Corte costituzionale

JUDGMENT NO. 86 OF 2009

FRANCESC O AMIRANTE, President
ALFIO FINOCCHIARO, Author of the Judgment

JUDGMENT NO. 86 YEAR 2009

In this case the Court considered a reference from an unmarried mother whose long-term partner, who was also the father of her child, had been killed in an industrial accident, seeking the award of a widow's annuity on the same conditions as a married survivor, or in the alternative an annuity as the person with parental responsibility for the minor. The Court rejected the main claim, on the grounds that the discrimination between married and unmarried couples was justified under constitutional law due to the principle that marriage be protected. However, with regard to the child, the child of married parents would also be able to benefit from the annuity awarded to the surviving spouse in their own right, in this case the child would suffer discrimination were he to receive only the part of the annuity due to the child, and therefore the court ordered that the child should be awarded the supplementary annuity due in cases where the child has lost both parents, rather than only one.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: 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 85 of presidential decree No. 1124 of 30 June 1965 (Consolidated text of provisions on compulsory insurance against industrial accidents and occupational diseases), commenced by the *Tribunale di Milano* in the civil proceedings pending between M.R. in her own right and as the person with parental responsibility for her under-age child J.P.Q. and the *Inail* [National Institute for Insurance against Industrial Accidents], by the referral order of 6 May 2008 registered as No. 268 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 38, first special series 2008.

Considering the entry of appearance by M.R. as well as the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Alfio Finocchiaro in the public hearing of 10 February 2009;

having heard Maria Stefania Masini, barrister, for M.R. and the *Avvocato dello Stato* Francesco Lettera for the President of the Council of Ministers.

The facts of the case

1. – By referral order of 6 May 2008, the *Tribunale di Milano* – during the course of civil proceedings commenced by Mrs R.M., in her own right and as the person with parental responsibility for her under-age child J.P.Q., seeking to obtain an annuity from the *Inail* equal to fifty percent of the salary earned by her cohabitant as a result of his death following an industrial accident, namely the sum of € 17,216.46, or in the alternative the recognition of the right of the minor to an annuity from the *Inail* equal to forty percent of the father's annual salary – raised, pursuant to an objection by the plaintiff, the question of the constitutionality of Article 85 (rather: Article 85(1)(i) and (ii)) of presidential decree No. 1124 of 30 June 1965 (Consolidated text of provisions on compulsory insurance against industrial accidents and occupational diseases), with reference to Articles 2, 3, 10, 11, 30, 31, 38 and 117 of the Constitution and Articles 12 and 13 of the EC Treaty.

1. 1 – With regard to the question raised by Mrs R.M. in her own right, the lower court held that since Article 85(1)(i) of presidential decree No. 1124 of 1965 provided that, in the event of the death of a worker, the spouse be awarded a fifty percent annuity, it violates first and foremost Article 2 of the Constitution on the grounds that, insofar as it does not grant a cohabitant with habit and repute the annuity of fifty percent which is by contrast awarded to the spouse, it does not provide adequate protection for *de facto* families which, as for those which are founded on marriage, makes possible the full development of the individual's personality.

The contested provision is also claimed to violate Article 3 of the Constitution since it denies the right to an annuity to a cohabitant with habit and repute even when the cohabitation has acquired the characteristics of stability and certainty which are typical of the matrimonial bond.

Article 31 of the Constitution is also claimed to have been violated on the grounds that the arrangements violate the principle that special protection be granted to families [*favor familiaris*], which requires the state to take steps to promote and facilitate the nuclear family, whatever its form.

This above principle that special protection be granted to families is also inspired by the Convention on the Rights of the Child, signed in New York on 20 November 1989 and ratified in Italy by law No. 176 of 27 May 1991, Article 27 of which requires the states to

adopt appropriate measures, in accordance with national conditions and within their means, to assist parents to implement the right of every child to a standard of living adequate for the child's physical, mental, spiritual and social development.

The referring court goes on to aver the violation of Article 38 of the Constitution, according to which the Republic is directly vested with powers over assistance and social security which guarantee the worker and dependent family members an adequate protection against occupational and other risks.

The contested provision does not permit an unmarried parent to attend to the maintenance of his or her own children and does not avert or reduce in any way the conditions of need and individual and family hardship.

Finally, the contested provision is stated to violate Articles 11 and 117 of the Constitution on the grounds that it does not comply with the requirements laid down by Community law (the EU Treaty and the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000) and international law obligations (Convention on the rights of the child). In fact, Article 13 of the Treaty provides for a mechanism which may be activated by the Council, acting on a proposal from the Commission and after consulting the European Parliament, to take appropriate action to combat any form of discrimination within the European Union. Moreover, Article 21 of the Charter of Fundamental Rights of the European Union prohibits any form of discrimination based on birth, and sub-section two provides that "Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, ...any discrimination on grounds of nationality shall be prohibited". In the case before the Court, the plaintiff claims that she has suffered discrimination on the grounds of her nationality, since had she been cohabiting with habit and repute with a non-Italian citizen, or alternatively on the grounds that had Mr Q. suffered the fatal accident in a state of the European Union other than Italy (pursuant to Regulation EEC/1408/71, the applicable law is in fact that of the country in which the employment activity is performed, regardless of the country of residence), the plaintiff would have had the right to receive the indemnity provided for in the event of death in the workplace. Article 85 of presidential decree No. 1124 of 1965 is therefore argued to the unconstitutional due to violation of Articles 11 and 117 of the Constitution, on the grounds that it does not comply with the requirements resulting from the provisions of Community law and violates Article 12 of the EC Treaty.

1. 2. – As regards the claim made by R.M. as the person with parental responsibility for the child, the lower court observes that, pursuant to Article 85(1)(ii) of presidential decree No. 1124 of 1965, as a result of accidental death, there is an entitlement to an annuity equal to "twenty percent for each legitimate biological child, recognised and/or recognisable, and

every adoptive child up until the age of eighteen, and forty percent for orphans who have lost both parents".

However – as pointed out in the referral order – the legislation does not take into consideration, given also the period when it was adopted, cases involving the death of a parent within a *de facto* consolidated family situation, with the result that also in this case the surviving child is only paid twenty percent of the annuity. In this way, the child is deprived also of that share of the annuity reserved for the spouse which is naturally destined to satisfy the requirements of the nuclear family and not only the spouse's own maintenance requirements. This fact is also recognised by the Convention on the rights of the child signed in New York on 20 November 1989 and ratified in Italy by law No. 176 of 27 May 1991 which, in order to guarantee protection and particular care to the child, also makes provision for the protection of the family (not understood in a narrow legal sense) as the "fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children". In particular, Article 27 of the Convention recognises the right of every child to a standard of living adequate for the child's mental, spiritual, moral and social development, and states that the parents have primary responsibility to secure the conditions of living necessary for the child's development. On the other hand, signatory states to the Convention are required to adopt "all appropriate measures to secure the recovery of maintenance for the child from the parents". Precisely due to Article 27 of the Convention, the refusal by the *Inail* to grant a lower annuity to the mother only because she was not recognised as the "spouse" is argued to impinge upon the guarantees provided to the child. In the case before the Court in fact, the annuity to which Mrs R. M. was entitled would be reduced to € 382.59 simply because she was not married to the deceased worker.

It appears to the referring court that a situation in which an adequate development of the personality and life of the minor J. Q. cannot be fairly guaranteed because his parents were not united in the legal bond of matrimony is unconstitutional, and the solution adopted under the legislation in force is not acceptable also since it does not recognise *de facto* families: in fact, the surviving cohabitant is not recognised any annuity, whilst the minor should be awarded that share of additional annuity which, for families recognised under law, is incorporated into the overall annuity destined for the spouse in his or her capacity as the surviving administrator of the household.

In this regard, the referring court refers to Constitutional Court judgment No. 360 of 1985, which struck the aforementioned article down as unconstitutional insofar as it provided that in the event that the insured person is fatally injured, children who had lost both parents would be entitled to forty percent of the annuity, but precluded that the said

annuity could be awarded also to a child who had lost the only parent who had recognised him or her.

According to the referring court, the provision in question therefore violates the combined provisions of Articles 2, 3 and 30 of the Constitution on the grounds that it creates an unreasonable disparity in treatment between children born out of wedlock and legitimate children. Every minor has the absolute and inviolable right (Article 2) to the full development of his or her personality (Article 3) and to a real family (Article 30) which can guarantee that development. Article 30 of the Constitution has been violated both as regards the right-duty of parents to maintain, instruct and educate their children, including those born out of wedlock, as well as with regard to the obligation on Parliament to guarantee such children all legal and social protection. The provision is also claimed to violate Article 31(2) of the Constitution, which enshrines the principle that special protection be granted both to families as well as children and identifies the cornerstone for a broad programme of initiatives to support the family and to protect infants and young people as having constitutional status. Along with that provision, Article 30 of the Constitution also undertakes to consider the individual provisions concerning young people and infants not as isolated forms of protection of institutionally vulnerable individuals, but as constituent elements of a strongly innovative legislative strategy. Such protection is also explicitly referred to in Article 24 of the Charter of Fundamental Rights of the European Union of 7 December 2000, which enshrines the right of the child to well-being and asserts the principle of the primary interest of the child in all actions taken by public authorities or private institutions, and similar protection is also guaranteed under Articles 26 and 27 of the Convention on the rights of the child.

In view of the above, Article 85(1)(ii) of presidential decree No. 1124 of 1965 is claimed to violate Article 31 of the Constitution insofar as it does not guarantee the minor appropriate economic protection, as well as Article 10 of the Constitution insofar as it does not comply with the generally recognised norms of international law, since Article 24 of the Charter of Fundamental Rights of the European Union provides as follows: “In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration”. Article 27 of the Convention on the rights of the child expressly provides that “the States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (...) the States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child”. By contrast, the minor J. Q. receives an annuity from the *Inail* equal to twenty percent of the annual remuneration earned by the father, for a monthly

amount equal to € 382.59, which is certainly not sufficient to guarantee him a sufficient level of development.

Moreover, Article 85(1)(ii) of presidential decree No. 1124 of 1965 is also claimed to be unconstitutional due to its clear contrast with Articles 11 and 117 of the Constitution, due to violation of international law obligations and provisions contained in the international conventions cited above.

2. – The private party in proceedings before the lower court entered an appearance before the Court, requesting that the Court declare the contested provision unconstitutional on the basis of arguments which followed those contained in the referral order.

3. – The President of the Council of Ministers intervened in proceedings, represented by the *Avvocatura Generale dello Stato*, arguing that the question was manifestly inadmissible or groundless, arguing that it seeks to obtain equal treatment for *de facto* families and those founded on marriage, whereas the different nature of the two situations constitutes a fixed point within constitutional jurisprudence and, in the absence of an express legislative provision, the social security benefits provided for members of the family based on marriage may not be extended to persons who do not have that status.

With regard in particular to the second question raised, the referral order contains, according to the intervener, an element of perplexity or lack of self-sufficiency, since the status of the minor is not well defined, it not being clear in particular whether the child has also lost his biological mother, or whether he has been recognised only by one parent.

Conclusions on points of law

1. – The *Tribunale di Milano* questions the constitutionality of Article 85(1)(i) of presidential decree No. 1124 of 30 June 1965 (Consolidated text of provisions on compulsory insurance against industrial accidents and occupational diseases), insofar as it provides that in the event of the death of a worker due to an accident, an annuity be awarded to the spouse at the level of fifty percent of the remuneration received by the worker, whilst a cohabitant with habit and repute is not guaranteed anything, due to violation of Article 2 of the Constitution on the grounds that it does not guarantee adequate protection to *de facto* families, Article 3 of the Constitution since it denies the right to an annuity for the cohabitant also where the cohabitation has acquired the characteristics of stability and certainty which are typical of the matrimonial bond, Article 31 of the Constitution, on the grounds that it breaches the principle that special protection be granted to families [*favor familiaris*], which requires the state to take action to promote and facilitate the nuclear family, whatever its form, Article 38 of the Constitution, since it does not permit the unmarried parent to attend to the maintenance of his or her own children and

does not avert or reduce in any way the conditions of need and individual and family hardship, and Articles 11 and 117 of the Constitution, on the grounds that it does not comply with the requirements laid down by Community law (the EU Treaty and the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000) and international law obligations (Convention on the rights of the child, signed in New York on 20 November 1989 and ratified in Italy by law No. 176 of 27 May 1991).

The lower court also questions the constitutionality of Article 85(1)(ii) of presidential decree No. 1124 of 1965 insofar as it provides that, as a result of the accidental death of a worker, an annuity be awarded of twenty percent of the remuneration earned by the same for each child, and forty percent for children who have lost both parents, without taking into consideration cases involving the death of a parent within a *de facto* consolidated family situation, with the result that also in this case the surviving child is only paid an annuity equal to twenty percent of the deceased worker's salary, due to violation of the combined provisions of Articles 2 and 3 of the Constitution as a result of the unreasonable disparity in treatment between children born out of wedlock and legitimate children, Article 30 of the Constitution, both as regards the right-duty of parents to maintain, instruct and educate their children, including those born out of wedlock, as well as with regard to the obligation on Parliament to guarantee such children all legal and social protection, Article 31 of the Constitution, violating the principle that special protection be granted both to families as well as children, and Articles 11 and 117 of the Constitution, on the grounds that it does not comply with the requirements laid down by Community law (the EU Treaty and the Charter of Fundamental Rights of the European Union) and international law obligations (Convention on the rights of the child).

2. – The first question focuses on the failure to treat cohabitants and spouses of the worker as equivalent for the purposes of the payment of the *Inail* annuity in the event of an industrial accident which results in the death of the worker.

This question is manifestly groundless for the reasons set out below.

This Court has repeatedly pointed out the difference between *de facto* families and families founded on marriage, due to the aspects of stability, certainty, reciprocity and *quid pro quo* of rights and duties which are born only out of that bond, identifying the constitutional grounds which justify a different legislative treatment for the two situations in the fact that marriage is directly protected by Article 29 of the Constitution (order No. 121 of 2004).

With reference in particular to pensions, the Court confirms the principle asserted in judgment No. 461 of 2000, according to which the failure to include a cohabitant with habit and repute amongst the individuals who benefit from inherited pension rights is justified, not unreasonably, by the fact that this benefit is genetically related to a pre-existing legal

relationship, which is lacking in the case under consideration. The Court therefore finds that the contested legislation does not violate Articles 2, 3, 31 and 38 of the Constitution (cf. order No. 444 of 2006).

Moreover, the Court does not accept the objection relating to a presumed violation of Articles 11 and 117 of the Constitution due to the failure to comply with the requirements laid down by Community law (the EU Treaty and the Charter of Fundamental Rights of the European Union) and international law obligations (Convention on the rights of the child), since these requirements and obligations are not identified in a precise manner.

3. – The second question is admissible and well founded.

3.1. – The objection by the state representative that the question is inadmissible on the grounds that the status of the minor is not clearly described in the referral order, it not being clear whether the child has also lost his biological mother, or whether he has been recognised only by one parent, is groundless.

It is in fact clear from the referral order that the plaintiff applied for the award of the post-accident annuity to which the child was entitled in her capacity as the person with parental responsibility for the child: this is sufficient in order to conclude that the minor has not lost his or her biological mother and has been recognised by both parents.

3.2. – Notwithstanding the absence of any specification to this effect by the referring court, this question is proposed in the alternative compared to the first, since the plaintiff in the proceedings before the lower court had requested – should she fail to obtain the annuity from the *Inail* at the level of fifty percent of the remuneration earned by the cohabitant due to the death of the latter following an industrial accident – that she be awarded, in her capacity as the person with parental responsibility for the child, an annuity on behalf of the child equal to forty percent of the remuneration earned by the father.

It should be stated at the outset that since the question concerns the interest of a recognised under-age biological child, even though it was raised within the context of a case concerning a child born to a couple cohabiting with habit and repute, it must be considered to refer in general to a recognised biological child.

With reference to this question – regarding the failure to provide that, following the death of a worker from an accident, an annuity of forty percent of the remuneration earned by the worker be awarded to a child born out of wedlock – it must first and foremost be observed that the contested Article 85(1)(ii) of presidential decree No. 1124 of 1965 provides that, in the event of an industrial accident followed by death, an annuity equal to twenty percent of the worker's remuneration be paid to each child up until the age of eighteen, and forty percent if the child has lost both parents.

It may be inferred from an examination of the referral order that the referring court seeks to obtain a judgment which applies the arrangements put in place in the relevant

matters for children who have lost both parents (annuity equal to forty percent of the remuneration of the deceased worker) to the under-age child of an unmarried but stably cohabiting couple in the event that only one of the parents dies, a situation in which the minor has the right only to the annuity equal to twenty percent of the remuneration of the deceased parent, whilst he or she is not able to benefit from the financial support which would be obtained indirectly from the award to the other parent of the annuity equal to fifty percent, which was however lawfully denied to the cohabitant.

3. 3. – In providing that the post-accident annuity is to be awarded at the level of twenty percent to each legitimate, biological, recognised or recognisable child up until the age of eighteen, and forty percent for children who have lost both parents, the contested provision discriminates between biological children and legitimate children and hence violates Articles 3 and 30 of the Constitution.

In fact, whereas for legitimate children the death of a spouse from an accident entails the award of an annuity to the surviving spouse at the level of fifty percent, and to each child at twenty percent, the death due to accident of a person who is not married and has recognised biological children does not entail the award to the surviving parent of any post-accident annuity, whilst the children have the right only to twenty percent of the said annuity.

Although legitimate or biological recognised children enjoy – in the event of a fatal accident to their parent – the post-accident annuity at the same level, the discrimination however derives from the fact that only legitimate children, and not also biological children, may receive that additional benefit of the assistance which results from the award to the surviving parent of fifty percent of the annuity.

In fact whereas, for the purposes of the determination of the level of post-accident annuity the minor is in a similar situation to that of a child who has lost both parents – not receiving any financial benefit, even indirectly, to that end by virtue of the survival of the other parent, who is not entitled to any annuity due to the fact that he or she is not married – he only has the right to twenty percent of the annuity, and not also to the forty percent due to children who have lost both parents.

The Court therefore finds that Article 85(1)(ii) of presidential decree No. 1124 of 1965 is unconstitutional insofar as, in providing that in the event that the insured person is fatally injured, children who have lost both parents shall be entitled to forty percent of the annuity, it precludes the award of the annuity at the same level also to a child who has only lost one biological parent.

3. 4. – Since the question has been accepted with reference to Articles 3 and 30 of the Constitution, the other grounds of challenge are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 85(1)(ii) of presidential decree No. 1124 of 30 June 1965 (Consolidated text of provisions on compulsory insurance against industrial accidents and occupational diseases) is unconstitutional insofar as, in providing that in the event that the insured person is fatally injured, children who have lost both parents shall be entitled to forty percent of the annuity, it precludes its award at the same level also to children who have lost only one biological parent;

rules that the question of the constitutionality of Article 85(1)(i) of presidential decree No. 1124 of 1965 raised, with reference to Articles 2, 3, 10, 11, 30, 31, 38 and 117 of the Constitution and Articles 12 and 13 of the EC Treaty by the *Tribunale di Milano* in the referral order mentioned in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 March 2009.

Signed:

Francesco AMIRANTE, President

Alfio FINOCCHIARO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 27 March 2009.

The Director of the Registry

Signed: DI PAOLA