Corte costituzionale

JUDGMENT NO. 269 OF 2010

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 269 YEAR 2010

In this case the Court heard an application from the President of the Council of Ministers challenging legislation enacted by Tuscany Region concerning the "acceptance, integration, participation and protection of foreign nationals" on the grounds that it infringed the State's legislative competence over immigration, failed to comply with the fundamental principles set out in State legislation and purported to establish new powers to establish relations with international organisations. The Court ruled the question partially inadmissible (on a procedural technicality) and partially groundless on the grounds, *inter alia*, that the legislation was "limited to guaranteeing also to citizens of new Member States of the Community those services due to them under the terms of Community law obligations and relating to matters under their jurisdiction" and was aimed at furthering fundamental rights under the Constitution, such as healthcare, which were available irrespective of a person's status as a lawful resident

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, 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 Articles 2(2) and (4) and 6(11), (35), (43), (51) and (55)(d) of Tuscany Regional Law no. 29 of 9 June 2009 (Provisions governing the acceptance, integration, participation and protection of foreign nationals in Tuscany Region), initiated by the President of the Council of Ministers by the application served on 30 July / 3 August 2009, filed in the Court Registry on 6 August 2009 and registered as no. 52 in the Register of Applications 2009.

Considering the entry of an appearance by Tuscany Region;

having heard the Judge Rapporteur Giuseppe Tesauro in the public hearing of 8 June 2010;

having heard the *Avvocato dello Stato* Sergio Fiorentino for the President of the Council of Ministers and Counsel Lucia Bora for Tuscany Region.

The facts of the case

1.– By application served on 30 July / 3 August 2009, filed on 6 August, the President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, raised a question concerning the constitutionality of Article 2(2) and (4) and Article 6(11), (35), (43), (51) and (55)(d) of Tuscany Regional Law no. 29 of 9 June 2009 (Provisions governing the acceptance, integration, participation and protection of foreign nationals in Tuscany Region), with reference to Article 117(2)(a) and (b) and (9) of the Constitution.

1.1.– In particular, having specified in the preamble that the Regional Law seeks to accept foreign nationals in accordance with the principle of solidarity and that it lays down provisions inspired by the principles of equality and equal opportunities, the applicant challenges Article 2(2) of the Law insofar as it provides that "specific initiatives shall be provided for also in favour of foreign nationals who live on any grounds within the Region, subject to the limits specified under this Law".

In regulating specific initiatives in favour of immigrants with no lawful residence permit, this provision is claimed to facilitate the stay of foreigners who are not legally present in Italy, and therefore to impinge upon the provisions regulating the entry and residence of immigrants, which falls under the exclusive jurisdiction of the State legislature. Moreover, it is also claimed to violate the fundamental principles laid down by Articles 4, 5, 10, 11, 13 and 14 of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of the provisions governing immigration and rules on the status of foreign nationals) and introduces different cases in addition to those identified under the

State legislation in which the general rule establishing the "unlawful situation of the illegal immigrant" does not apply.

Article 2(4) of the Regional Law is also claimed to be unconstitutional insofar as, in providing that "the initiatives provided for under this Law shall also be extended to citizens of the new Member States of the Community, insofar as compatible with applicable legislative provisions, without prejudice to rules providing for more favourable treatment", it introduces a measure concerning Community citizens, in breach of the State's exclusive legislative jurisdiction over matters pertaining to relations with the European Union provided for under Article 117(2)(a) of the Constitution, and also contrasts with the constitutional principles governing the "right of asylum and the legal status of citizens of non-Member States of the European Union".

As regards Article 6(35) of the Regional Law, the Applicant argues that it is unconstitutional insofar as it provides that "all persons who live in the Region, including those with no residence permit, may receive urgent and non-deferrable social security services necessary in order to guarantee respect for the fundamental rights guaranteed to every person under the Constitution and international law". In enacting this provision, the contested regional rule is claimed to grant a right to foreigners illegally present in Italy to a range of services not identified in detail, reserving to the Region the task of setting the criteria according to which the urgent and non-deferrable nature and content of those services is to be identified, thereby giving rise to a parallel social security system for foreigners not lawfully present in Italy, in breach of Article 117(2)(a) and (b) of the Constitution, as well as Article 35(3) and Article 41 of Legislative Decree no. 286 of 1998.

Moreover, Article 6(51) of Regional Law no. 29 of 2009 is also claimed to be unconstitutional insofar as it provides that "the regional network of information offices shall provide support to the municipalities in the experimentation, initiation and operation of functions relating to the issue of residence permits; it shall moreover promote coordination between the local authorities for the development of services aimed at facilitating and simplifying relations between foreign citizens and the public administration". This provision is claimed to impinge upon matters relating to the "legal status of foreigners" and "immigration", in breach of Article 117(2)(a) and (b) of the

Constitution, since it extends the tasks of that regional network to functions – relating to action taken in respect of the issue and renewal of residence permits – which State legislation does not allocate to the municipalities, but rather to the local police headquarters, thereby violating Article 5(2) and (4) of Legislative Decree no. 286 of 1998.

Article 6(55)(d) is also challenged insofar as it guarantees that foreigners who have taken court action to challenge the refusal to grant a residence permit recognising their status as a refugee, their application for asylum or subsidiary protection or on humanitarian grounds may also be registered with the regional health service. In the opinion of the applicant, in enacting this provision, the Region impinged upon the legal rights and obligations of the individuals referred to above, introducing legislation that falls under the exclusive jurisdiction of the State provided for under Article 117(2)(a) and (b) of the Constitution, without however making any mention of or reference to the relevant State legislation.

The applicant finally challenges Article 6(11) and (43) of Regional Law no. 29 of 2009, which respectively provide that "the Region shall promote agreements and joint action with the local authorities, other regions, the central and local offices of the State administrations, the European institutions and the agencies of the United Nations with competence over immigration", and that "in accordance with State legislation, the Region shall promote agreements aimed at facilitating the entry into Italy of foreign citizens to follow professional training courses or trainee apprenticeships".

These provisions are claimed to violate Article 117(2)(a) and (b) and (9) of the Constitution: the former due to the fact that it breaches Article 6(2) and (3) of Law no. 131 of 5 June 2003 (Provisions to bring the legal system of the Republic into line with Constitutional Law no. 3 of 18 October 2001), which does not specify international organisations as one of the bodies with which the regions may establish relations, and both on the grounds that they grant the regions international tasks in respect of matters – immigration policies – which do not fall under regional jurisdiction, and which in fact pertain to legislation on immigration flows.

2.– Tuscany Region entered an appearance in the proceedings, asking that the questions be ruled inadmissible or in any case groundless.

The respondent argues that all of the contested provisions apply to areas falling under regional jurisdiction since they are aimed at favouring the implementation of effective territorial policies, with particular reference to education, health, employment and social security, all matters falling under the legislative jurisdiction shared with the State, and the residual legislative jurisdiction of the regions, pursuant to Article 117(3) and (4) of the Constitution.

In particular, with reference to the specific challenges made to Articles 2(2) and 6(35) of Regional Law no. 29 of 2009, Tuscany Region observes that the contested provisions are limited to providing for urgent and non-deferrable social services in respect of immigrants already present in the Region, and do not impinge either upon the conditions governing entry and residence nor the legal capacity of foreigners, remaining within the ambit of its own jurisdiction over matters relating to social assistance and the protection of health.

The challenges made to Article 2(4) of Regional Law no. 29 of 2009 are also claimed to be groundless. In fact, in extending the integration initiatives provided for non-Community citizens also to citizens of the new Member States of the Community, the contested regional legislation is claimed to do nothing other than favour such integration, which is an indispensable prerequisite for the full implementation of the Community provisions on European citizenship. It is claimed to fall within the scope of the region's residual jurisdiction, or the shared jurisdiction with the State, pursuant to Article 117(3) and (4) of the Constitution (social assistance, education, health and housing), whilst fully respecting – as expressly stipulated – the national and Community legislation applicable to such matters.

As regards the challenges to Article 6(51) of Regional Law no. 29 of 2009, the respondent claims that they are groundless in view of the fact that the contested provision limits itself to providing for activities to support the information network that is already in place and operational, *inter alia*, on the basis of the 2006 Protocol of Understanding between ANCI (*Associazione Nazionale Comuni Italiani*, National Association of Italian Municipalities) and the Interior Ministry, without infringing the state jurisdiction over the issue and renewal of residence permits.

Moreover, the challenges made against Article 6(35)(d) of the Regional Law under examination are also claimed to be groundless, given that this provision is limited to regulating matters pertaining to healthcare, which fall under its jurisdiction, whilst fully respecting the provisions enacted by the State legislature.

As regards Article 6(11) of Regional Law no. 29 of 2009, the respondent argues that in providing that the Region may, within the ambit of its own jurisdiction relating to immigration, make joint arrangements with other national and foreign bodies involved, the aforementioned provision is fully consistent with the division of jurisdiction under constitutional law provided for under Article 117(9) of the Constitution in that it makes provision to regulate, through a policy-based provision, activities that are of mere international significance in the matters falling under its own jurisdiction, whilst fully respecting the foreign policy established by the State and the law on immigration, which also fall under State jurisdiction.

Finally, on the basis of analogous arguments, the challenges made to Article 6(43) of Regional Law no. 29 of 2009 are also claimed to lack any foundation, in that this provision legislates in respect of an area of law – professional training and summer apprenticeships – that falls under the regions' residual jurisdiction pursuant to Article 117(4) of the Constitution.

3.– In the public hearing, the applicant and the respondent both petitioned the Court to accept the arguments contained in their written submissions.

Conclusions on points of law

1.– The President of the Council of Ministers questions the constitutionality of Articles 2(2) and (4) and 6(11), (35), (43), (51) and (55)(d) of Tuscany Regional Law no. 29 of 9 June 2009 (Provisions governing the acceptance, integration, participation and protection of foreign nationals in Tuscany Region). The applicant argues that these provisions exceed the jurisdiction of the Region, impinging upon matters such as the "legal status of foreigners", "immigration" and "the State's relations with the European

Union" within the exclusive jurisdiction of the State legislature, thereby violating Article 117(2)(a) and (b) and (9) of the Constitution.

2.– In particular, Article 2(2) of the Regional Law is challenged insofar as, in providing for specific initiatives in favour of immigrants without a lawful residence permit, it impinges upon the legislation governing the entry and residence of immigrants, which falls under the exclusive jurisdiction of the State legislature.

2.1.– The question is inadmissible.

This Court has already had the opportunity to assert that the Government's resolution challenging a Law and the attached ministerial report, to which reference is made, must indicate the contested provisions, failing which the relative challenges will be inadmissible. In this case, that provision is not mentioned in the Council of Ministers resolution (and in this case in the attached report of the Minister for Relations with the Regions) ordering that the Regional Law be challenged, with the result that the relative question must be ruled inadmissible.

3.– Article 2(4) of the Regional Law is also challenged on the grounds that, in providing that "the initiatives provided for under this Law shall also be extended to citizens of the new Member States of the Community, insofar as compatible with applicable legislative provisions, without prejudice to rules providing for more favourable treatment", it violates Article 117(2)(a) of the Constitution. In the opinion of the applicant, this provision introduces a measure concerning Community citizens, falling under the State's exclusive legislative jurisdiction over matters pertaining to relations with the European Union, and also contrasts with the principles laid down in relation to the "right of asylum and the legal status of citizens of non-Member States of the European Union" pursuant to Article 1(2) of Legislative Decree no. 286 of 25 July 1998 (Consolidated text of the provisions governing immigration and rules on the status of foreign nationals), as amended by Article 37 of Decree-Law no. 112 of 25 June 2008 (Urgent measures to provide for economic development, simplification, and competitiveness, the stabilisation of public finance and tax equalization), converted into Law no. 133 of 6 August 2008.

3.1.– The question is groundless.

The contested regional provision was enacted against a legislative backdrop aimed at favouring the full integration also of citizens of new Member States of the Community, an indispensable prerequisite for the implementation of the Community provisions on European citizenship. By Legislative Decree no. 30 of 6 February 2007 (Implementation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), the secondary legislation enacted on State level implemented Community Directive 2004/38/EC of 29 April 2004 (Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC) on the right of citizens of the European Union and their family members to move and reside freely. Legislative Decree no. 30 laid down precise criteria relating to the right of residence of citizens of the European Union, aimed at regulating the recognition of their right to a series of entitlements relating to civil and social rights. However, the indications contained in the aforementioned decree must be harmonised with the provisions of Italian constitutional law that enshrine the principle of the protection of health, guarantee free assistance to those on a low income and the exercise of the right to education, and which otherwise relate to services pertaining to the protection of fundamental rights vested in the citizens of new Member States of the Community pursuant to Article 12 of the Treaty, which requires that the citizens of new Member States of the Community in a situation governed by European Union law be guaranteed equal treatment compared to citizens of the relevant Member State.

Within this perspective, the regional legislation under examination does not in any way infringe the State's legislative jurisdiction over relations with the European Union, since it is limited to guaranteeing also to citizens of new Member States of the Community those services due to them under the terms of Community law obligations and relating to matters under their jurisdiction – whether shared or residual – attributable to healthcare, education, access to employment and housing and professional training.

4.– The President of the Council of Ministers further avers that Article 6(35) of Regional Law no. 29 of 2009 is unconstitutional insofar as it provides that, notwithstanding the provisions of Article 5(4) of Regional Law no. 41 of 24 February 2005 (Integrated system of initiatives and services to protect the social citizenship rights), "all persons who live in the Region, including those with no residence permit, may receive urgent and non-deferrable social security services necessary in order to guarantee respect for the fundamental rights guaranteed to every person under the Constitution and international law". In fact, that provision is claimed to grant a right to foreigners illegally present in Italy to a range of services not identified in detail, reserving to the Region the task of setting the criteria according to which the urgent and non-deferrable nature and content of those services is to be identified, and therefore the very content of those services, thereby giving rise to a parallel social security system for foreigners not lawfully present in Italy, in breach of Article 117(2)(a) and (b) of the Constitution, as well as Article 35(3) and Article 41 of Legislative Decree no. 286 of 1998.

4.1.– The question is groundless.

This Court has already asserted on various occasions that "the foreigner is […] entitled to all fundamental rights that the Constitution acknowledges as vested in all persons" (judgment no. 148 of 2008) and has in particular specified, with reference to healthcare, that there is "an irreducible core of the right to health protected by the Constitution as an inviolable sphere of human dignity, which requires that the creation of situations with no protection which may be detrimental to the implementation of that right be prevented". The right must therefore also be granted "to foreigners, irrespective of their situation as regards the provisions regulating entry into and residence in the State, notwithstanding that Parliament may provide for different procedures for their exercise" (judgment no. 252 of 2001). In enacting Legislative Decree no. 286 of 1998, the State legislature incorporated that view, providing, in particular in Article 35(3), that "foreign citizens present in the national territory who have not complied with the provisions relating to entry and residence shall be guaranteed urgent or otherwise essential out-patient and in-patient treatment, including on an ongoing basis, in public and accredited facilities for illnesses or accidents and the preventive medicine

programmes to safeguard individual and public health shall be extended", further ensuring the social protection for pregnancy and maternity under conditions of equal treatment with Italian citizens, the protection of the health of minors, vaccinations, measures of international prevention, other preventive measures and the diagnosis and cure of infective diseases including, if appropriate, the control of the relative outbreaks.

The contested regional provision was enacted against this backdrop. In implementing the fundamental principles relating to the protection of health laid down under State legislation, the legislation seeks to guarantee also to illegal immigrants the fundamental health and social security services capable of guaranteeing the right to healthcare, and does so through an exercise of its own legislative jurisdiction, whilst fully respecting the provisions laid down by the State legislature relating to the entry into and residence in Italy of foreigners, including with regard to foreigners living in the country without a valid entry visa.

5.– Article 6(51) of the Regional Law is also challenged insofar as it provides that "the regional network of information offices shall provide support to the municipalities in the experimentation, initiation and operation of functions relating to the issue of residence permits; it shall moreover promote coordination between the local authorities for the development of services aimed at facilitating and simplifying relations between foreign citizens and the public administration". In so providing, the provision is claimed to impinge upon matters relating to the "legal status of foreigners" and "immigration", in breach of Article 117(2)(a) and (b) of the Constitution, since it is not limited to guaranteeing an information service – relating to action taken in respect of the issue and renewal of residence permits – but extends the tasks of that regional network to functions which the State provisions do not allocate to the municipalities, but rather to the local police headquarters, in contrast with the provisions of Article 5(2) and (4) of Legislative Decree no. 286 of 1998, which reserves to the local police headquarters the functions relating to the issue and renewal of residence permits.

5.1.– This question is also groundless.

The contested provision regulates a mere support activity for the information network that is already in place and operational, *inter alia*, on the basis of the Protocol of Understanding concluded in 2006 between the ANCI and the Interior Ministry

starting an experiment involving the progressive conferral on the Municipalities of additional administrative duties relating to the issue and renewal of residence permits.

Therefore, far from regulating aspects impinging upon the question of immigration *strict sensu*, it is limited to providing for a form of assistance to foreigners present in the Region amounting to the mere conferral upon the local authorities of tasks which, within the context of the application and renewal procedures for residence permits and residence cards, would otherwise have been carried out by the applicants themselves (judgment no. 156 of 2006), whilst fully respecting the State's jurisdiction provided for under Article 5(2) and (4) of Legislative Decree no. 286 of 1998 .

Accordingly, already as of 5 March 2008, the Region took action to regulate forms of assistance and the implementation of the network of information offices for foreigners, initiating a project outlined in the Protocol of Understanding concluded with the ANCI and subsequently expended by a subsequent Protocol concluded between Tuscany Region and the Tuscany branch of the ANCI on 8 February 2010, with reference to the goal of providing mere support and assistance for the existing assistance network for foreign citizens, in accordance moreover with the terms of the Protocol of Understanding concluded in 2006 between the ANCI and the Interior Ministry.

6.– Article 6(55)(d) of Regional Law no. 29 of 2009 is also challenged insofar as it guarantees that foreigners who have taken court action to challenge the refusal to grant a residence permit recognising their status as a refugee, their application for asylum or subsidiary protection or on humanitarian grounds may also be registered with the regional health service. According to the applicant, in enacting this provision, the Region impinged upon the legal situation of the individuals referred to above, the regulation of which falls under the exclusive jurisdiction of the State pursuant to Article 117(2)(a) and (b) of the Constitution, without however making any mention of or reference to the relevant State legislation.

6.1.– The question is groundless.

As is the case for Article 6(55), this provision was enacted within a legislative context characterised by the acknowledgement that foreigners, including those without a valid residence permit, have an irreducible core of protection for their right to health guaranteed under the Constitution as an inviolable sphere of human dignity. Leaving

aside the general indications contained in Article 35(3) of Legislative Decree no. 286 of 1998 on healthcare protection, it must be remembered that, with particular reference to the category of individuals covered by the regional provision under examination, Article 34(1)(b) of the Decree provides that foreigners who have applied for the renewal of their residence permit, including for political asylum, humanitarian asylum or following an application for asylum, may be registered with the national health service. As clarification of the precise scope of the provision referred to above, the Ministry of Health specified in paragraph I.A.6. of circular no. 5 of 24 March 2000 that the mandatory registration with the national health service of those who have submitted an application for political or humanitarian asylum is required for the entire "period starting from the time when the measure was applied for, and including the period of any appeal against a decision to refuse to issue a residence permit".

In consideration of these requirements, it is clear that the contested regional provision is limited to regulating the protection of health, insofar as it falls under the Region's jurisdiction, whilst fully respecting the provisions of State legislation concerning the rights and obligations of the individuals indicated above, to which the provisions implicitly refer.

7.– Finally, Article 6(11) and (43) are challenged insofar as the former provides that "The Region shall promote agreements and joint action with the local authorities, other regions, the central and local offices of the State administrations, the European institutions and the agencies of the United Nations with competence over immigration", whilst the latter provides that "In accordance with State legislation, the Region shall promote agreements aimed at facilitating the entry into Italy of foreign citizens to follow professional training courses or trainee apprenticeships".

According to the State representative, both of these provisions are unconstitutional: the former due to the fact that it breaches Article 117(2)(a) and (b) and (9) of the Constitution and Article 6(2) and (3) of Law no. 131 of 5 June 2003, which does not specify international organisations as one of the bodies with which the regions may establish relations, and both on the grounds that they grant the regions international tasks in respect of matters – immigration policies – which do not fall under regional

jurisdiction, and which in fact pertain to legislation on immigration flows, in contrast with the provisions of Article 117(2)(a) and (b) and (9) of the Constitution.

7.1.– These questions are also groundless.

With regard to the foreign power of the regions, this Court has repeatedly asserted that it covers "activities of mere international significance" involving those activities carried out with counterpart foreign bodies "for study or information purposes (in relation to technical matters) or the regulation of participation in events intended to facilitate cultural or economic progress on local level or, finally, the development of proposals aimed at unilaterally harmonising their respective conduct" (judgment no. 454 of 2007) in the matters falling under regional jurisdiction, or in respect of those actions aimed at linking up their activities– again in the matters falling under their jurisdiction – with the initiatives of the state administration, the European Union or international organisations (judgment no. 131 of 2008), provided obviously that they are adopted in accordance with the foreign policy principles determined by the State.

On the basis of these premises, it is clear that the objections raised against the regional provisions cited are without foundation.

In fact, as far as Article 6(11) is concerned, this does nothing other than link together the Region's activity, in the matters falling under its own jurisdiction, with that of other regions, state administrations, European institutions and international organisations with a view to pursuing more effectively, in a purely indirect and ancillary manner, the immigration policy goals laid down by the State legislature.

As regards Article 6(43), the objective of the provision is clearly to enable the Region to promote understandings (in order to facilitate the attendance of professional training courses or trainee apprenticeships by foreigners) relating to a matter falling under the Region's residual jurisdiction, namely to professional training, which must moreover be achieved expressly "in accordance with State legislation", namely fully respecting the foreign policy principles determined by the State.

ON THOSE GROUNDS

rules that the question concerning the constitutionality of Article 2(2) of Tuscany Regional Law no. 29 of 9 June 2009 (Provisions governing the acceptance, integration, participation and protection of foreign nationals in Tuscany Region), initiated with reference to Article 117(2)(a) and (b) of the Constitution by the President of the Council of Ministers by the application referred to in the headnote, is inadmissible;

rules that the questions concerning the constitutionality of Articles 2(4) and 6(11), (35), (43), (51) and (55)(d) also of Tuscany Regional Law no. 29 of 2009, initiated with reference to Article 117(2)(a) and (b) and (9) of the Constitution by the President of the Council of Ministers by the application referred to in the headnote, are groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 July 2010.

Signed:

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 22 July 2010.

The Director of the Registry

Signed: DI PAOLA