Corte costituzionale

JUDGMENT NO. 329 OF 2011

Alfonso QUARANTA, President

Paolo GROSSI, Author of the Judgment

JUDGMENT NO. 329 YEAR 2011

This case involved the challenge to legislation which subjected the award of an attendance allowance to disabled non-Community minors to the prerequisite of a residence card. The Court ruled the contested legislation unconstitutional, holding that in requiring minors to wait for five years in order to fulfil the prerequisites for the award of the benefit, the legislation risked causing the very detriment which the benefit was intended to counter.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of the "combined provisions" of Articles 1 of Law no. 289 of 11 October 1990 (Amendments to the rules on the carer's allowance pursuant to Law no. 508 of 21 November 1988, laying down supplementary provisions on economic assistance to non-military invalids, the non-military blind and the deaf-mute and establishment of an attendance allowance for underage invalids) and 80(19) of Law no. 388 of 23 December 2000 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2001), initiated by the Genoa Court of Appeal in the proceedings pending between M.A.S.M., in his capacity as parent of the minor L.M.A.O., and the National Institute for Social Security [*Istituto nazionale della previdenza sociale*, *INPS*] be referral order of 3 December 2010, registered as no. 53 in the Register of Orders 2011 and published in the *Official Journal of the Republic* no. 14, first special series 2011.

Considering the entries of appearance by M.A.S.M., in his capacity as parent of the minor L.M.A.O., and the *INPS*;

having heard the Judge Rapporteur Paolo Grossi at the public hearing of 8 November 2011;

having heard Counsel Vittorio Angiolini and Counsel Gloria Pieri for M.A.S.M., in his capacity as parent of the minor L.M.A.O., and Counsel Clementina Pulli for the *INPS*.

(omitted)

Conclusions on points of law

1.— The Genoa Court of Appeal raises, with reference to Articles 2, 3, 32, 34, 38 and 117 of the Constitution, a question concerning the constitutionality of the "combined provisions" of Articles 1 of Law no. 289 of 11 October 1990 (Amendments to the rules on the carer's allowance pursuant to Law no. 508 of 21 November 1988, laying down supplementary provisions on economic assistance to non-military invalids, the non-military blind and the deaf-mute and establishment of an attendance allowance for underage invalids) and 80(19) of Law no. 388 of 23 December 2000 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2001), insofar as they subject the award of the attendance allowance for non-Community minors to the prerequisite of possession of a residence card.

It must be specified that although the question as framed by the referring court is formally directed at the "combined provisions" of the two Articles referred to, it relates strictly speaking to the provisions of Article 80(19) of Law no. 388 of 2000 in that it implies a reference to Article 1 of Law no. 289 of 1990 in order to identify the specific economic benefit under examination.

The lower court focuses its challenges on the principles which this Court asserted, precisely with regard to the contested legislation, in judgments no. 306 of 2008 on the carer's allowance, no. 11 of 2009 on the disability pension and, specifically, no. 187 of 2010, which ruled unconstitutional Article 80(19) – which is contested again in these proceedings – insofar as it subjected the award to foreign nationals legally present within the territory of the State of incapacity benefit pursuant to Article 13 of Law no. 118 of 30 March 1971 (Conversion into law of Decree-Law no. 5 of 30 January 1971 and new provisions in favour of the disabled and non-military invalids), as amended, to the prerequisite of possession of a residence card.

Having stressed the analogy existing between the benefit at issue in the proceedings before the lower court and those at issue in the judgments referred to with regard to the prerequisites specified – with the benefits sharing the common feature in particular of being measures aimed at guaranteeing social security benefits to persons suffering from illnesses of various forms and who live in difficult economic circumstances, which were

heightened in this case by the fact of being directed at underage disabled – it is observed that the limitation associated with presence within the territory of the State for a minimum period of five years, as is required in order to be eligible for a residence card, result in the emergence of a broad range of challenges regarding the provision's constitutionality. In the opinion of the referring court in fact, the contested provision on the one hand violates the principle of equality and the constitutional requirements which guarantee protection for human rights (such as the right to education (Article 34), health (Article 32) and social assistance (Article 38)), as well as the duties of economic and social solidarity (Article 2), whilst on the other hand violating the duty to exercise legislative powers in accordance not only with the Constitution but also with the requirements imposed by Community law and international law obligations (Article 117 of the Constitution). This is because it establishes a regime which discriminates against foreign nationals and is also incompatible with the principles asserted by this Court with reference to the United Nations Convention on the Rights of Disabled People, ratified by Law no. 18 of 3 March 2009 (Ratification and implementation of the United Nations Convention on the Rights of Disabled People, and the optional Protocol, done in New York on 13 December 2006 and establishment of the National Monitoring Centre on the circumstances of people with disabilities).

2.— Both the private party in the proceedings before the lower court, in his capacity as parent of the minor affected by the benefit, as well as the *INPS* entered an appearance in the proceedings, and both submitted written statements shortly before the public hearing substantiating the arguments set out in the statement of facts above.

3.— The question is well founded.

4.— As was correctly highlighted by the referral order, the question has a specific precedent in the principles underlying judgment no. 187 of 2010, in which it was held that, in view of the prerequisites on which its award was conditional, the benefit under examination in that case amounted to a payment which was not intended to supplement the lower income having regard to individual circumstances and reduced earning capacity, but to provide the person with a minimum level of support: in keeping evidently with the principles of mandatory social solidarity, which have been adopted as a foundational value for the inalienable rights of the individual, and which do not allow for any distinctions whatsoever with regard to status or individual circumstances, hence

also in view of fact that the individual concerned is an Italian national or a foreigner. As the Court held, the case law of the European Court of Human Rights has stressed on various occasions that in cases – such as the present one – involving benefits intended to further the provision of support for individuals, any distinction in arrangements applicable to Italian nationals and to foreigners legally resident within the territory of the State would end up breaching the principle of non-discrimination provided for under Article 14 of the European Convention on Human Rights. Therefore, insofar as it applied directly and with a chilling effect on the prerequisites for entitlement to receipt of the social security benefits intended to satisfy fundamental requirements of the individual, the contested legislation in that case was held to breach the limits resulting from the requirement to comply with obligations under international law imposed by Article 117(1) of the Constitution, precisely because it introduced a regime which unreasonably discriminated against foreign nationals legally present within the territory of the State, with regard to the exercise of the rights which are to be acknowledged and guaranteed to all under conditions of equality.

5.— These principles apply all the more so with specific reference to the social security benefit at issue in these constitutionality proceedings, since it is clear upon examination of the relative prerequisites and goals that there is a range of individual protection requirements which is even broader than the protection at issue in the various – albeit associated – social security benefits examined in previous cases, with specific reference to the peculiar and restrictive regulations applicable to foreign nationals introduced by Article 80(19) of Law no. 388 of 2000.

As this Court had the opportunity to stress in judgment no. 187 of 2010, the decisive factor for the purposes of the review reserved to this Court is not the name or formal classification of the individual benefit, but rather its actual operation within the panorama of the various measures and benefits of an economic nature which Parliament has established as auxiliary instruments intended to provide assistance to "weak" categories of individual. When assessing the constitutionality of the legislative choices, it is in fact necessary to verify whether or not "in the light of the legislative arrangements and its social function", the measure under consideration "constitutes... a remedy intended to enable the actual satisfaction of 'primary' needs' relating to the

sphere of protection of the human person, which it is the duty of the Republic to promote and to safeguard…".

Within this reference framework it is easy to discern how the award of the attendance allowance falls within the range of measures which are, so to speak, "multi-functional", since the needs which are intended to be satisfied through them are not focused solely on health or the related loss or reduction in earning capacity, but also on the educational and assistance requirements of minors suffering from debilitating illnesses whose families live in difficult economic circumstances.

Indeed, Article 1 of Law no. 289 of 11 October 1990 provides that the attendance allowance – which is to have an amount equal to the monthly allowance paid to non-military invalids pursuant to Article 13 of Law no. 118 of 1971 – is to be granted to minors who are disabled or non-military invalids who encounter "persistent difficulties in carrying out tasks and functions typical of their age" or who have a specific level of hypacousia, in order to enable "the continuous or also occasional recourse to rehabilitative or therapeutic treatment as a result of their impairment". The allowance in question is also granted to minors who are disabled or non-military invalids suffering from one of the aforementioned conditions "who frequent public or private schools or all kinds and at every level starting from primary school, as well as well as educational or vocational training centres with the goal of achieving the individuals' reincorporation into society". Finally, the allowance concerned is to be paid subject to the same income conditions specified for monthly incapacity benefit pursuant to Article 13 of Law no. 118 of 1971, and it is subject to the same automatic equalisation mechanism.

Therefore, this reference framework features above a goal which is directly attributable to the safeguarding of the requirements to provide treatment and assistance to minors who suffer from significant debilitating illnesses which, as such, may be directly classified as initiatives grounded in solidarity for which the legal system is required to make provision. Moreover, it is obvious that this is to be done both with regard specifically to health, as well as to social inclusion, and attention is to be directed at the provision of the necessary assistance, which may also be economic, for the families involved, especially in cases in which their circumstances are difficult – as is inescapably confirmed by the income limits to which the benefit is subject.

As this Court has not failed to emphasise, the protection of the mental and physical health of the disabled – which is one of the goals pursued by Law no. 104 of 5 February 1992 (Framework law on assistance, social integration and the rights of handicapped persons) – is also premised on the adoption of supplementary economic initiatives to provide support to families, the role of which remains fundamental (judgment no. 233 of 2005). Alongside this, attendance at centres specialising in therapeutic and rehabilitative treatment and "in the recovery of handicapped persons" or "educational or vocational training centres with the goal of achieving the individuals' reincorporation into society", as provided for under Article 1 of Law no. 289 of 1990, takes on a very special significance, precisely within the perspective of facilitating the social inclusion of minors suffering from disabilities which impair their social inclusion. Moreover – as was stressed in order no. 285 of 2009 – all of the above must occur in accordance with the principles asserted in the United Nations Convention on the Rights of Disabled People, adopted by the General Assembly on 13 December 2006 and ratified by Law no. 18 of 3 March 2009, which stress *inter alia* not only the requirement to ensure full respect for human rights and fundamental freedoms with particular reference to disabled children (Article 7), but also the commitment to adopt measures aimed at satisfying the educational and re-educational requirements of disabled persons, those related to their health as well as those seeking to guarantee an adequate standard of living and social protection.

The context within which the attendance allowance operates is therefore extremely varied and covers a range of social goals impinging upon interests and values, all of which are of primary standing within the context of fundamental human rights. These range in fact from the protection of childhood and health to the guarantees which must be afforded under conditions of equality to the handicapped, as well as the safeguarding of standards of living which are acceptable having regard the family context within which the disabled minor lives, at the same time furthering the requirement of facilitating the future entry of the minor into the world of employment and his or her active participation in social life.

However, in view of the above, the prerequisite which is imposed on the award of the benefit in question to foreign nationals who are minors, notwithstanding their lawful presence within the territory of the State, that is possession of a residence card, ends up

thwarting the right for at least five years – the period required in order for the card to be issued – which is incompatible not only with the requirements of "effectiveness" and satisfaction which are natural prerequisites of fundamental rights, but also the specific function itself of the attendance allowance, given that – as specified in detail by the referring court – the wait until the expiry of the five year period of residence in the national territory could "cause significant detriment to the requirements of care and assistance of individuals which the legal system should by contrast protect", if not even thwarting them entirely.

The legislation under discussion therefore contrasts not only with Article 117(1) of the Constitution, in the light of Article 14 ECHR as interpreted by the Strasbourg Court, but also with the remaining principles invoked by the lower court, given that the unreasonable difference in treatment which it imposes – based simply on the fact of being a foreign national lawfully resident within the territory of the State, but who has not yet complied with the time limits required in order to receive a residence card – violates the principle of equality and the right to education, health and access to employment in a manner which is heightened in that these rights are those of minors who are disabled.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 80(19) of Law no. 388 of 23 December 2000 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2001) is unconstitutional insofar as it subjects the award to non-Community minors who are legally present within the territory of the State of the attendance allowance pursuant to Article 1 of Law no. 289 of 11 October 1990 (Amendments to the rules on the carer's allowance pursuant to Law no. 508 of 21 November 1988, laying down supplementary provisions on economic assistance to non-military invalids, the non-military blind and the deaf-mute and establishment of an attendance allowance for underage invalids) to the requirement of possession of a residence card.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 December 2011.

(omitted)