Corte costituzionale

JUDGMENT NO. 250 OF 2010

Francesco AMIRANTE, President
Giuseppe FRIGO, Author of the Judgment

JUDGMENT NO. 250 YEAR 2010

In this case the Court considered two references from justices of the peace concerning the criminal offence of illegal immigration alleging, *inter alia*, the violation of the principles of non-discrimination, the principle of *nemo tenetur se detegere,* the failure to provide for an exemption in cases involving a "justified reason" and the lack of transitory arrangements. The court dismissed the objections on numerous grounds, holding that the State did have a legitimate interest in the control and management of migratory flows, and that the exercise of its policy discretion in this area was only amenable to review if manifestly unreasonable. It also held that the general exemptions from punishment provided for under the criminal law were sufficient and that there was no constitutional requirement for specific exemptions for this particular offence. Finally, the objection based on the lack of transitory provisions was rejected on the grounds that it "essentially amounts to a request for a substantive ruling, the contents of which are undefined and not mandatory under constitutional law ".

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, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 10a of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of provisions concerning the regulation of immigration and rules on the status of foreigners), introduced by Article 1(16)(a) of

Law no. 94 of 15 July 2009 (Provisions on public security), initiated by the Lecco Justice of the Peace, Missaglia division, by referral order of 1 October 2009 and the Turin Justice of the Peace by referral order of 6 October 2009, registered respectively as nos. 292 and 300 in the Register of Orders 2009 and published in the *Official Journal of the Republic* nos. 49 and 51, first special series 2009.

Considering the interventions by the President of the Council of Ministers;

having heard the *Judge Rapporteur* Giuseppe Frigo in chambers on 9 June 2010.

The facts of the case

1.1. – By referral order of 1 October 2009, the Lecco Justice of the Peace, Missaglia division, raised with reference to Articles 3, 27 and 117 of the Constitution questions concerning the constitutionality of Article 10a of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of provisions concerning the regulation of immigration and rules on the status of foreigners), introduced by Article 1(16)(a) of Law no. 94 of 15 July 2009 (Provisions on public security), which punishes with a fine of between 5,000 and 10,000 Euros, "unless the conduct amounts to a more serious offence, any foreigner who enters into or remains within the territory of the State in breach of the provisions of the [aforementioned] consolidated text or those contained in Article 1 of Law no. 68 of 28 May 2007" (Provisions on short-term stays by foreign nationals for visits, business, tourism and study).

The lower court states that it has been seized of criminal proceedings against a non-Community national accused of the offence provided for under the contested provision "on the grounds that he entered into and remained within the territory of the State without authorisation" (an act which is specified in the charge as having been committed on 13 August 2009).

The charge originates from a control carried out by a Carabinieri patrol, following which it was ascertained that the foreign national – who did not have any identification documents – was illegally staying in the country, since he had not applied for a residence permit within the statutory time limit following his entry into Italy, which

occurred in December 2007 at the border in the Ventimiglia area. An expulsion order was therefore issued against him by the office of the Prefect, and he was consequently ordered to leave the country within five days by the Lecco Chief of Police: this measure, which was motivated by the fact that it was impossible either to deport the individual immediately – since it was necessary to carry out supplementary investigations regarding his identity and to obtain a valid document for international travel – or to detail him at a Centre for Identification and Expulsion, due to the lack of space. In parallel, the foreign national had been arraigned, charged with the offence provided for under Article 10a of Legislative Decree no. 286 of 1998.

In view of these facts, the referring court considers that the contested provision is unconstitutional first and foremost insofar as is does not specify as one of the constituent elements of the offence provided for thereunder the lack of a "justified reason", thereby avoiding the punishment of individuals whose illegal stay in Italy is in any case not "reprehensible" on valid objective or subjective grounds, even though it is not covered by a genuine justification.

In the light of the Constitutional Court's assertions in relation to the offence provided for under Article 14(5b) of Legislative Decree no. 286 of 1998 (judgments no. 5 of 2004 and no. 22 of 2007 are cited), it amounts in fact to a provision that is indispensable in order to bring the criminal offence into line with the principles of guilt and proportionality (Article 27 of the Constitution), since it can apply in highly different situations, and also in respect of individuals who do not understand Italian or who enter into contact with the national legal system for the first time.

It also follows that Article 3 of the Constitution has been violated, given the irrational difference in treatment compared to the criminal offence provided for under Article 14(5b), which by contrast contemplates the negative element specified above. The two criminal offences are in fact fully comparable, since both apply to the illegal stay by a foreign national in the country: in one case (Article 10a) due to the generic violation of the provisions of Legislative Decree no. 286 of 1998, whilst in the other (Article 14(5b)) due to the specific failure to comply with the Chief of Police's order to leave the country within five days. The different nature of the obligation violated could

indeed justify different punishment for the two situations, but not the adoption of divergent criteria in order to assess the reprehensibility of the conduct.

In this case, the contested omission is claimed to have prevented the defence from providing evidence – on the grounds that as things stood it was irrelevant – of the fact that after 8 August 2009 (date of entry into force of Law no. 94 of 2009), it would have been impossible or at the very least difficult for the accused to leave the State before an expulsion order was issued against him.

The referring court points out on the other hand that, pursuant to Article 10a(5), the court must issue an order that there is no case to answer in relation to the offence under examination in cases in which the foreign national has actually been expelled or refused entry pursuant to Article 10(2) of Legislative Decree no. 286 of 1998. The contested provision is also claimed to violate the principles of equality (Article 3 of the Constitution) and blame (Article 27 of the Constitution) in this regard, since it treats the same conduct differently depending upon whether the administrative authority – also as a consequence of its own organisational choices – is able to enforce the refusal of entry or expulsion or, on the contrary, where it is not able to do so, orders the foreign national to leave the country at his own expense within five days, in which case the foreign national would be liable to the severe punishment – imprisonment to a term of between one and four years – provided for under Article 14(5b) for the failure to comply with that order.

The contested provision is finally claimed to violate Article 117 of the Constitution on the grounds that it breaches the provisions of Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Article 7(1) of the aforementioned Directive lays down the ordinary procedure for implementing expulsion as voluntary return, providing to this effect that the foreign national must be granted "an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4".

The criminalisation of any entry into or illegal stay in the State aims to circumvent that Community law obligation, rendering applicable the exception provided for under Article 2(2)(b) of the Directive, pursuant to which the Member States may decide not to

apply the Directive "to third country nationals who … are subject to return as a criminal law sanction or as a consequence of a criminal law sanction". In this way, the ordinary procedure for implementing expulsion remains immediate deportation by the public law enforcement authorities, in accordance with the current provisions of Article 13(4) of Legislative Decree no. 286 of 1998.

Moreover, it cannot be objected that the time limit for bringing the legislation of Member States into line with the Directive – set for 24 December 2010 (Article 20) – has not yet expired. Indeed, on 8 August 2009, Directive 2008/115/EC had already been in force for several months, having entered into force on the twentieth day after its publication in the Official Journal of the European Union (Article 22). Consequently – according to the referring court – in order to conclude that Article 10a of Legislative Decree no. 286 of 1998 does not violate the Directive, it would be necessary to presume that the national provision was enacted with the intention of repealing or amending it prior to the expiry of the final deadline for implementation: by contrast, this intention cannot be inferred either from the letter of the provision – which does not provide for any temporal limitation of its effect – or its rationale.

1.2. – The President of the Council of Ministers intervened in the proceedings before the Constitutional Court, represented by the *Avvocatura Generale dello Stato*, requesting that the questions be ruled groundless, except with regard to the second, which should be ruled inadmissible.

As regards the failure to make provision for a "justified reason", the State representative points out that the criminal offence in any case remains subject to the general principles of criminal justice, which include various grounds for exemption from punishment, including the blameless ignorance of the criminal law provision, the fact that it would be unreasonable to require the lawful conduct and "good faith": this means that there is no difference in treatment compared to other criminal offences provided for under the same legislation.

With reference then to the provision that an order be made that there is no case to answer in the event that the foreign national is expelled or refused entry, the question is claimed to be inadmissible since the referring court is in reality criticising Article 14(5b) of Legislative Decree no. 286 of 1998, which was not challenged in the proceedings

before the lower court. The challenge is in any case claimed to be groundless both because the two cases are not equivalent – as is clear from the different penalties applicable – as well as because the application of the penalty would in any case be dependent on the foreign national concerned who illegally enters into or stays within the territory of the State, and not the public administration which is not able to refuse him entry or to expel him physically.

Finally, there is claimed to be clearly no violation of Article 117 of the Constitution as alleged, since the time limit for bringing national law into line with the Directive invoked by the referring court has not yet expired.

2.1. – By referral order issued on 6 October 2009 during criminal proceedings against a foreign national accused of the offence provided for under the same contested provision, the Turin Justice of the Peace raised various questions concerning the constitutionality of that provision (Article 10a of Legislative Decree no. 286 of 1998), with reference to Articles 2, 3, 24(2) 25(2) and 97(1) of the Constitution

In the opinion of the lower court, Article 3 of the Constitution has been violated due to the fact that it breaches the principle of equality on three counts.

It does so first and foremost because – in indiscriminately punishing whoever has illegally entered into or stayed within the territory of the State – it treats as equivalent situations that are very different and which have different degrees of social danger. In fact, it applies in the same way both to foreign nationals who remain in Italy and live from the proceeds of criminal activity after having entered Italy illegally as well as those who, notwithstanding their illegal entry and stay without a permit, have nonetheless integrated themselves into the social community and live honestly, and also whose who, having entered legally (for example, for a short term stay), have overstayed their visa on purely contingent grounds, which cannot always be classified as *force majeure* occurrences (such as having missed the flight or not received the money necessary to purchase a travel ticket on time from relatives abroad).

Parliament is also claimed to have taken account of the difference in the situations that may come into consideration by introducing, through Article 1b of Decree-Law no. 78 of 1 July 2009 (Anti-crisis measures and extension of time limits), converted with amendments into Law no. 102 of 3 August 2009, a special regime for illegally staying

foreign nationals who provide assistance to third parties, permitting them to benefit from a leniency procedure pending which the criminal proceedings were suspended.

The unreasonableness of the new criminal offence may also be appreciated with reference to the regime of penalties considered overall: that is, not only with reference to the imposition of a penalty consisting in a fine of between 5,000 and 10,000 Euros, but also the prohibition on the conditional suspension of the penalty (following the classification of the offence under the jurisdiction of the justices of the peace: Article 60 of Legislative Decree no. 284 of 28 August 2000 laying down "Provisions on the criminal law jurisdiction of the justices of the peace, pursuant to Article 14 of Law no. 468 of 24 November 1999"), as well as the right granted to the courts to replace the pecuniary fine with a significantly harsher sanction, namely expulsion for a period not shorter than five years (Article 16(1) of Legislative Decree no. 286 of 1998, as amended by Article 1(16)(b) of Law no. 94 of 2009). In this case, this last provision is claimed to be the source of unreasonable discrimination compared to the other individuals against whom an expulsion order may be issued as a replacement measure, namely – pursuant to Article 16(1) – those convicted of non-negligent criminal offences to a term of imprisonment not exceeding two years, unless the prerequisites for ordering conditional suspension are met.

A further violation of the principle of equality is claimed to result from the fact that, in contrast to Article 14(5b) of Legislative Decree no. 286 of 1998, the contested provision does not subject punishment to the requirement that the foreign national remaining within the territory of the State not have any "justified reason": this formula, which – as clarified by the Constitutional Court (judgment no. 5 of 2004) – is intended "to preclude the commission of an offence in situations involving particularly important impediments which, whilst not amounting to justifications in the technical sense, impinge upon the very subjective and objective ability to comply with the intimation, preventing it or rendering it difficult or dangerous". In this way, the author of the minor offence provided for under Article 10a would be irrationally put in a less favourable situation compared to the author of the offence provided for under Article 14(5b) which is more serious and renders the minor offence moot pursuant to the clause "unless the conduct amounts to a more serious offence" at the start of the contested provision.

It is also claimed to violate Article 24(2) of the Constitution by rendering liable to punishment all foreign nationals illegally present in Italy at the time Law no. 94 of 2009 entered into force unless they have voluntarily left the country. And this is the case notwithstanding the lack of provision for a time limit and an "operational procedure" in order to mitigate that rule. This means that such individuals have no option other than to leave Italy illegally in order to avoid having to turn themselves in, which violates the principle of *nemo tenetur se detegere*, as the expression of the right to a defence.

The failure to make provision for the possibility of voluntary departure and the relative procedures is also claimed to violate Directive 2008/115/EC, Article 7 of which provides that – other than in certain specific situations – a return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, which may be extended, where necessary, taking into account the specific circumstances of the individual case.

Article 10a of Legislative Decree no. 286 of 1998 is also claimed to be incompatible with Article 24(2) of the Constitution on other grounds. According to Article 38 of the Legislative Decree in fact, minors who are foreign nationals present on any grounds within the territory of the State are subject to the obligation to attend school on the same terms as their Italian peers: their parents are responsible for compliance with that obligation, failing which they may be liable to criminal penalties (Article 731 of the Criminal Code). In this regard, Article 6(2) of Legislative Decree no. 286 of 1998, as amended by Law no. 94 of 2009, provides however that, notwithstanding the general rule set forth thereunder, a foreign national is not required to present to the public administration the documents attesting the legality of his stay in order to obtain measures regarding compulsory schooling services, in addition to sporting and recreational activities of a temporary nature and access to healthcare services pursuant to Article 35. However, whilst Article 35(5) of Legislative Decree no. 286 of 1998 expressly provides that access to healthcare facilities by foreign nationals whose situation has not been regularised cannot result in any type of report being made to the authorities, unless it is compulsory to do so on the same conditions as Italian citizens, an analogous provision is not repeated in relation to compulsory schooling services. In this way therefore – even though he is not required to present any document

attesting the lawful nature of his stay in order to register his children with a school – a foreign national could nonetheless be reported as an "illegal immigrant" by a member of the school's staff meeting the requirements specified under Articles 361 and 362 of the Criminal Code who otherwise becomes aware of the fact that he is an illegal immigrant. Moreover, given the ease with which that situation may emerge during the course of teaching activity, any migrant who wishes to comply with the law enacted to guarantee the right and duty to educate one's children would in practice be required to turn himself in for the offence provided for under Article 10a of Legislative Decree no. 286 of 1998, which amounts to a further violation of the principle "*nemo tenetur se detegere*".

The fact that the contested provision does not provide for any form of guarantee in favour of an illegal immigrant who intends – notwithstanding the other provisions of the consolidated text – to request authorisation from the Juvenile Court, pursuant to Article 31 of Legislative Decree no. 286 of 1998, to remain in Italy for a fixed term for serious reasons associated with the protection of an underage family member is also claimed to be objectionable. If he submitted the application concerned, the foreign national would therefore once again end up "certifying" his own status as an illegal immigrant, thereby violating both the principle "*nemo tenetur se detegere*" as well as Article 3 of the Constitution due to the unjustified difference in treatment compared to a foreign national who has submitted an application for international protection. Indeed, Article 10a(6) provides that criminal proceedings are to be suspended in such cases and that the acceptance of the application will result in a ruling that there are no grounds to prosecute the offence under examination.

The referring court observes secondly that, considered as a whole, the legislation enacted by the contested provision has been devised in view of the purpose of requiring the foreign national to leave the country, which is deemed to be a priority. It is not in fact necessary to receive clearance from the judiciary in order to enforce the expulsion of a foreign national subject to criminal proceedings for the offence under examination, whilst on the other hand, once notice has been received of the expulsion of the foreign national or of the refusal to grant him entry, the court must issue a ruling that there are no grounds to prosecute (Article 10a(4) and (5)). Articles 16a [more correctly, 62a] of Legislative Decree no. 274 of 2000 and 16(1) of Legislative Decree no. 286 of 1998 –

respectively added and amended by Law no. 94 of 2009 – provide moreover that when passing sentence for the offence concerned, the justice of the peace may replace the penalty with a measure of expulsion for a period not shorter than five years, unless the grounds for exclusion provided for under Article 14(1) obtain.

However, the result of the departure of the illegal immigrant from the territory of the State was and continues to be attainable through administrative expulsion; this means that, once the illegal presence of the individual within the territory of the State has been ascertained, two parallel proceedings that have the same purpose are automatically initiated, one administrative and the other criminal. However, the latter is conditional upon the former, since it must be concluded with an order that there are no grounds to prosecute if the administrative procedure – which runs faster – has concluded its "natural course". These arrangements are claimed to violate not only the principle of reasonableness, but also that of the proper administration of public offices laid down by Article 97(1) of the Constitution, since they have a negative impact on the length of trials and cause a needless increase in costs.

The contested provision is also claimed to violate Article 25(2) of the Constitution, since it subjects a particular personal and social condition to criminal sanction – specifically that of a person who is an "illegal immigrant" due to the fact that he has not complied with the provisions of Legislative Decree no. 286 of 1998 – rather than the commission of an act that causes harm to a right protected under constitutional law. It would essentially amount to a "guilt due to personal characteristics[*]" or "the actor's manner of being". This legislative choice must be deemed to be unacceptable since the imposition of criminal penalties can only be justified when it appears to be indispensable "in order to ensure that the progress of the social community is maintained or promoted or when there is a danger that the individual may commit a criminal offence". In this case by contrast, whilst it is indeed true that some illegal immigrants are dedicated to a life of crime, it is equally true nonetheless that many others are employed – often under conditions of exploitation – or in any case do not commit offences or threaten collective security.

[*] Translator's note: in Italian "*colpa d'autore*", similar to the concept of "*Täterschuld*" in German law.

Finally, Article 2 of the Constitution, which recognises and guarantees the inviolable rights of man and requires compliance with inderogable duties of political, economic and social solidarity is claimed to have been violated due to the state of extreme poverty in which almost all illegal immigrants live.

As far as the relevance of the questions is concerned, this is evident – in the opinion of the lower court. Indeed, the foreign national accused in the main proceedings entered into Italy without a regular visa and did not hold a residence permit, with the result that, as things stand, he should "almost certainly" be found guilty of the offence charged, as provided for under Article 10a of Legislative Decree no. 286 of 1998, with the result that the alternative measure of expulsion may be applied. Moreover, this measure would have a significant impact on his social integration and family circumstances: according to the documentation filed in the proceedings, the accused has recently fathered a child with a non-Community citizen who is lawfully resident, with whom he lives, and who works as a household assistant with a family and has completed the procedures in order to regularise her position.

2.2. – The President of the Council of Ministers intervened, represented by the *Avvocatura Generale dello Stato*, who requested that the questions be ruled inadmissible or groundless.

According to the State representative, they are without doubt inadmissible due to the lack of relevance of the questions concerning Articles 6(2), 31 and 38 of Legislative Decree no. 286 of 1998, since these provisions are not applicable in the proceedings before the lower court.

The complaint alleging the violation of Article 3 of the Constitution, relating to the possibility of replacing the penalty with an expulsion order, is claimed to be equally inadmissible since the applicability of this provision is mooted as merely contingent.

The same should apply as regards the complaint alleging the violation of Article 2 of the Constitution, since it follows from the referral order itself that the accused is not poor, and is in employment, as well as the complaint alleging the violation of Article 25(2) of the Constitution, which would appear to lack any "relevance for the trial before the lower court".

The remaining challenges are claimed to be groundless.

In fact, the contested provision is claimed to be the expression of broad legislative discretion relating to the identification of punishable conduct and the relative penalties: the exercise of this discretion cannot be deemed to be unreasonable solely on the grounds that the expulsion order resulting from the application of the criminal penalty was already provided for as an administrative penalty.

Moreover, the fact as to whether the author of the offence may be identified both as an honest person as well as a criminal is claimed to be irrelevant. The penalty is in fact imposed on any person – honest or criminal – who stays unlawfully within the territory of the State, and hence there is no difference between the situations compared by the referring court.

Moreover, as far as the failure to make provision for the "quasi excuse" of a "justified reason" is concerned, the criminal offence in question in any case remains subject to the general principles applicable to the criminal law, which include the various grounds for exemption from punishment, such as the blameless ignorance of the criminal law rule, the fact that lawful conduct could not be required and "good faith".

As regards the lack of transitory provisions, the contested legislation is substantive in nature, and therefore the principle laid down in Article 2 of the Criminal Code applies.

Furthermore, the reference to Article 97 of the Constitution is claimed to be immaterial, since this is a provision that does not apply to the administration of justice.

Finally, as far as the alleged violation of the principle of solidarity is concerned, the provision has been incorporated into the text of Legislative Decree no. 286 of 1998, with the result that political refugees and those who have submitted an application for international protection will remain guaranteed, as moreover is expressly provided for under Article 10a(6).

Conclusions on points of law

1. – The Lecco Justice of the Peace, Missaglia division, questions the constitutionality of Article 10a of Legislative Decree no. 286 of 25 July 1998

(Consolidated text of provisions concerning the regulation of immigration and rules on the status of foreigners), added by Article 1(16)(a) of Law no. 94 of 15 July 2009 (Provisions on public security), which punishes with a fine of between 5,000 and 10,000 Euros, "unless the conduct amounts to a more serious offence, any foreigner who enters into or remains within the territory of the State in breach of the provisions of the [aforementioned] consolidated text or those contained in Article 1 of Law no. 68 of 28 May 2007".

In the opinion of the referring court, the contested provision violates Articles 3 and 27 of the Constitution, insofar as it does not include as one of the constituent elements of the offence the lack of a "justified reason". In this way, it first renders liable to punishment also the act of illegally saying that is not "reprehensible" due to valid subjective or objective reasons, in breach of the principles of blame and proportionality. Secondly, it is claimed to be a source of an irrational difference in treatment compared to the analogous criminal offence provided for under Article 14(5b) of Legislative Decree no. 286 of 1998 (failure to comply "without justified reason" with an order by the Chief of Police to leave the country).

The contested provision is claimed to violate the same constitutional principles (Articles 3 and 27 of the Constitution) also on a different ground. Indeed, in providing that the court must issue a ruling that there are no grounds to prosecute in the event that the author of the offence is expelled or is refused entry pursuant to Article 10(2) of Legislative Decree no. 286 of 1998 (Article 10a(5)), it renders the application of a criminal penalty dependent upon the fact – which is entirely outwith the foreign national's control – that the administrative authority is unable to enforce the expulsion or refuse entry prior to conviction.

It is also claimed to violate Article 117 of the Constitution, since the classification of any illegal entry or stay in the State as an offence seeks to circumvent Directive 2008/115/EC of 16 December 2008 – according to which an expulsion order must as a rule be enforced in the form of voluntary return – and to activate the derogation provided for under Article 2(2)(b) of the Directive in the event that return amounts to a "criminal law sanction" or the "consequence of a criminal law sanction".

2. – Article 10a of Legislative Decree no. 286 of 1998 has also been submitted for constitutional review by the Turin Justice of the Peace, who also considers that it violates Article 3 of the Constitution on various grounds.

This is first because, by punishing indiscriminately a foreign national who has entered into or remained illegally within the territory of the State, it treats as equivalent factual situations that are very different and subject to different degrees of social dangerousness.

It is secondly due to the irrational nature of the penalty, which is characterised by the imposition of a fine of between 5,000 and 10,000 Euros, the prohibition on the conditional suspension of the penalty and the right of the court to substitute the pecuniary fine with a significantly more severe penalty, namely expulsion for a period not shorter than five years: this provision is claimed to be the source of unreasonable discrimination compared to the other individuals against whom the replacement penalty may be ordered pursuant to Article 16(1) of Legislative Decree no. 286 of 1998 (those who have been sentenced to a term of imprisonment not exceeding two years, unless the prerequisites for ordering conditional suspension are met).

It is thirdly because – in contrast to the position for the more serious offence provided for under Article 14(5b) of Legislative Decree no. 286 of 1998 – the contested provision does not subject punishment of the illegal stay within the territory of the State to the prerequisite that the violation is committed "without justified reason".

Article 24(2) of the Constitution is also claimed to have been violated since, absent transitory legislation, the new criminal offence would require all foreign nationals who are illegally present in Italy at the time that Law no. 94 of 2009 entered into force to leave Italy illegally in order to avoid having to turn themselves in, in contrast with the principle of *nemo tenetur se detegere*, which is a constituent expression of the right to a defence.

Article 24(2) of the Constitution is also claimed to have been violated on another ground. Whilst a foreign national who is illegally present within the territory of the State and who intends to comply with the obligation to attend school to which minors are subject (Article 38 of Legislative Decree no. 286 of 1998) – an obligation backed up by a criminal law penalty (Article 731 of the Criminal Code) – is not required to submit

any document attesting the lawful nature of his stay in order to register his children with a school (Article 6(2) of Legislative Decree no. 286 of 1998), he would inevitably end up betraying his status, both due to the ease with which his unlawful situation may emerge during the course of teaching activity, as well as the existence of an obligation for members of the school's staff who meets the requirements specified under Articles 361 and 362 of the Criminal Code to report that fact.

Articles 3 and 24(2) of the Constitution are also claimed to have been violated due to the fact that the contested provision does not provide analogous guarantees to those granted to a foreign national who submits an application for international protection (suspension of criminal proceedings, with an order that there are no grounds to prosecute the offence in the event it is accepted) to illegal immigrants who intend to file an application to remain within the territory of the State for the purpose of protecting an underage family member (Article 31 of Legislative Decree no. 286 of 1998). This means that, even were the application concerned to be submitted, the foreign national would end up "certifying" his own status as an illegal immigrant, in breach of the principle of *nemo tenetur se detegere*.

The contested provision is also claimed to violate the principles of reasonableness and the proper administration of public offices (Articles 3 and 97(1) of the Constitution) since it pursues, in the light of its complex structure, a goal – the removal of the foreign national illegally present within the territory of the State – that can already be achieved through the procedure of administrative expulsion, which is in any case initiated in parallel with the criminal proceedings. This is claimed to have a negative impact on the reasonable length of trials and to cause a needless increase in costs.

Article 25(2) of the Constitution is claimed to have been violated since the contested provision imposes a criminal law penalty on a particular personal and social condition – that of an "illegal immigrant", resulting from the mere violation of the provisions regulating entry into and stay within the territory of the State – and not the commission of an act that causes harm to a right protected under constitutional law.

Finally, Article 2 of the Constitution is claimed to have been violated since the new punitive provision affects persons almost all of whom live in a state of extreme poverty,

in contrast with the guarantee that inviolable human rights and the duty of solidarity must be respected.

3. – The referral orders raise partially analogous questions relating to the same provision, and therefore the proceedings should be joined for resolution in a single judgment.

4. – In considering the *thema decidendum*, it should first be pointed out that, leaving aside the generic and undifferentiated nature of the remedy sought, the referring courts have submitted two general questions for review by this Court.

In the first place, they challenge the constitutionality of the choice of criminalisation underling the contested provision on various grounds, thereby raising complaints which – should they prove to be well founded – would be the prelude to the complete erosion of the provision's validity. Secondly, they claim that specific features of the substantive or procedural arrangements governing the offence under examination violate the Constitution, thereby raising challenges aimed at achieving – should they be accepted – a ruling that the provisions are partially unconstitutional.

Having specified the above, the Court finds that the questions raised are in part groundless and in part manifestly inadmissible.

5. – With reference to the questions falling under the first group (namely those seeking to challenge the choice of criminalisation expressed by the contested provision on a global level) – to which attention must be directed as a matter of priority since it is evidently a preliminary issue in logical terms – the constitutional review must inevitably be guided by the principle, asserted within the settled case law of this Court, whereby the identification of punishable conduct and the classification of the relative penalties fall within the discretion of the legislature: the exercise of this discretion may be a matter for review as to its constitutionality only if it results in manifestly unreasonable or arbitrary choices (*inter alia*, judgments no. 47 of 2010, no. 161, no. 41 and no. 23 of 2009 and no. 225 of 2008).

6. – Given the above, it is the challenge alleging the violation of the principles of the tangible nature and necessarily offensive nature of the offence formulated by the Turin Justice of the Peace with reference to Article 25(2) of the Constitution that comes

to the fore first and foremost of significance, due to the fact that it lies at the root of the entire issue.

6.1. – In this regard, the objection that the question is inadmissible, raised by the *Avvocatura dello Stato* on the basis of the generic argument that the violation of constitutional law averred lacks any "relevance for the trial before the lower court" must be rejected. On the contrary, it is evident that were the contested provision to be removed as a result of the acceptance of the question, this would have an effect on the outcome in the main proceedings, which would otherwise – as asserted in the referral order – be destined to conclude with a ruling that the accused has committed the offence concerned.

6.2. – However, no violation of the Constitution may be ascertained on the merits.

Contrary to the assertions of the referring court, it is not possible to conclude that, by introducing into the legal order the offence of the "illegal entry into and stay in the territory of the State", Article 10a of Legislative Decree no. 286 of 1998 penalises a mere "personal and social condition" – namely that of the "illegal immigrant" (or, more properly, the "irregular" foreign national) – who is arbitrarily deemed to be a danger to society. The object of the offence is not a "manner of being" of the person, but specific conduct in breach of applicable legislation. In this case, the relevant conduct is that described in the alternative phrases "enter into" and "remain" within the territory of the State in breach of the provisions of the consolidated text on immigration or the legislation governing short-term stays for visits, business, tourism and study, pursuant to Article 1 of Law no. 68 of 2007: these phrases correspond, respectively, to a synchronic act (the illegal crossing of the national borders) and conduct of an ongoing nature, the illegal core of which is an omission (the failure to leave the national territory, notwithstanding the failure to hold a permit legitimising one's presence).

Status as a so-called "illegal immigrant" is not a pre-existing given that is extraneous to the offence, but on the contrary is the consequence of the very same conduct that is criminalised, encapsulating its unlawful nature (no differently from the way in which the status of previous offender for particular offences results from the fact that those offences have been committed, as subsequently ascertained by the courts).

6.3. – Moreover, the Court cannot endorse the argument that this case involves an unlawful act "of mere disobedience" that does not infringe any legal interest which deserves protection – even solely by jeopardising it. Thus its punishment is claimed to establish an instance of "criminal law guilt due to personal characteristics", which is underpinned by the intention to criminalise situations of poverty and marginalisation *per se* (similar to the situation which occurred in the past for the minor offence of "non-invasive begging" provided for under Article 670(1) of the Criminal Code, which was struck down as unconstitutional in judgment no. 519 of 1995).

The legal interest protected under the provision creating the offence can in reality easily be identified as the State's interest in the control and management of migratory flows in accordance with a specific legislative framework: the adoption of this interest as the object of criminal law protection cannot be regarded as irrational or arbitrary – since it moreover amounts to a "category" legal interest [i.e. an interest of a specified class], a common feature of most of the criminal law provisions contained in the consolidated text of 1998 – and which may moreover be breached by the conduct of illegal entry and stay by a foreign national.

The orderly management of migratory flows is presented in this case as an "instrumental" legal interest, by safeguarding which Parliament has provided an advance form of protection for the entire body of "final" public interests – of certain constitutional significance – that are liable to be negatively affected by uncontrolled immigration. This approach follows a strategy of intervention analogous to that which characterises vast areas of complementary criminal law, in which the criminal penalty – especially for minor offences – is associated with the violation of administrative provisions relating to the regulation and control of particular activities, and is intended to safeguard on a pre-emptive basis those interests, which are often supra-individual and are exposed to danger from the indiscriminate exercise of those activities (it is sufficient for example to consider the criminal law provisions associated with town planning, the environment, the financial markets and workplace safety). In the case under examination, this characteristic is moreover reflected in the low level of the criminal law's response set forth in the contested provision, which is merely pecuniary in nature.

It cannot be disputed that the power to regulate immigration is one of the essential features of State sovereignty as an expression of territorial control. As this Court has previously remarked, "the State cannot […] relinquish the ineluctable task of guarding its own borders: the rules laid down to govern an orderly migratory flow and an adequate welcome must therefore be respected, and not ignored […], since they have been enacted in order to defend the national collectivity, as well as to protect those who have respected them and who may suffer harm form the tolerance of illegal situations" (judgment no. 353 of 1997). Indeed, the legislation governing the entry into and stay in Italy by foreign nationals is "associated with the consideration of various public interests such as, for example, security and public health, public order, restrictions of an international nature and the national policy on immigration" (judgments no. 148 of 2008, no. 206 of 2006 and no. 62 of 1994). These are restrictions and policies which, in turn, are the result of assessments relating to the socio-economic "sustainability" of the phenomenon.

On the other hand, the legal regulation of immigration – which is undoubtedly for the State (judgment no. 5 of 2004), in order to protect values of constitutional standing and to comply with international obligations – necessarily entails the classification of the violation of the rules through which that control manifests itself as an unlawful act. The determination of the most appropriate response to that offence in terms of punishment, and specifically to determine whether it is to be regulated under the criminal law rather than merely under administrative law (as was the case prior to the entry into force of Law no. 94 of 2009), falls to the discretionary choice of the legislature, which may indeed modify the quality and level of the criminal law provision in this area differently over time – depending upon changes in circumstances and the size of the migratory phenomenon along with the differing significance of the requirements associated with it.

6.4. – Within this perspective, the lower court's view that the criminal offence has essentially introduced an absolute presumption of the social dangerousness of an illegal immigrant which does not reflect *id quod plerumque accidit*, and is hence arbitrary, is also groundless.

In a similar manner to the offence of the failure to comply with a deportation order pursuant to Article 14(5b) of Legislative Decree no. 286 of 1998 – which, as this Court has already held, "is a separate matter to any ascertained or presumed dangerousness of the individuals concerned" (judgment no. 22 of 2007) – the contested provision does not establish any presumption of that fact, but is limited – on a similar basis to criminal law provisions in general – to punishing the commission of an objectively unlawful act which infringes an interest deemed to deserve protection. As the *Avvocatura Generale dello Stato* also notes, this violation may be ascertained irrespective of the author's personality, which may be of significance, if at all, only during sentencing by the court, according to the criteria laid down by Article 133(2) of the Criminal Code.

Therefore, for our present purposes, it is not possible to rely on this Court's assertion whereby the individual situation brought about by the "failure to hold legal authorisation to stay within the territory of the State […] is not *per se* unequivocally symptomatic […] of any particular social dangerousness" (judgment no. 78 of 2007). This assertion was in fact made within an entirely different context to that at issue here, namely in support of the ruling that certain provisions of the law on prisons were unconstitutional (Articles 47, 48 and 50 of Law no. 354 of 26 July 1975), if these were interpreted to the effect that illegal immigrants were not under any circumstances eligible for the measures alternative to detention provided for thereunder. In fact, these measures were associated with the need to tailor the sentence to the convicted person's individual circumstances during enforcement, with respect to which the assessment of that individual's social dangerousness – which is to be carried out case by case, and not on the basis of arbitrary and absolute presumptions – is conversely of primary significance.

6.5. – To conclude on this point, it must on the other hand be pointed out that the choice made by the Italian Parliament in the 2009 amendment is far from isolated within the international context.

Indeed, a comparative analysis reveals that provisions creating an offence of illegal immigration of similar inspiration – which are at times accompanied by sentences that are even significantly more severe that those provided for under the contested provision – are present within the legislation of various countries of the European Union: both

within those of the countries closest to our legal traditions (such as France and Germany) as well as those hailing form a different tradition (such as the United Kingdom).

7. – It is already inherent within the above considerations that there has been no violation of the principle of equality (Article 3 of the Constitution), as alleged by the Turin Justice of the Peace on the grounds that, by indiscriminately punishing a foreign national who has entered into or remained illegally within the territory of the State, the new Article 10a of Legislative Decree no. 286 of 1998 treats as equivalent cases that are decidedly heterogeneous and individuals that pose differing dangers to society (such as a foreign national who has illegally crossed the national borders and who lives from the proceeds of crime, and the migrant who has illegally remained following lawful entry though he is well integrated into the social community and has a job).

It is first of all reiterated that the criminal law provision under examination is not intended to punish the "lifestyle" and goals of an illegal migrant (which, where they are of significance under the criminal law, will be punished as appropriate by other provisions), as rather (and solely) the failure by the foreign national to comply with the provisions governing entry into and stay within the territory of the State.

However, the differing degree of seriousness of this breach may be assessed and quantified by the court when setting the actual penalty within the limits of the tariff differential, which is sufficiently broad for that purpose, as well as when classifying the offence as a minor offence punished solely by a pecuniary penalty (a fine of between 5,000 and 10,000 Euros). Under the settled case law of this Court, Parliament is in fact permitted to include a range of conduct with distinct structure and censurable result under the umbrella of a single offence, and in these cases it is for the court to establish the difference between the various forms of conduct by imposing a sentence between the minimum and maximum tariffs (see, *inter alia*, judgment no. 47 of 2010, and orders no. 213 of 2000, no. 145 of 1998, no. 456 of 1997 and no. 220 of 1996).

With particular regard on the other hand to the situation of a "marginal" nature – which the lower court invokes with reference to the situation of a foreign national who remains in Italy beyond the expiry of his entry visa on purely contingent grounds (such as having missed the plane or not having received money from relatives abroad in order

to purchase the travel ticket) – it is also necessary to take account of the fact that the vesting of jurisdiction over the offence under examination in the justice of the peace allows the operation of the rule whereby the prosecution is not to be continued if the nature of the conduct is "particularly slight" pursuant to Article 34 of Legislative Decree no. 274 of 2000. Where the prerequisites specified under that Article are met, this institution may have the effect of exempting irregularities of more reduced significance from punishment.

8. – With regard to the additional challenge, formulated again by the Turin Justice of the Peace, alleging the infringement of inviolable human rights and the principle of solidarity (Article 2 of the Constitution), the objection by the *Avvocatura dello Stato* that it is inadmissible, based on the consideration that, according to the referral order, the accused in the proceedings before the lower court is not living in extreme poverty and has a job, is groundless.

Indeed, the objection overlays the issues of relevance and non-manifest groundlessness. The fact that it is liable to affect persons who are living in a "state of extreme poverty" is in fact mentioned by the referring court as a general characteristic of the criminal law provision which is liable to bring it into alleged contrast with the constitutional principle considered. However, this does not mean that – for the purposes of the admissibility of the question – it must also obtain in the actual case in which an interlocutory ruling was made to this Court, and the question in any case remains relevant due to the impact, as pointed out, which the striking down of the contested provision would have on the outcome in the principal trial.

On the merits, there is no such violation as averred.

It should be pointed out as a preliminary matter in this regard that, if the referring court's argument were valid, the ground for unconstitutionality would not lie in the choice to classify the failure to comply with the legislation governing the entry into and stay within the territory of the State by a foreign national as an offence – that is, in the punishment – but rather upstream in the very principle, that is to say in the very rules – outwith the scope of the provision currently subject to review – that preclude or limit the entry into or stay within the territory of the State by foreign nationals (or at the very

least or "extremely poor" foreign nationals), irrespective as to whether the violation is punished under the criminal law or with a simple administrative penalty.

In addition, it should also be pointed out that, whilst the breach of inviolable human rights is alleged by the referring court in entirely incontrovertible terms, as far as the principle of solidarity is concerned it is the settled case law of this Court – which has been called upon to deal with this issue specifically in relation to the legislation governing the prohibition on expulsion and refusal of entry and family reunification (Articles 19 and 29 of Legislative Decree no. 286 of 1998) – that, in matters relating to immigration, "the requirements of human solidarity cannot be asserted unless a correct balance of the values in play is struck" (judgment no. 353 of 1997). In particular, "the requirements of human solidarity are not *per se* at odds with the rules on immigration put in place in order to ensure an orderly migratory flow and an adequate welcome and integration of foreign nationals" (orders no. 192 and no. 44 of 2006 and no. 217 of 2001). Moreover, this balance must be struck within the context of a "legislative framework […] which regulates in a different manner – including under constitutional law (Article 10(3) of the Constitution) – the entry into and stay within the country of foreign nationals, depending upon whether they are asylum seekers or refugees, or so-called 'economic migrants'" (judgment no. 5 of 2004; orders no. 302 and no. 80 of 2004). The legislature therefore has a broad range of discretion in this area when placing limits on the entry by foreign nationals into the territory of the State, upon conclusion of a balancing of the values that are of significance: the exercise of this discretion may only be reviewed by this Court if the choices made are clearly unreasonable (*inter alia*, judgments no. 148 of 2008, no. 361 of 2007, no. 224 and no. 206 of 2006) and, according to the observations made above, this principle also extends to the issue of the selection of the forms of punishment for the offences committed.

In this regard, the requirements of solidarity manifest themselves not only in the legislation referred to above governing the prohibition on expulsion and refusal of entry and family reunification, but also to the applicability to illegal immigrants of the legislation on support for refugees and international protection laid down by Legislative Decree no. 251 of 19 November 2007 (Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless

persons as refugees or as persons who otherwise need international protection and the content of the protection granted), without prejudice to Article 10a(6) of Legislative Decree no. 286 of 1998, which provides that criminal proceedings relating to the offence under examination are to be suspended if an application is submitted and, if that application is accepted, that the court is to issue a ruling that there are no grounds to prosecute (provision is also made for an analogous ruling in the event that a residence permit is issued pursuant to Article 5(6) of Legislative Decree no. 286 of 1998, that is when there are "serious grounds […] of a humanitarian nature or resulting from the obligations of the Italian State under constitutional or international law", even where the conditions for exclusion specified thereunder are met).

9. – The Court also finds that there has been no violation of Article 117(1) of the Constitution, as argued by the Lecco Justice of the Peace due to the alleged breach by the contested provision of Directive 2008/115/EC, specifically insofar as the latter specifies the setting of a time limit for "voluntary departure" (Article 7) as the ordinary procedure for implementing "decisions to return" the third-country nationals whose stay is illegal.

It is not necessary to verify before this Court the real validity of the argument on which this challenge is based, essentially consisting in the argument that the Member States' right not to apply the above directive to "third-country nationals […] who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction" (Article 2(2)(b)) must be deemed to relate exclusively to criminal offences other than illegal entry or stay, unless the directive is to be deprived of all meaning.

It is sufficient to note that the time limit for bringing national law into line with the Directive has not yet expired, having been set for 24 December 2010 (Article 20). As things stand, this fact means that the breach of Community law mooted is in any case irrelevant in determining whether the Constitution has been violated.

Moreover, any such contrast would not in any case result from the introduction of the offence under review as rather – hypothetically – from the maintenance of the previous national legislation that specify deportation as the normal procedure for enforcing expulsion orders (in particular, Article 13(4) of Legislative Decree no. 286 of 1998), which is therefore different from the legislation challenged.

10. – The complaint alleging the violation of the principles of reasonableness and the proper administration of public offices (Articles 3 and 97 of the Constitution) formulated by the Turin Justice of the Peace on the basis of the consideration that the contested provision, considered overall, pursues an objective (the removal of foreign nationals illegally present within the territory of the State) that could be achieved in the same manner through the institution of administrative expulsion, thereby giving rise to a pointless duplication of proceedings with the same purpose, is also groundless.

As far as the first of the two principles invoked is concerned (the principle of reasonableness), it is indeed the case that the conduct constituting the offence concerned, which also amounts to a violation of the legislation on the entry into and stay within the territory of the State by a foreign national, has been and continues to be punished on an administrative level by expulsion ordered by the Chief of Police pursuant to Article 13(2) of Legislative Decree no. 286 of 1998. This means that there is an overlap – potentially complete – between the criminal and administrative law.

However, it is also the case that, in the light of the overall structuring of the provision under examination, Parliament has demonstrated that it regards the application of the criminal penalty as a "subordinate" outcome compared to the actual removal from the national territory of illegally staying foreign nationals. This is unequivocally demonstrated by the following facts highlighted by the lower court: first that, notwithstanding the general provisions of Article 13(3) of Legislative Decree no. 286 of 1998, a foreign national subject to prosecution for the offence concerned may be expelled by an administrative measure without clearance from the courts; secondly that, once notice of expulsion or refusal of entry pursuant to Article 10(2) of Legislative Decree no. 286 of 1998 has been received, the court must issue a ruling that there are no grounds to prosecute (irrespective of the stage of the criminal proceedings, in contrast to the provisions of Article 13(3c) of Legislative Decree no. 286 of 1998); and thirdly that, if the individual is convicted, the fine – which is expressly ineligible for immediate payment extinguishing prosecution (Article 10a(1), second sentence, of Legislative Decree no. 286 of 1998) – may be replaced by the judge with an order of expulsion for a period not shorter than five years (Articles 16(1) of Legislative Decree no. 286 of 1998 and 62a of Legislative Decree no. 274 of 2000).

This legislative framework – the rationale for which lies mainly "in the reduced interest of the State in the punishment of individuals who have already been removed from its territory" (with reference to the provisions of Article 13(3c) of Legislative Decree no. 286 of 1998, orders no. 143 and no. 142 of 2006), which is even more tangibly felt when the conduct relevant under criminal law consists in the mere violation of the legislation governing entry into and stay within the territory of the State – does not however mean that prosecutions for the offence are by definition destined to amount to a mere "duplicate" of the administrative expulsion proceedings (which are moreover normally more rapid). This is because, leaving aside all other considerations, as experience shows, in a large number of cases it is not possible for the public administration to implement expulsion orders. The very replacement of the pecuniary fine with an expulsion order by the court – which Article 16(1) of Legislative Decree no. 286 of 1998 moreover classifies merely as a matter of discretion ("may") – remains expressly subject to the requirement that no circumstances obtain which, pursuant to Article 14(1) of Legislative Decree no. 286, prevent the enforcement of the expulsion through deportation by the law enforcement authorities (the requirement to provide assistance to the foreign national, to carry out additional checks regarding his identity or nationality or to obtain travel documents or the unavailability of a carrier or another appropriate means of transport).

Secondly, it is also difficult to dispute the fact that – as has been critically remarked from several quarters – the penalty of a fine applicable in cases in which expulsion is not enforced (or cannot be enforced immediately) has a reduced persuasive capacity. This is due to the fact that illegal migrants are very often (though nonetheless not without exception) impecunious and the difficulty in converting an unenforced penalty into an alternative working penalty or house arrest (Article 55 of Legislative Decree no. 274 of 2000), given the problem relating to the compatibility of these measures with the personal circumstances of the convicted individual, who often lacks a fixed abode, and in any case cannot legally reside in Italy.

However, similar considerations – in the same manner as those relating more generally to the relationship between "costs" and "benefits" associated with the introduction of the new criminal offence, a balance which according to many leans

heavily towards the costs (especially under a system which provides for an expulsion order by the Chief of Police if expulsion is not enforced immediately, which sets in motion the more robust criminal law protection provided for under Article 14(5b) of Legislative Decree no. 286 of 1998) – apply to the appropriateness of the legislative choice in terms of criminal and judicial policy, a level which is *per se* not amenable to constitutional review. As has already been noted in relation to a different issue in fact, "it is not for this Court to make assessments as to the efficacy of the criminal law provision against unlawful conduct that manifests itself in relation to the imposing phenomenon of present day migratory flows, which poses serious problems from a social, humanitarian and security perspective" (judgment no. 236 of 2008).

Moreover, it is not superfluous to add that the subjection of immigration offences to pecuniary penalties is also far from unknown within a comparative perspective (pecuniary penalties, as an alternative to or in addition to the custodial sentence, are for example provided for under German, French and British legislation, whilst Spanish law contemplates only administrative pecuniary penalties for illegal residence).

The other parameter relied on by the referring court is also immaterial, namely the principle of the proper administration of public offices. Indeed, according to the settled case law of this Court, this principle relates to the administration of justice only insofar as it concerns the organisation and functioning of judicial offices, and not judicial activity *stricto sensu* (see *inter alia* judgments no. 64 of 2009 and no. 272 of 2008, orders no. 408 of 2008 and no. 27 of 2007).

11. – Moving on to examine the second group of questions concerning specific segments of the legislation governing the offence under discussion, the first issue which comes into consideration is that relating to the failure to repeat the clause "without justified reason" contained in the "adjacent" criminal law provision set forth in Article 14(5b) of Legislative Decree no. 286 of 1998 in relation to illegal stays. This provision punishes – indeed more severely – a special form of unlawful presence of a foreign national in the State, namely that resulting from the failure to comply with an order by the Chief of Police to leave the national territory within five days, issued pursuant to paragraph 5a of the same Article.

11.1. – The question is groundless.

This Court has had the opportunity to rule on the value of the formula "without justified reason", which appears in the provision invoked as a comparator, in relation to questions of constitutionality specifically involving objections as to the lack of precision in that clause and, by extension, the criminal offence to which it relates. In dismissing the objection, the Court held that the meaning of the term may in reality be established – through an interpretation which does not reach beyond the ordinary interpretative task of the courts – in the light of the specific goal of the offence (removal, giving "effect to the expulsion order", "situations of illegality or danger associated with the foreign national's presence within the territory of the State") and the legislative framework against which the offence was created. As recalled above in relation to a separate issue, this legislative framework regulates the entry into and stay within the territory of the State by foreign nationals differently, depending upon whether they have applied for asylum or refugee status, or are "economic migrants". From a similar perspective, "whilst the clause concerned cannot be deemed to evoke grounds for justification in a technical sense only – a reading that would render it superfluous, given that the ordinary exclusions, as institutions of general application, would in any case apply – it nonetheless relates to impediments of particular significance which affect the subjective and objective ability to comply with the order, rendering it impossible, difficult or dangerous. However, it does not also apply to needs that reflect the typical condition of an "economic migrant" (even though these are an expression of considerations that are in themselves entirely legitimate) unless – as is obvious – circumstances obtain that can fall under the exclusions provided for under the legal order" (judgment no. 5 of 2004; orders no. 386 of 2006, no. 302 and no. 80 of 2004).

In the light of this conclusion, the Court therefore rules groundless the further objections of unconstitutionality, according to which the provision for a criminal offence contained in Article 14(5b) of Legislative Decree no. 286 of 1998 established a strict liability offence – in breach of Article 27 of the Constitution – subjecting to punishment also a foreign national who is in practical terms unable to procure travel documents and tickets within the limited time limit of five days, for example due to his "condition of absolute impecuniosity […], which does not permit him to arrive at the border on time (especially an air or sea border) and to purchase" the said ticket, or as a

consequence of the "failure by the competent diplomatic or consular authorities to issue the necessary documents, notwithstanding that they were promptly and correctly applied for". In such cases, it is undoubtedly necessary to conclude that there was a "justified reason" for the failure to comply with the order to leave, with the result that no offence was committed (judgment no. 5 of 2004; orders no. 386 of 2006 and no. 302 of 2004).

11.2. – It is not legitimate to infer from this Court's assertions mentioned above – as however the Lecco Justice of the Peace seeks to conclude – that the insertion into the *actus reus* of the offence of the clause "without justified reason" is indispensable in order to ensure compliance with the principle of blame applicable to all immigration offences, and in particular that currently subject to review.

Whist it may indeed be the case, as already noted above, that the scope of that clause reaches beyond the mere reference to exclusions of a general nature, it is equally certain however that the absence of the clause does not prevent the general exclusions from applying nonetheless, which is in any case sufficient to guarantee compliance with the constitutional principle invoked (otherwise, that clause would have to be contained in any provision establishing a criminal offence).

Thus, it is beyond discussion that the common exclusions also apply to the offence of illegal entry into and stay within the territory of the State – including in particular the defence of necessity (Article 54 of the Criminal Code) – as well as the grounds for exclusion of blame, including the unavoidable ignorance of the criminal law (Article 5 of the Criminal Code, as in force following judgment no. 364 of 1988 of this Court), which the referring court specifically cites when critically commenting on situations involving foreign nationals who do not understand Italian or who enter into contact with the national legal system for the first time.

With particular reference to the figure of illegal stay – to which the interlocutory reference is limited – the basic principle of *ad impossibilia nemo tenetur*, which is applicable to omissions in general, also continues to apply. In fact, a widespread view regarding such situations is that the (material or legal) inability to carry out the action requested precludes the commission of an offence not only due to the lack of blame, but also on a prior objective level, since this amounts to a logical limit on the very possibility of the omission. It follows that, in this regard, a variety of situations relevant

as a “justified reason” for the offence of the failure to comply with the order to leave may indeed be taken into consideration in any decision that no offence has been committed pursuant to Article 10a of Legislative Decree no. 286 of 1998 (consider for example a situation where the foreign national does not have the documents necessary in order to leave the national territory legally on grounds outwith his control).

11.3. – There is indeed still a difference compared to the criminal offence provided for under Article 14(5b), due to the greater scope of the situations falling under the concept of “justified reason” compared to the general grounds for exemption from punishment. However, this difference does not result in the violation of Article 3 of the Constitution as objected by both referring courts, due to the fact that the offences are structured differently as well as the fact that they are regulated by different legislation.

As has already been observed by this Court elsewhere in fact, “Parliament’s choice to grant justificatory effect to impediments different from exclusions of a general nature in respect of the offence of the failure to comply with an order to leave the country issued by the Chief of Police is grounded on the special nature of that form of expulsion, the enforcement of which is left to the foreign national, and the adoption of which is only permitted when deportation, as appropriate preceded by the detention of the interested party in a centre for identification and expulsion, is not possible” (order no. 41 of 2009, which consequently held that there was no constitutional requirement to extend the “without justified reason” clause to the criminal offence, consisting in an action, regulated under Article 14(5c), which provides that a foreign national who is found within the national territory after having been expelled pursuant to paragraph 5b has committed an offence).

Within the legislative scheme (Article 14(1) of Legislative Decree no. 286 of 1998), the prerequisites which authorise the administration to issue an order to leave, notwithstanding the principle that forced expulsion is to be enforced immediately, in effect recall requirements that frequently arise in situations involving significant difficulty in timely compliance by the recipient of the order (judgment no. 5 of 2004, order no. 386 of 2006). Against this backdrop therefore, the use of the clause concerned amounts to an element that contributes to render constitutionally “tolerable” the severity of the punishment associated with the criminal offence (judgment no. 22 of 2007).

The minor offence introduced by the contested Article 10a of Legislative Decree no. 286 of 1998, which punishes with a simple pecuniary penalty the generic failure to comply with the law on the residence of (and entry by) a foreign national in(to) the territory of the State is not comparable on these grounds. This is the case irrespective of the issue of an individual administrative order which is characterised by a limited time for compliance and liable to set in motion a decisive "quality increase" in the criminal law's response.

A different instrument of "moderation" of the punishment applies in relation to the minor offence concerned, which does not by contrast apply in relation to the offence used as a comparator. In this case, this is the rule whereby the prosecution will not be continued due to the particularly slight nature of the conduct (Article 34 of Legislative Decree no. 274 of 2000) already noted above, which is applied by the vesting of jurisdiction over the offence under examination in the justice of the peace. In specifying the prerequisites of the slight nature of the breach of the protected interest, the occasional nature of the breach, the reduced level of blame and the detriment that would be caused by prosecution on requirements relating to the employment, study, family or health of the accused, the regulation of this institution may have the effect of "offsetting" the failure to attribute significance to the existence of a "justified reason" which falls beyond the scope of the general grounds for exemption from punishment.

12. – On the other hand, the question raised by the Turin Justice of the Peace with reference to Article 3 of the Constitution, concerning the right of the court, in the event of a conviction, to replace the pecuniary penalty imposed for the offence provided for under Article 10a of Legislative Decree no. 286 of 1998 with an expulsion order, is manifestly inadmissible.

Leaving aside all considerations as to the merits of the argument, the contested violation of the Constitution does not result from the contested provision, but from distinct provisions not subject to constitutional review: in this case from Article 16(1) of Legislative Decree no. 286 of 1998 insofar as – following the amendment introduced by Law no. 94 of 2009 – it extends the applicability of expulsion as an alternative penalty for the offence under Article 10a of Legislative Decree no. 286, as well as the associated provision contained in Article 62-bis of Legislative Decree no. 274 of 2000, according

to which – in contrast to the provisions set forth in Article 62 above with reference to the alternative penalties provided for under Law no. 689 of 24 November 1981 (Amendments to the criminal law system) – "the justice of the peace shall apply the alternative measure provided for under Article 16 of the consolidated text contained in Legislative Decree no. 286 of 25 July 1998 in the cases specified by law".

Since the question is manifestly inadmissible, the submissions made by the *Avvocatura dello Stato* concerning the – presumably – solely hypothetical nature of the applicability of the alternative measure in this case are moot.

13. – In arguing that the overall sanctions regime in place for the offence under Article 10a of Legislative Decree no. 286 of 1998 is unconstitutional, the Turin Justice of the Peace also argues that Article 3 of the Constitution has been violated due to the prohibition on granting the conditional suspension of the sentence.

This question is also manifestly inadmissible.

The exclusion of conditional suspension does not in fact result from Article 10a of Legislative Decree no. 286 of 1998 either, as rather from the new letter s-a of Article 4(2) of Legislative Decree no. 274 of 2000, which vests jurisdiction over the offence under examination in the justice of the peace, thereby activating the provisions of Article 60 of Legislative Decree no. 274. However, these provisions have not been referred for scrutiny.

In any case, there is no motivation either as to the relevance of the question (it is not asserted that in this case the accused could have benefited from conditional suspension in the light of the general rules contained in the Code) or its non-manifest groundlessness (Article 3 of the Constitution is claimed to have been violated in a purely axiomatic manner).

14. – An analogous conclusion must be reached as regards the question concerning the provisions of Article 10a(5) of Legislative Decree no. 286 of 1998, according to which the court is to issue a ruling that there are no grounds to prosecute whenever it receives information that the administrative expulsion order against the author of the offence has been enforced or he has been refused entry pursuant to Article 10(2) of the consolidated text. According to the Lecco Justice of the Peace, this provision violates Articles 3 and 27 of the Constitution since it renders the application of the penalty for

the offence under examination dependent upon the actions of the administrative authorities.

The objection raised by the State representative that this question is inadmissible is groundless. The reference by the lower court to the fact that, if it is impossible for the administrative authorities to enforce the expulsion order, the foreign national will be issued with an order to leave the territory of the State – thereby becoming liable to the more severe penalty imposed by Article 14(5b) of Legislative Decree no. 286 of 1998 should he fail to comply with the order – is not in fact sufficient to substantiate the argument by the *Avvocatura dello Stato* according to which the referring court is in reality objecting to the latter provision only, which is not at issue in the main proceedings.

If the question is nonetheless irrelevant for the different reason that, according to the referral order, it does not appear that the accused in the proceedings before the lower court was actually expelled or refused entry, with the result that the requirement that the legislative provision challenged was applied is not met (for an analogous ruling of manifest inadmissibility in relation to a question of constitutionality concerning the general provisions governing rulings that prosecution will not be continued due to expulsion pursuant to Article 13(3c) of Legislative Decree no. 286 of 1998, see order no. 142 of 2006).

15. – The question raised by the Turin Justice of the Peace with reference to Article 24(2) of the Constitution challenging the failure to make provision for transitory arrangements that may safeguard foreign nationals illegally staying within the territory of the State at the time of entry into force of Law no. 94 of 2009 is also manifestly inadmissible.

In fact, the question essentially amounts to a request for a substantive ruling, the contents of which are undefined and not mandatory under constitutional law. In effect, it cannot be for this Court to specify "a time limit and operational procedure" in order to permit the said foreign nationals to leave Italy voluntarily without incurring criminal responsibility, as this is an operation that implies discretionary choices which are vested exclusively in the legislature.

16. – The objection alleging the violation of Article 24(2) of the Constitution raised by the same referring court in relation to the alleged introduction of an obligation on illegal immigrants responsible for complying with the obligation relating to compulsory schooling provided for under Article 38 of Legislative Decree no. 286 of 1998 to turn themselves in is also manifestly inadmissible.

In fact, once again, the contested violation of constitutional law would not result from the offence created under Article 10a of Legislative Decree no. 286 of 1998, but if at all, according to the referring court's account, from the defective coordination between certain "collateral" provisions (Articles 6, 35 and 38 of Legislative Decree no. 286 of 1998), and more specifically from the failure by Article 38 to make provision for an exemption from the obligation on the school's staff to report the illegal immigrant to the competent authorities, analogous to that enshrined under Article 35(5) of Legislative Decree no. 286 of 1998 in relation to healthcare staff.

Besides, these "collateral" provisions are not specified in the challenge, and in any case are not an issue in the proceedings before the lower court.

17. – Finally, the question raised by the Turin Justice of the Peace with reference to Articles 3 and 24(2) of the Constitution concerning the failure to make provision for guarantees in favour of a foreign national who submits an application to stay in Italy for serious reasons associated with the protection of family members who are minors pursuant to Article 31(3) of Legislative Decree no. 286 of 1998 is also manifestly inadmissible due to lack of relevance.

This is because the referral order does not state whether the accused in the proceedings before the lower court has submitted such an application.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) *rules* that the questions concerning the constitutionality of Article 10a of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of provisions concerning the regulation of immigration and rules on the status of foreigners), introduced by Article 1(16)(a) of Law no. 94 of 15 July 2009 (Provisions on public security), referred to in paragraphs 6, 7, 8, 9, 10 and 11 of the Conclusions on points of law, raised with reference to Articles 2, 3, 25(2) 27, 97(1) and 117 of the Constitution by the Lecco Justice of the Peace, Missaglia division, and the Turin Justice of the Peace by the referral orders mentioned in the headnote, are groundless;

2) *rules* that the questions concerning the constitutionality of Article 10a of Legislative Decree no. 286 of 25 July 1998, referred to in paragraphs 12, 13, 14, 15, 16 and 17 of the Conclusions on points of law, raised with reference to Articles 3, 24(2) and 27 of the Constitution by the Lecco Justice of the Peace, Missaglia division, and the Turin Justice of the Peace by the same referral orders, are manifestly inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 5 July 2010.

Signed:

Francesco AMIRANTE, President

Giuseppe FRIGO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 8 July 2010.

The Director of the Registry

Signed: DI PAOLA