Corte costituzionale

JUDGMENT NO. 11 OF 2009

GIOVANNI MARIA FLICK, President
FRANCESCO AMIRANTE, Author of the Judgment

JUDGMENT NO. 11 YEAR 2009

In this case the Court considered a body of legislation which made the award of incapacity benefit (a measure of income support) to foreign nationals subject to possession of an EC residence card for long-term residents (the issue of which is dependent on receipt of a minimum level of income). The Court declared the provisions unconstitutional, first due to the unjustified difference in treatment between Italian citizens and foreign citizens legally resident in Italy, and secondly because "the subjection of the award of this benefit to the possession by the foreigner of a right of residence, the granting of which presupposes the receipt of an income, renders the inherent unreasonableness of the body of legislation under review even more evident.

THE CONSTITUTIONAL COURT

Composed of: President: Giovanni Maria FLICK; Judges: Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 80(19) of law No. 388 of 23 December 2000, No. 388 (Provisions governing the formation of the annual and long-term budget of the state – Finance Law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of the law on immigration and provisions governing the status of foreigners), as amended by Article 9(1) of law No. 189 of 30 July 2002, in the light of 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 disabled and non-military

invalids) and law No. 18 of 11 February 1980 (Carer's allowance for totally incapacitated non-military invalids) commenced by the *Tribunale di Prato* in the civil proceedings pending between I. H. in his capacity as legal guardian of N. H. and the National Institute for Social Security (INPS) and others, by referral order of 2 April 2008 registered as No. 188 in the Register of Appeals 2008 and published in the *Official Journal of the Republic* No. 26, first special series 2008.

Considering the entry of appearance by the INPS [*National Institute for Social Security*];

having heard the Judge Rapporteur Francesco Amirante in chambers on 3 December 2008.

The facts of the case

1.— During the course of a dispute concerning a social security benefit, commenced by an Albanian citizen, the *Tribunale di Prato* raised, with reference to Articles 2, 3 and 117(1) of the Constitution, the question of the constitutionality of the combined provisions of Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formation of the annual and long-term budget of the state – Finance Law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of the law on immigration and provisions governing the status of foreigners), as amended by Article 9(1) of law No. 189 of 30 July 2002, in the light of 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 disabled and non-military invalids) and law No. 18 of 11 February 1980 (Carer's allowance for totally incapacitated non-military invalids), insofar as it stipulates the requirement for possession of a residence card and the related income requirements in order for foreign non-military invalids to be able to receive incapacity benefit and the carer's allowance.

The referring court states, with regard to the facts of the case, that the plaintiff – in his capacity as an Albanian citizen lawfully resident in Italy since 2000, who has been recognised as being completely and permanently incapacitated requiring round-the-clock

care following a serious road accident in 2003 – filed an administrative application for the award of incapacity benefit and the carer's allowance to the incapacitated individual on 19 July 2005. Following the rejection of this application, due to the failure by the interested party to possess a residence card, he filed an appeal within the applicable time limits pursuant to Article 442 of the Code of Civil Procedure, requesting the court to order the Municipality of Prato, along with the National Institute for Social Security (INPS) and the Ministry for the Economy and Finance, to pay the aforementioned benefits, setting aside Article 80(19) of law No. 388 of 2000 (because it contrasts with EC regulations No. 1408 of 1971, No. 574 of 1972, No. 859 of 2003 and No. 647 of 2005, as well as Articles 6 and 8 of ILO Convention No. 97 of 1949, Article 10 of ILO Convention No. 143 of 1975, Article 14 of the ECHR and Article 1 of the First Additional Protocol to the Convention), or by accepting the challenge to the constitutionality of the provision.

After having specified that the Community regulations invoked are inapplicable in the case before the Court, since the case concerns ties exclusively between a third country and one single Member State of the EU, and not at least two Member States of the Union, and after having precluded that it was able to set aside the internal legislation due to the alleged breach of the ILO Conventions and the ECHR, the lower court raised the current question of constitutionality, specifying that it was not able to resolve the problem through interpretation.

On the question of relevance, the *Tribunale di Prato* emphasised that the acceptance of the plaintiff's claim was prevented only by the failure by the interested party to hold a residence card, given the satisfaction of the medical prerequisite, the income requirement specified under Article 12(3) of law No. 412 of 30 December 1991 (Provisions relating to the public finances), as subsequently amended, as well as the lawful residence in Italy on the basis of a residence permit.

As far as the merits of the question are concerned, the referring court argues that the contested provision in the first place breaches Article 117(1) of the Constitution on the grounds that, by discriminating between foreign invalids lawfully resident in Italy compared to invalids who are Italian citizens, it breaches Article 14 of the ECHR and

Article 1 of the related Additional Protocol which, according to the interpretation of the European Court of Human Rights, require the Italian state to legislate in the area of social security benefits without providing for any differentiation in treatment based on the nationality of the persons concerned.

In the opinion of the lower court, this discrimination also entails the violation of Articles 2 and 3 of the Constitution since the provision, with regard to the aforementioned category of foreigners, for less favourable treatment when establishing eligibility for the benefits governed by laws No. 118 of 1971 and No. 18 of 1980 violates not only their basis in solidarity, but above all the specific rationale of providing support which underpins the benefits themselves.

Finally, the referring court claims that the contested provision breaches the principle of rationality enshrined in Article 3 of the Constitution as a result of the clear unreasonableness of the adoption of a discriminatory criterion which results in the refusal of the above benefits – intended to alleviate the situation of need of completely disabled individuals – precisely to those who most deserve them, in contrast with the provisions in place for Italian citizens for whom the award of incapacity benefit presupposes the failure to earn more than a certain income threshold, whilst the carer's allowance is awarded irrespective of the income situation of the beneficiary and his family.

2.— The INPS entered an appearance, requesting the Court to rule the question groundless.

The Institute points out that Article 41 of legislative decree No. 286 of 1998 had provided that foreign citizens who were holders of a residence card or residence permit with a duration not shorter than one year were to be treated equally to Italian citizens for the purposes of the receipt of social security benefits and services, including those provided for the blind, the deaf-mute and non-military invalids. Subsequently, Article 80(19) of law No. 388 of 2000 provided that pecuniary benefits for non-military invalids could be awarded only to foreigners in possession of a residence card, whilst foreigners in possession of a residence permit would have the right to receive exclusively other social security benefits, including maternity benefit. In this way Parliament decided, starting

from the time when law No. 388 of 2000 entered into force, to restrict the conditions for eligibility for specific social security benefits and to remove, on the basis of a clear reference parameter, the equal treatment of foreign holders of residence permits and Italian citizens (Council of State, opinion No. 76/2001 of 28 February 2001).

According to the INPS, this choice is not in itself unconstitutional since, as clarified by this Court when examining a case similar to the current one, Parliament is permitted to enact legislation which amends the rules governing ongoing relationships to the detriment of those affected (judgment No. 324 of 2006) and therefore to modify the prerequisites for the receipt of pensions or social security benefits, especially as the very passage of time offers suitable grounds for justifying the recourse to different treatment, at different moments in time, of the same class of individuals.

Moreover, as regards pensions, there is complete equality of treatment between citizens of the EU and non-community workers, whilst the fact that this does not occur for social security benefits – such as those at issue here – is due principally the need to avoid so-called social tourism: this goal, which is entirely reasonable, makes it possible to differentiate [in the award of] the aforementioned benefits, taking as a criterion that of favouring individuals who have a more established residence in Italy, especially since the disputed Article 80(19) was enacted with the clear purpose of reducing public spending.

According to the same logic moreover, when enacting the recent Article 20(10) of decree-law No. 112 of 25 June 2008 (Urgent measures to provide for economic development, simplification, and competitiveness, the stabilisation of public finance and tax equalization"), Parliament provided that, starting from 1 January 2009, the "social allowance" (i.e. income support for pensioners) "shall be paid to those entitled thereto, provided that they have been legally resident in Italy for five years on a continuing basis" (time limit raised to ten years by the conversion law No. 133 of 6 August 2008).

Finally, it must also be noted that not only do the Community regulations invoked by the plaintiff not come into consideration, but also not even do the ECHR and the related First Protocol contain provisions with constitutional status capable of requiring the equal

treatment of non-Community citizens and EU citizens for the purposes of the award of pecuniary social security benefits.

Conclusions on points of law

1.— The *Tribunale di Prato* has raised, with reference to Articles 117(1), 2 and 3 of the Constitution, the question of the constitutionality "of the combined provisions of Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formation of the annual and long-term budget of the state – Finance Law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of the law on immigration and provisions governing the status of foreigners), as amended by Article 9(1) of law No. 189 of 30 July 2002, in the light of 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 disabled and non-military invalids) and law No. 18 of 11 February 1980".

The aforementioned body of legislation is challenged insofar as it "stipulates the requirement for possession of a residence card and the related income requirements in order for foreign non-military invalids to be able to receive incapacity benefit and the carer's benefit (*sic*: allowance)".

Article 117(1) of the Constitution is invoked by the referring court in relation to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), implemented by law No. 848 of 4 August 1955, and the Additional Protocol to the Convention, signed in Paris on 20 March 1952.

According to the *Tribunale di Prato*, the contested legislation creates a difference in treatment between foreigners and Italian citizens with regard to the award of the aforementioned social security benefits, whilst the principal of equality applies for Italian citizens and foreigners legally resident in Italy.

The referring court moreover underscores the inherent unreasonableness of provisions which render the entitlement of social security benefits subject to the receipt of an income only for foreigners.

As a matter of fact, it is stated in the referral order that the application for the aforementioned awards was made by the legal guardian of an incapacitated Albanian citizen regularly resident in Italy since 2000, but not in possession of a residence card, in a persistent vegetative state following a road accident, who has been recognised as completely disabled and requiring round-the-clock care. The referring court concludes, asserting that only the failure to hold a residence card (now the EC residence permit for long-term residents, in accordance with the provisions of Articles 1(1) and 2(3) of legislative decree No. 3 of 8 January 2007 containing the "Implementation of directive 2003/109/EC on the status of third-country nationals who are long-term residents") justified the denial of the application by the administrative authorities.

2.— The element of the question relating to the carer's allowance has become manifestly inadmissible because after the question was filed by the *Tribunale di Prato*, this Court declared in judgment No. 306 of 2008 that, with regard to the aforementioned allowance, the provisions under review were unconstitutional, which entails the extinction of the subject-matter of the question, and therefore its manifest inadmissibility (orders No. 19 of 2004 and No. 269 of 2008).

3.— The question is well-founded as far as incapacity benefit is concerned.

The main grounds which led this Court to the pass judgment No. 306 of 2008 – namely the inherent unreasonableness of the body of legislation contested here and the inequality in treatment which it causes between Italian citizens and foreigners legally and not temporarily resident in Italy – apply all the more so also in relation to incapacity benefit.

Whilst in fact the carer's allowance is awarded on the sole grounds of the disability, without any significance being given to income conditions, incapacity benefit is precluded by the receipt of an income above a statutory minimum. The subjection of the award of this benefit to the possession by the foreigner of a right of residence, the granting of which presupposes the receipt of an income, renders the inherent unreasonableness of the body of legislation under review even more evident.

Therefore, the Court finds that Article 3 of the Constitution has been violated on two counts, which means that Article 80(19) of law No. 388 of 2000 and Article 9(1) of

legislative decree No. 286 of 1998 – the latter as amended by Article 9(1) of law No. 189 of 30 July 2002, and as replaced by Article 1(1) of legislative decree No. 3 of 2007 – must be declared unconstitutional insofar as they provide that incapacity benefit covered by Article 12 of law No. 118 of 1971 cannot be awarded to non-Community foreign citizens only because they do not satisfy the income conditions formerly stipulated for the residence card and now required, pursuant to legislative decree No. 3 of 2007, for the EC residence permit for long-term residents.

The other challenges are moot.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 80(19) of law No. 388 of 23 December 2000 (Provisions governing the formation of the annual and long-term budget of the state – Finance Law 2001) and Article 9(1) of legislative decree No. 286 of 25 July 1998 (Consolidated text of the law on immigration and provisions governing the status of foreigners) – as amended by Article 9(1) of law No. 189 of 30 July 2002, and as replaced by Article 1(1) of legislative decree No. 3 of 8 January 2007 (Implementation of directive 2003/109/EC on the status of third-country nationals who are long-term residents) – are unconstitutional insofar as they provide that incapacity benefit covered by 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 disabled and non-military invalids) cannot be awarded to foreign non-Community citizens only because they do not satisfy the income conditions formerly stipulated for the residence card and now required, pursuant to legislative decree No. 3 of 2007, for the EC residence permit for long-term residents;

rules that the question of the constitutionality of Article 80(19) of law No. 388 of 2000 and Article 9(1) of legislative decree No. 286 of 1998 – as amended by Article 9(1) of law No. 189 of 2002, and as replaced by Article 1(1) of legislative decree No. 3 of 2007 – raised with reference to Articles 2, 3 and 117(1) of the Constitution and in the light of law No. 18 of 11 February 1980 (Carer's allowance for totally incapacitated non-military

invalids) by the *Tribunale di Prato* in the referral order mentioned in the headnote, is manifestly groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 14 January 2009.

Signed:

Giovanni Maria FLICK, President

Francesco AMIRANTE, Author of the Judgment

Maria Rosaria FRUSCELLA, Registrar

Filed in the Court Registry on 23 January 2009.

The Registrar

Signed: FRUSCELLA