Member States must comply with those requirements when organising their respective social security schemes and when laying down "the conditions under which social security benefits are granted, as well as the amount of such benefits and the period for which they are granted" (recital 26).

6.3.2.– This is the general context to Article 12 of the Directive, which was invoked by the Court of Cassation when raising the questions of constitutionality. This provision has been referred to both by the Courts of Appeal that issued the contested judgments as well as by all of the parties to the proceedings, albeit with contrasting

assessments.

"[T]hird-country nationals who have been admitted to a Member State for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/200" (point (b) of Article 3(1)) and "third-country nationals who have been admitted to a Member State for the purpose of work in accordance with Union or national law" (point (c) of Article 3(1)) shall enjoy equal treatment with nationals of the Member State where they reside with regard to, in particular, "branches of social security, as defined in Regulation (EC) No 883/2004" (point *e* of Article 12(1)).

Article 3(1) of Regulation (EC) No. 883/2004, which delineates its scope *ratione materiae*, provides that the Regulation shall apply to all legislation concerning the following branches of social security: "maternity and equivalent paternity benefits" (point (b)) and "family benefits" (point (j)), which point (z) of Article 1 of the Regulation defines as "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I".

6.3.3.– Point (b) of Article 12(2) of the Directive provides that the right to equal treatment in the branch of social security may be limited by the Member States, but shall however not restrict such rights "for third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered as unemployed".

As regards specifically family benefits, the Member States may also decide not to apply the principle of equal treatment "to third-country nationals who have been authorised to work in the territory of a Member State for a period not exceeding six months, to third-country nationals who have been admitted for the purpose of study, or to third-country nationals who are allowed to work on the basis of a visa".

6.3.4.– By Legislative Decree No. 40 of 4 March 2014 (Implementation of Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State), the Italian State made provision to regulate the single permit, which allows third-country nationals to reside and work within the territory of a Member State, and did not expressly avail itself of the right to make derogations provided for in the Directive. As regards point (e) of Article 12(1) of the Directive, the Italian State decided not to enact a specific provision to transpose it.

6.4.– The Court of Justice has considered the issue of the compatibility of national law with the requirements laid down by Article 12 of Directive 2011/98/EU with regard to the benefit for households having at least three minor children, governed by Article 65 of Law No. 448 of 23 December 1998 laying down "Measures concerning public finance, stabilisation and development", which is granted to foreign nationals upon condition that they hold a long-term resident's EU residence permit (Judgment of 21 June 2017 in Case C-449/16, *Kerly Del Rosario Martinez Silva*).

The Court of Justice held that the benefit concerned should be regarded as a social security benefit because it is granted on the basis of objective criteria without any individual and discretionary assessment of personal needs, and because it is "a cash benefit intended, by means of a public contribution to a family's budget, to alleviate the financial burdens involved in the maintenance of children" (para. 24.).

Due to the fact that the Italian State did not exercise its right to a derogation, the Court of Justice held that "Article 12 of Directive 2011/98 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under

which a third-country national holding a single permit within the meaning of Article 2(c) of that directive cannot receive a benefit such as ANF [benefit for households having at least three minor children] established by Law No 448/1998" (para. 32.).

6.5.– The case currently pending before the Court of Justice (Case C-302/19) does not have any relevance for the questions raised here. The Court of Cassation has asked whether Article 12 of Directive 2011/98/EU is compatible with national legislation under which the family members of a worker with a single permit from a third country are excluded when determining the members of the family unit, for the purpose of calculating the family unit allowance, where those family members live in the third country of origin.

7.– In the light of the legislative framework set out above, this Court considers it necessary to seek clarification from the Court of Justice concerning the following provisions of EU law, which are relevant for the solution to the questions of constitutionality referred to this Court for examination and which have been a matter of dispute between the parties throughout the various stages of the proceedings.

7.1.– It is necessary to ask the Court of Justice whether Article 34 of the Charter must be interpreted as meaning that its scope includes the childbirth allowance and the maternity allowance pursuant to points (b) and (j) of Article 3(1) of Regulation (EC) No 883/2004, referred to by point (e) of Article 12(1) of Directive 2011/98/EU, and therefore whether EU law must be interpreted as precluding national legislation that does not grant the benefits referred to above to foreign nationals who hold a single permit under that Directive, which are already granted to foreign nationals who hold a long-term resident's EU residence permit.

7.1.1.– As regards the childbirth allowance at issue in this case [*assegno di natalità*], it cannot be classified under the special childbirth or adoption allowance [*assegno speciale di nascita o di adozione*] mentioned in Annex 1 of Regulation 883/2004, which sets out a closed list of the benefits that are precluded *ratione materiae* from the scope of the Regulation. No Italian benefit is mentioned.

Moreover, the situation does not involve advances of maintenance allowances, which constitute "recoverable advances intended to compensate for a parent's failure to fulfil his legal obligation of maintenance to his own child, which is an obligation derived from family law" (recital 36). Childbirth allowances differ from such payments, which fall outwith the scope of the Regulation, essentially because they do not constitute recoverable advances and are not contingent upon a parent's inability to fulfil his or her obligations to maintain the child.

Since none of the typical grounds for exclusion is met in the case under examination, it is thus necessary to establish whether the benefit mentioned can be classified as a family benefit.

This Court is aware of the large body of case law of the Court of Justice according to which the benefits that fall *ratione materiae* within the scope of Regulation (EC) No 883/2004 include all benefits granted to recipients "without any individual and discretionary assessment of personal needs, on the basis of a legally defined position" concerning "one of the risks expressly listed in Article 3(1) of Regulation No 883/2004" (see most recently, Judgment of 2 April 2020 in Case C-802/18, *Caisse pour l'avenir des enfants*, para. 36.). Within such an assessment, the particular name chosen by the national legislator, the method by which an individual benefit is financed or the legal mechanism by which the Member State implements the benefit have no bearing (Judgment of 24 October 2013 in Case C-177/2012, *Lachheb*, para. 32), as it is, rather, necessary to consider the content and purpose of the benefit.

As regards the family benefits provided for under point (z) of Article 1 of the

Regulation, the Court of Justice has already clarified that they are "a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children" (see, *inter alia*, the Judgment of 21 June 2017 in Case C-447/17 (cited above), and the Judgment of 19 September 2013 in Joined Cases C-216/12 and C-217/12, *Hliddal and Bornand*, para. 55.).

Considering the significant changes that have been made to it over the last few years, the childbirth allowance has certain novel features compared to the family allowances that have already been considered by the Court of Justice, such as the benefit for households having at least three minor children examined in the Judgment of 21 June 2017 in Case C-449/16. It is precisely owing to these particular features that it has been decided to make a reference for a preliminary ruling to the Court of Justice.

The benefit under examination, which was initially granted for three years and subsequently for one year only, is now governed by objective criteria established by law, is configured as a universal benefit and is payable in different amounts depending upon income bracket. Whilst it can be classified as a social security benefit, it features a range of functions that could render its classification as a family benefit uncertain.

First of all, it could have the nature of an incentive, as is apparent from the very wording of the legislation (Article 1(125) of Law No. 190 of 2014), which refers to "the purpose of providing incentives for childbirth", and was pointed out by State Counsel and the INPS. The purpose is claimed to have been confirmed by the evolution of the legislation, which has configured the benefit as a universal benefit and has provided for it to be increased for any children in addition to the first child.

However, the fact that the original wording of the Law in question established the income of the family unit as a prerequisite for the grant of the benefit would appear to afford significance to the circumstances of financial distress of the beneficiary family, thus associating the purpose of "contributing to the costs of the maintenance of children" with the purpose of providing incentives for childbirth. These aspects could give significance to the additional goal of supporting family units in precarious financial circumstances and ensuring essential care for minors. This purpose may also be apparent from the recent changes to the law which, whilst configuring the benefit as a universal benefit, provide for it to be payable in different amounts depending on income brackets, and thus on different levels of need.

In the light of these considerations, its status as an incentive would not appear to be exclusive, in view of the parallel objective of offering a public contribution to a family's budget, in accordance with the distinguishing features of the family benefits provided for under point (z) of Article 1 of Regulation (EC) No. 883/2004.

7.1.2.– As far as the maternity allowance is concerned, the Court of Justice is asked whether it must be covered by the guarantee provided by Article 34 CFREU, read in the light of secondary law, which seeks to ensure "equal treatment with the nationals of their respective host Member State" to all third-country nationals who are legally residing and working in Member States, thus requiring them to pursue the objective mentioned.

8.– According to Article 105 of the Rules of Procedure of the Court of Justice of 25 September 2012, it is requested that this preliminary reference be determined pursuant to an expedited procedure.

It is not possible to exclude the possibility that the questions currently before this Court for review, which have been discussed in detail within the case law, may give rise to numerous further references for preliminary rulings from the ordinary courts.

The sheer number of pending disputes is testament to the serious uncertainty concerning the meaning to be ascribed to EU law. The view broadly adopted by the

merits courts that the provisions of Article 12 of Directive 2011/98/EU have direct effect is not followed by the administration competent to grant the benefits, whilst the Court of Cassation, which is called upon to guarantee the uniform interpretation of national law, has sought a ruling from this Court in order to issue a judgment with *erga omnes* effect.

The uncertainty, which must be resolved with all due dispatch, is even more serious as it concerns both the core sector of the EU's common policy on immigration within the area of freedom, security and justice, as well as the issue of equal treatment between nationals of third countries and nationals of the Member States where they reside, which is a decisive element of and a driving force behind that policy.

The answer to the question put by this Court will have an impact on the provision of benefits to ensure protection for maternity as well as the needs of children.

Considering Article 267 TFEU and Article 3 of Law No. 204 of 13 March 1958 on the "Ratification and implementation of the following international agreements signed in Brussels on 17 April 1957: a) Protocol on the Privileges and Immunities of the European Communities; b) Protocol on the Statute of the Court of Justice of the European Economic Community; c) Protocol on the Privileges and Immunities of the European Atomic Energy Community; d) Protocol on the Statute of the Court of Justice of the European Atomic Energy Community (excerpt: Euratom protocols)".

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the cases,

1) *orders* that the following reference for a preliminary ruling be made to the Court of Justice of the European Union pursuant to and for the purposes of Article 267 of the Treaty on the Functioning of the European Union (TFEU), as amended by Article 2 of the Treaty of Lisbon of 13 December 2007 and ratified by Law No. 130 of 2 August 2008:

must Article 34 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007, be interpreted as meaning that its scope includes the childbirth allowance and the maternity allowance pursuant to points (b) and (j) of Article 3(1) of Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, referred to by point (e) of Article 12(1) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit, and must EU law therefore be interpreted as precluding national legislation that does not grant the benefits referred to above to foreign nationals who hold a single permit under that Directive, which are already granted to foreign nationals who hold a long-term resident's EU residence permit;

2) *asks* that the reference for a preliminary ruling be determined pursuant to an expedited procedure;

3) *stays* the proceedings pending a decision on the aforementioned reference for a preliminary ruling;

4) *orders* that a copy of this order be transferred immediately along with the case file to the Registry of the Court of Justice of the European Union.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 July 2020.

Signed: Marta CARTABIA, President

Silvana SCIARRA, Author of the Judgment