Corte costituzionale

JUDGMENT NO. 172 OF 2012

Alfonso QUARANTA, President
Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 172 YEAR 2012

In this case the Court heard referral orders objecting to legislation according to which non-Community workers who had been convicted, including on a non-definitive basis, of certain offences were automatically denied eligibility to benefit from an undocumented worker amnesty. The Court held that, whilst Parliament enjoys broad discretion in this area, "the choice that is made must result from a reasonable and proportional balancing of these interests, above all when it is liable to impinge upon the exercise of fundamental rights vested also in non-Community nationals". The Court held on the facts that since the automatic mechanism resulted in the denial of regularisation also to those who had been convicted of minor offences which are "not necessarily symptomatic of the dangerousness of their perpetrator", the contested legislation was unconstitutional, given moreover that it did not allow the public administrations "to make a correct assessment of the interests involved and to ascertain whether or not the non-Community worker is dangerous for public order or the security of the state".

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1-ter(13) (more correctly: Article 1-ter(13)(c)) of Decree-Law no. 78 of 1 July 2009 (Anti-crisis measures and extension of time limits), introduced upon conversion by Law no. 102 of 3 August 2009, initiated by the Regional Administrator Court for Marche by the referral order of 8 July 2011 and the Regional Administrative Court for Calabria, Reggio Calabria division, by the referral

order of 13 October 2011, registered as nos. 22 and 26 in the Register of Orders 2012 and published in the Official Journal of the Republic nos. 9 and 10, first special series 2012.

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

Having heard the Judge Rapporteur Giuseppe Tesauro in chambers on 6 June 2012.

(omitted)

Conclusions on points of law

1.— The Regional Administrative Court for Marche and the Regional Administrative Court for Calabria question, with reference respectively to Article 3 of the Constitution and to Articles 3, 27 and 117(1) of the Constitution in the light of Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (below: ECHR), ratified and implemented by Law no. 848 of 4 August 1955, the constitutionality of Article 1-ter(13) (more correctly: Article 1-ter(13)(c)) of Decree-Law no. 78 of 1 July 2009 (Anti-crisis measures and extension of time limits), introduced upon conversion by Law no. 102 of 3 August 2009.

2.— The proceedings concern the same provision, which is challenged with reference to principles of constitutional law, on grounds and according to arguments which in part coincide, and should thus be joined for decision by a single judgment.

3.— Article 1-ter of Decree-Law no. 78 of 2009, introduced upon conversion by Law no. 102 of 2009, governs, insofar as is of interest here, the regularisation of the employment situation of non-Community workers (defined as “emergence”) who on 30 June 2009, provided assistance to an employer or to members or his or her family, irrespective of whether

cohabiting or not, suffering from illness or handicap limiting their self-sufficiency or who performed domestic work in support of family needs.

Paragraph 13(c) of the said provision stipulates that non-Community workers "who have been convicted, including by non-definitive judgment, (…) of one of the offences provided for under Articles 380 and 381" of the Code of Criminal Procedure shall be ineligible for such regularisation. According to the Regional Administrative Court for Marche, that provision violates Article 3 of the Constitution first and foremost on the grounds that it subjects to the same regulations individuals who have been found guilty of criminal offences that are "profoundly different as to their seriousness and level of blameworthiness" since they do not enable "the administration attending to the procedure [to] assess the seriousness of the offence, the social alarm which it caused, the individual's subsequent conduct" and hence "the current dangerousness of the individual in respect of whom regularisation is sought". Moreover, it is asserted to violate that rule of constitutional law since, in breach of the principles of reasonableness and proportionality, it does not grant eligibility to the emergence procedure either to non-Community workers who have been found guilty of serious offences that generate social alarm or to those "such as the applicant who committed one single deplorable act, of extremely minor criminal significance, due to an objective state of need and desperation, and who subsequently followed a rehabilitation process and, having understood the negative value of their actions, have thereafter conducted their life in an exemplary manner".

According to the Regional Administrative Court for Calabria, the said provision breaches Article 3 of the Constitution insofar as it provides for the automatic refusal of regularisation also in the event of conviction by non-definitive judgment owing to "an implicit assessment of dangerousness resulting from the mere *prima facie* assumption of guilt" in relation to the offences provided for under Article 381 of the Code of Criminal Procedure,

which however “could express such a low level of social alarm as to preclude even arrest in the act of committing the offence”. According to the referring court, this *prima facie* conclusion does not justify an automatic mechanism which, in breach of the principle of reasonableness and the other principles of constitutional law referred to above, impinges upon the fundamental rights of the non-Community worker and deprives him “of work and family relations”, notwithstanding the absence of a definitive conformation of his criminal responsibility and a prior assessment of his actual dangerousness, having regard “to the nature and seriousness of the actions alleged and his previous and subsequent lifestyle”.

4.— It should be pointed out as a preliminary matter that the Regional Administrative Court for Calabria accepted the interim application, and ordered the suspension of the contested measure pending the decision by the Constitutional Court; for this reason, it did not exhaust its *propria potestas iudicandi*, with the consequence that the question is admissible in this respect (see most recently, order no. 307 of 2011).

5.— The objection of inadmissibility due to the failure to give reasons in support of the relevance of the question raised by the Regional Administrative Court for Marche, which was raised by the General State Counsel [*Avvocatura Generale*] on the grounds that the referring court did not specify the elements which distinguish the situation under examination from those relating to analogous questions not accepted by this Court, is groundless. Irrespective of any consideration as to the relevance of the precedents referred to by the intervener, the lack of any specific assessment of these and of any arguments which may already have been provided by this Court cannot in fact affect the relevance of the question raised, for which plausible motivation has been given by the lower court.

Similarly, the further objection that the question is inadmissible on the grounds that the said referring court did not ascertain whether it was possible

to interpret the contested provision in a manner compatible with the Constitution is also groundless, since the Regional Administrative Court implicitly but clearly indicated the arguments which, taking account of the clear semantic formulation of Article 1-ter(13)(c), preclude such an interpretation.

6.— Again as a preliminary matter, it must be specified that the questions of constitutionality are relevant solely with regard to the part of the provision under examination which does not enable non-Community workers to be granted eligibility for the emergence procedure if they have been convicted – by definitive judgment according to the Regional Administrative Court for Marche, or by non-definitive judgment in the opinion of the Regional Administrative Court for Calabria – of one of the offences provided for under Article 381 of the Code of Criminal Procedure.

In fact, the employment position of the applicants in the main proceedings has not been regularised since each has been convicted of one of the offences contemplated by this provision. Moreover, both of the referring courts assert that Article 3 of the Constitution has been violated asserting, albeit according to arguments which coincide only in part, that the automatic application of the refusal of regularisation is manifestly unreasonable, *inter alia* because it is associated with a conviction for one of the said offences, notwithstanding that they are not significantly serious and such as to arouse particular social alarm, taking account of the fact that arrest in the act of committing the offence is not stipulated as mandatory in relation to them.

7.— On the merits, the question is well-founded with reference to Article 3 of the Constitution, as set out below.

7.1.— According to the case law of the Constitutional Court, the regularisation of the entry and stay of a foreign national within the national territory is associated with a balancing of various public interests, which is a matter in the first instance for primary legislation, which possesses broad

discretion in this area (judgments no. 206 of 2006 and no. 62 of 1994). This discretion includes the specification of the prerequisites necessary for the granting of authorisation enabling non-Community nationals to remain and work within the territory of the Republic (judgment no. 78 of 2005) and the automatic mechanism characteristic of certain aspects of the rules governing the issue or renewal of residence permits (judgment no. 148 of 2008) or expulsion (orders no. 463 of 2005 and no. 146 of 2002) and which, in certain respects, was also characteristic of the legalisation of illegal work by non-Community nationals provided for under the legislation in force prior to that enacted by the contested provision (judgment no. 206 of 2006; orders no. 218 of 2007 and no. 44 of 2007), notwithstanding the requirement for a specific judgment of the degree of social danger in the event that expulsion from the national territory is ordered as a security measure (judgments no. 148 of 2008 and no. 58 of 1995). In particular, this automatic mechanism amounts to "a reflex of the principle of strict legality which permeates the entire body of legislation on immigration" and is "also for foreign nationals, a non-negotiable safeguard for their rights, enabling potential arbitrary action on the part of the administrative authorities to be thwarted" (see *inter alia*, judgment no. 148 of 2008; order no. 146 of 2002).

As has been reiterated on various occasions, that discretion must however be exercised subject to the limits laid down by the rules of constitutional law and, in order to ensure compliance with Article 3 of the Constitution, it is necessary that it satisfy the requirements of inherent reasonableness (judgments no. 206 of 2006 and no. 62 of 1994). This Court has therefore held that a provision requiring that regularisation of a non-Community worker be refused following the issue of an expulsion order to be implemented by deportation does not violate that principle of constitutional law, in doing so giving express weight to the special significance of that measure in that "it was not associated with minor administrative irregularities but the situation of

those who had already demonstrated the obstinate intention to remain in Italy unlawfully in a manner outwith all normal controls or of those who may be presumed to have such an intention following a case by case assessment carried out on the basis of the specific circumstances of the case" (judgment no. 206 of 2006; orders no. 44 of 2007 and no. 218 of 2007). Similarly, it has held that the automatic refusal of the issue or renewal of a residence permit does not violate Article 3 of the Constitution where the foreign non-Community national has been convicted of an offence relating to narcotic drugs, whilst taking case to assert that such a provision is not manifestly unreasonable also because the said offence amongst other things often implies "contacts on various levels with members of criminal organisations" (judgment no. 148 of 2008).

The lack of any incompatibility as a matter of principle between the aforementioned automatic mechanism and Article 3 of the Constitution does not therefore imply that cases in which such provision is made are not subject to a control as to their non-manifest arbitrariness. Parliament may therefore render the regularisation of the employment relationship conditional upon the fact that the continuing stay within the territory of the state is not liable to be detrimental to any of the interests addressed by the law on immigration; however, the choice that is made must result from a reasonable and proportional balancing of these interests, above all when it is liable to impinge upon the exercise of fundamental rights vested also in non-Community nationals (judgments no. 245 of 2011 and no. 299 and no. 249 of 2010), because the legal situation of the foreign national must not be "considered – with regard to the protection of those rights – as an acceptable basis for different or less favourable treatment" (judgment no. 245 of 2011). Moreover, this Court has also asserted the principle – which may be invoked here, even though it was asserted with reference to a different subject matter – according to which "absolute presumptions, especially when the limit a fundamental

human right, will violate the principle of equality if they are arbitrary and irrational, that is if they do not comply with generalised facts of experience, which may be summed up in the maxim *id quod plerumque accidit*", and an absolute presumption will be deemed to be unreasonable "whenever it is 'easy' to formulate real factual hypotheses which run contrary to the generalisation underlying the presumption" (judgments no. 231 and no. 164 of 2011; and no. 265 and no. 139 of 2010).

7.2.— Against the backdrop of these principles, the consideration that the refusal of regularisation automatically results from a conviction also for one of the offences provided for under Article 381 of the Code of Criminal Procedure, notwithstanding that these are not necessarily symptomatic of the dangerousness of their perpetrator, is significant first and foremost in concluding that the contested provision is manifestly unreasonable. In this respect, it is significant that since the perpetrator may only be arrested in the act of committing such offences "if the measure is justified by the seriousness of the conduct or the dangerousness of the individual as inferred from his personality or the circumstances of his actions" (Article 381(4) of the Code of Criminal Procedure), the applicability itself of that measure is already conditional upon a specific assessment of further elements in addition to those constituting mere proof of commission of the offence.

The manifest unreasonableness of the legislation laid down by the contested provision, insofar as is relevant in these proceedings, is also confirmed by the fact that the automatic mechanism applies to situations involving specific aspects forming part of the broader assessment as to whether the prerequisites for remaining within the territory of the State have been met. The regularisation under examination relates only to non-Community foreign nationals who have provided, albeit according to irregular arrangements, assistance to their employer or members of the latter's family, irrespective of whether cohabiting or not, suffering from illness or handicap

limiting their self-sufficiency or who have performed domestic work in support of family needs for a period of time regarded as considerable by the legislature. These are in fact activities which, due to their content and the fact that they are carried out within a family, in the first place make it easier to assess whether the foreign national is actually dangerous. Secondly, they highlight the fact that, in cases involving the provision of assistance to those suffering from illness or handicap limiting their self-sufficiency, the automatic mechanism risks causing unreasonable detriment to the interests of such persons. It is in fact well known that, above all when such activities have been carried out for a considerable period of time, a special and strong bond may be established with those requiring constant assistance, which may thus be harmed by a refusal ordered without any assessment as to whether it is actually indispensable and proportional having regard to the need to guarantee public order and the security of the state, even though it is easy to conjecture, and ascertain, the existence of situations which refute the generalisation underlying the absolute presumption on which the automatic mechanism is based.

Therefore, the specific circumstances of such cases render the automatic refusal of regularisation on the grounds of conviction for one of the offences provided for under Article 381 of the Code of Criminal Procedure manifestly unreasonable unless the public administration is allowed to make a correct assessment of the interests involved and to ascertain whether or not the non-Community worker is dangerous for public order or the security of the state. Finally, the arbitrary nature of these provisions is rendered even more clear in relation to the case, to which the referral order from the Regional Administrative Court for Calabria refers, involving a non-definitive conviction for one of the offences contemplated by the said provision. Whilst elements which are capable of providing guidance when assessing dangerousness may be inferred from the non-definitive judgment, it

nonetheless amounts to a manifest breach of the principle of reasonableness for highly serious consequences, which are often irreversible for the non-Community national, to be associated with that judgment automatically and notwithstanding its non-definitive nature whereas, for the reasons set out above, the mere fact that the offence has been committed may not necessarily be symptomatic of the social danger of the perpetrator.

Accordingly, the aforementioned Article 1-ter(13)(c) must be ruled unconstitutional with reference to Article 3 of the Constitution insofar as it stipulates that an application for regularisation by a non-Community worker must be automatically rejected if he has been convicted of one of the offences for which Article 381 of the Code of Criminal Procedure permits the option of arrest in the act of committing the offence, without providing that the public administration should assess whether the individual represents a threat to public order or the security of the state.

All other grounds for challenge are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 1-ter(13)(c)) of Decree-Law no. 78 of 1 July 2009 (Anti-crisis measures and extension of time limits), introduced upon conversion by Law no. 102 of 3 August 2009, is unconstitutional insofar as it stipulates that an application for regularisation by a non-Community worker must be automatically rejected if he has been convicted of one of the offences provided for under Article 381 of the Code of Criminal Procedure, without

stipulating that the public administration may take steps to ascertain whether he represents a threat to public order or to the security of the state.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 2 July 2012.

(omitted)