Corte costituzionale

JUDGMENT NO. 19 OF 2009

GIOVANNI MARIA FLICK, President
MARIA RITA SAULLE, Author of the Judgment

JUDGMENT NO. 19 YEAR 2009

In this case the Court considered a legislative decree from 2006 which granted an entitlement to paid leave to various cohabiting family members of seriously disabled persons, but not to the cohabiting child who was the only cohabiting family member able to provide care and assistance. The Court applied by analogy its ruling from judgment No. 158 of 2007 (which extended such a right to the cohabiting spouse). The Court therefore read the legislation as providing such a right also to cohabiting children, as a requirement of solidarity (Article 2), on equality grounds (Article 3) and pursuant to the right to healthcare (Article 29).

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 42(5) of legislative decree No. 151 of 26 March 2001 (Consolidated law containing legislative provisions to protect and support motherhood and fatherhood, enacted pursuant to Article 15 of law No. 53 of 8 March 2000), commenced pursuant to the referral order of 26 March 2008 from the *Tribunale di Tivoli* in civil proceedings pending between C.F. and the higher education institute "Zambeccari", registered as No. 244 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 35, first special series 2008.

Considering the entry of appearance by C.F.;

having heard the judge rapporteur Maria Rita Saulle in the public hearing of 2 December 2008;

having heard the barrister Giampaolo Ruggiero for C.F.

The facts of the case

1. – By referral order of 26 March 2008, the employment law division of the *Tribunale di Tivoli* raised the question of the constitutionality of Article 42(5) of legislative decree No. 151 of 26 March 2001 (Consolidated law containing legislative provisions to protect and support motherhood and fatherhood, enacted pursuant to Article 15 of law No. 53 of 8 March 2000), due to violation of Articles 2, 3 and 32 of the Constitution.

In the view of the referring court, the provision breaches the constitutional principles cited "insofar as it excludes cohabiting children from the category of individuals entitled to take the leave provided for therein, in the absence of other individuals capable of caring for a person affected" by a serious handicap.

1.1. – The referral order states that the main proceedings concern an appeal lodged pursuant to Article 700 of the Code of Civil Procedure against a measure by which a state higher education institute rejected the application made by one of its employees – a school janitor on a permanent contract – seeking to obtain recognition of the right to extraordinary paid leave in order to care for his mother who was affected by a serious handicap, duly certified pursuant to Article 3(3) of law No. 104 of 5 February 1992 (Framework law regulating the care, social integration and rights of handicapped persons) as the sole cohabitee.

The rejection of the application by the administration, the referring court asserts, was justified on the grounds that the contested provision failed expressly to mention the children of disabled parents amongst the individuals entitled to take extraordinary paid leave.

2. – As regards the issue of non manifest groundlessness, the referring court observes that in judgments No. 233 of 2005 and No. 158 of 2007, this Court extended the benefit

under examination: in the former judgment to cohabiting brothers or sisters where the parents are incapable of providing care for their child affected by a serious handicap on the grounds that they are completely incapable of doing so, and in the second judgment to cohabiting spouses of disabled persons.

In particular, in the opinion of the lower court, the assertion by this Court that the "*ratio legis* of the legislative provision under examination consists in favouring the care of seriously handicapped individuals by establishing the right to extraordinary leave − paid at a level corresponding to the last salary and covered covered by imputed contributions − which, with the clear goal of ensuring continuity of care and assistance and avoiding gaps detrimental to the physical and mental health of the physically challenged individual, is granted not only to working mothers, or in the alternative working fathers, but also, after their death, to a cohabiting brother or sister" (judgment No. 233 of 2005), is significant in this case. The referring court also emphasises that, against according to this Court "the primary interest pursued by the provision in question – even though it is incorporated into a legislative instrument intended to protect and support motherhood and fatherhood – is that of ensuring as a matter of priority the continuity in care and assistance of the disabled person within the family context, irrespective of the age of the person receiving care and whether or not he is the carer's child" (judgment No. 158 of 2007).

3. – Given these premises, according to the *Tribunale di Tivoli*, the exclusion of the children of the disabled individual from the category of persons entitled to take the paid leave under the terms of Article 42(5) of legislative decree No. 151 of 2001, in the absence of other individuals capable of caring for the same, in the first place breaches Article 3 of the Constitution, given that the "status as a child is the source of the obligation to provide support provided for under Article 433 of the Civil Code, within the ambit of which the child himself is granted priority status compared to the parent of the person with the entitlement"; accordingly, the failure to recognise such a right for cohabiting children, in contrast to that provided for cohabiting parents, spouses and siblings, results in an unjustified difference in treatment of the child compared to the other relatives of the disabled person.

Secondly, again in the opinion of the lower court, the said exclusion also violates Article 2 of the Constitution, "which requires respect for mandatory duties of solidarity and the resulting provision for measures which permit the exercise of the same", as well as Article 32 of the Constitution, since the right to healthcare would not be sufficiently protected due to the failure to guarantee to an "individual in employment, with the status of the sole cohabitee with the permanently handicapped person", the "provision of appropriate measures intended to ensure the provision of the necessary care".

4. – Finally, as far as the question of relevance is concerned, the *Tribunale di Tivoli* observes that "the claim actioned by the plaintiff must be examined with reference" to the contested provision, since it is moreover clear from the case file that "the applicant is the only individual cohabiting with the mother […] recognised as being affected by a serious handicap, pursuant to Article 3(3) of law No. 104 of 1992, by the competent committee of the local AUSL [*Local Health Board*]" and that the rejection by the school authorities of the application for extraordinary leave made by the plaintiff is justified exclusively by the failure to include the child of the disabled person in the category of entitled individuals.

5. – By written statement of 17 July 2008, the plaintiff in proceedings before the lower court entered an appearance, requesting that the question of constitutionality be allowed.

After having reiterated the statement of facts and arguments submitted by the referring court, the private party avers in particular that the difference in treatment caused by the exclusion of the child of a disabled person from the individuals entitled to take extraordinary paid leave would "unreasonably" provide "a lower level of protection both to the immediate family of the disabled person […] compared to that provided to his original family, as well as the disabled person's own right to healthcare, the realisation of which is ensured also through financial support for the family which cares for him".

Conclusions on points of law

1. – The *Tribunale di Tivoli*, sitting as an employment tribunal, questions the constitutionality of Article 42(5) of legislative decree No. 151 of 26 March 2001

(Consolidated law containing legislative provisions to protect and support motherhood and fatherhood, enacted pursuant to Article 15 of law No. 53 of 8 March 2000) "insofar as it excludes cohabiting children from the category of individuals entitled to take the leave provided for therein, in the absence of other individuals capable of caring for a person affected" by a serious handicap, due to violation of Articles 2, 3 and 32 of the Constitution.

In the opinion of the referring court in fact, by granting the right to extraordinary paid leave exclusively to the parents of the person suffering from a serious handicap or, alternatively where they have died or are incapable of providing care (after judgment No. 233 of 2005 of this Court), to the brothers and sisters cohabiting with the person, as well as (after the later judgment No. 158 of 2007) to the spouse cohabiting with the disabled person, the contested provision breaches Article 3(1) of the Constitution by treating less favourably an individual, the cohabiting child, who is bound by the same moral and material duties to provide care to the disabled person.

At the same time, the provision in question is argued to breach Article 2 of the Constitution which, by imposing respect for mandatory duties of solidarity, requires the provision of measures suitable for permitting their fulfilment, as well as Article 32 of the Constitution, since the guarantee of the right to healthcare provided for therein would be thwarted by the failure to provide for the right to extraordinary paid leave to the only individual cohabiting with the permanently handicapped person requiring the necessarily assistance.

2. – The question is well founded.

2.1. – This court has already carried our a first review of the contested provision concerning the institution of extraordinary leave, declaring that Article 42(5) of legislative decree No. 151 of 2001 was unconstitutional insofar as it did not provide for the right for one of the brothers or sisters cohabiting with a seriously disabled person to take the leave contemplated thereunder in cases where the parents are incapable of providing care to the handicapped child because they are completely incapable of doing so (judgment No. 233 of 2005).

In that judgment the Court emphasised that extraordinary paid leave counts as one of the supplementary financial initiatives to provide support for families which take on responsibility for the care of a physically challenged person, also pointing out the close and direct relationship between the said institution and the goals pursued by law No. 104 of 1992, including in particular those of protecting the physical and mental health of the handicapped person and promoting his assimilation into the family.

2.2. – This Court later declared the same provision to be unconstitutional insofar as it did not include amongst the category of beneficiaries, and with priority over the other relatives indicated by the provision, the cohabiting spouse of the person affected by a serious disability (judgment No. 158 of 2007).

This ruling identified the rationale of the institution of extraordinary paid leave, in the light of its prerequisites and the legislative history which has characterised it, holding that "right from its introduction, […] the institution in question has aimed to provide protection for the care of a person suffering from a serious handicap already in existence, whilst limiting the extent of the benefit to the members (parents and, in the event of their death, siblings) only of the original family of the disabled person". Therefore, the Court held that "the primary interest which the provision in question intends to further – even though it is incorporated into a legislative instrument intended to protect and support motherhood and fatherhood – is that of ensuring as a matter of priority the continuity of care of and assistance to the disabled person provided within the family context, irrespective of the age of the person receiving care and whether or not he is the carer's child".

On the basis of these arguments, this Court held that the treatment reserved by the contested provision to workers married to a disabled person affected by a serious handicap and who cohabits with the former failed to consider situations in which the physical, mental and sensory capacities are compromised to such an extent as to "render necessary permanent, ongoing and global assistance to the disabled individual or to his family" – according to the provisions of Article 3 of law No. 104 of 1992 – which emerged as a consequence of post-natal events or as a result of degenerative illnesses. In this way, the provision itself imposed an inadmissible bar on the effectiveness of care and the integration

of the disabled person into the context of his immediately family in which the same needs which the institution in question is intended to satisfy apply, thereby violating Articles 2, 3, 29 and 32 of the Constitution.

2.3. – The principles mentioned above also apply to the situation at issue in these proceedings.

By failing to specify a cohabiting child amongst the persons entitled to take extraordinary paid leave, even when the child is the only person capable of providing care to the person affected by a serious handicap, the contested provision violates Articles 2, 3 and 32 of the Constitution since it contrasts with the rationale of the institution. In fact, as mentioned above, the rationale essentially consists in promoting care for the disabled person within the family context and ensuring continuity of care and assistance, in order to avoid gaps in the protection of the physical and mental health of the same, irrespective of the age of the person receiving care and whether or not he is the carer's child.

Moreover, the above omission results in less favourable treatment for the sole cohabiting child of the disabled person – where he is also the only individual capable of caring for him – compared to other members of the immediate family of the latter expressly contemplated by the contested provision; by treating similar situations differently, with regard to the mandatory duties of solidarity resulting from the family tie, this less favourable treatment is devoid of any reasonable justification.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 42(5) of legislative decree No. 151 of 26 March 2001 (Consolidated law containing legislative provisions to protect and support motherhood and fatherhood, enacted pursuant to Article 15 of law No. 53 of 8 March 2000) is unconstitutional, insofar as it does not include cohabiting children amongst the category of individuals entitled to take the leave provided for therein, in the absence of other individuals capable of caring for a person affected by a serious handicap.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 26 January 2009.

Signed:

Giovanni Maria FLICK, President

Maria Rita SAULLE, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 30 January 2009.

The Director of the Registry

Signed: DI PAOLA