JUDGMENT NO. 67 YEAR 2022

**In this case, the Court considered two referral orders from the labor division of the Supreme Court of Cassation, asking it to strike down, on constitutional grounds, a social security provision. The provision stipulated that the family unit allowance, a social security benefit the Italian Republic extended to its own citizens and legal residents of Italy, did not apply to third-country nationals legally residing and working in Italy, when the members of the family unit did not reside in Italy. The Supreme Court of Cassation had already referred the question to the Court of Justice of the European Union with a reference for a preliminary ruling. The Court of Justice had ruled on this reference for a preliminary ruling by holding that the provision violated EU law and the principle of equality of treatment, and that, given that the Italian authorities had not invoked one of the specific derogations available for the principle of equality, the benefit must be extended to legal residents of Italy whose families reside outside the Republic on equal terms. Having received this answer, the Supreme Court of Cassation referred the case to the Constitutional Court, on the assumption that it could not disapply the provision, given that EU law did not provide a complete framework to fill the gap that would be left by the disapplied provision. The Constitutional Court disagreed with this assumption. The Court held the questions as to constitutionality to be inadmissible as irrelevant, ruling that the Supreme Court of Cassation was, indeed, able to simply disapply the provision, leaving in place the domestic provisions governing the family unit allowance, which would no longer be withheld from third-country nationals residing and working legally in Italy, when members of the family units reside temporarily abroad.**

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 2(6-*bis*) of Decree-Law No. 69 of 13 March 1988 (Provisions governing social security, for improvement of the management of port bodies and other urgent provisions), converted, with modifications, into Law No. 153 of 13 May 1988, initiated by the labor division of the Supreme Court of Cassation, with two referral orders of 8 April 2021, registered, respectively, as Numbers 110 and 111 of the 2021 Register of Referral Orders and published in the *Official Journal* of the Republic No. 33, first special series of 2021.

*Having regard* to the entries of appearance filed by R.M., S. B.G., and the *Istituto Nazionale della Previdenza Sociale* [Italian National Social Security Institute] (INPS), as well as the intervention filed by the President of the Council of Ministers;

*after hearing* Judge Rapporteur Silvana Sciarra at the public hearing of 8 February 2022;

*after hearing* Counsel Alberto Guariso on behalf of R.M. and other, Mauro Sferrazza on behalf of INPS, and State Counsel Paolo Gentili on behalf of the President of the Council of Ministers;

*after deliberations* in chambers on 8 February 2022.

[omitted]

*Conclusions on points of law*

1.– With the referral orders indicated in the headnote (R.O. Nos. 110 and 111 of

2021), the labor division of the Supreme Court of Cassation has raised questions as to the constitutionality of Article 2(6-*bis*) of Decree-Law No. 69 of 13 March 1988 (Provisions governing social security, for improvement of the management of port bodies and other urgent provisions), converted, with modifications, into Law No. 153 of 13 May 1988.

The challenged provision, which falls within the rules governing the family unit allowance, provides that, "the spouses, children, and equivalents of foreign nationals who are not resident in the territory of the Italian Republic do not qualify as part of a family unit, except where the State of which that foreign national is a citizen reserves reciprocal benefits for Italian citizens or where an international convention concerning family allowances has been concluded".

1.1.– Order No. 110 of 2021 alleges that this breaches Articles 11 and 117(1) of the Constitution, the latter in relation to Articles 2(1)(*a*), (*b*), and (*c*) and 11(1)(*d*) of Council Directive 2003/109/EC of 25 November 2003, concerning the status of third-country nationals who are long-term residents.

1.2.– Order No. 111 of 2021 also alleges a breach of Articles 11 and 117(1) of the Constitution, the latter in relation to Articles 3(1)(*b*) and (*c*) and 12(1)(*e*) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011, with regard to a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

1.2.1. Neither of the referral orders alleges a violation of the EU Charter of Fundamental Rights, in particular of Article 34.

1.3.– As the referring court observes, the challenged provision's inconsistency with EU law was ascertained by the Court of Justice of the European Union, ruling on a reference for a preliminary ruling in the course of proceedings for both underlying matters.

1.3.1.– The Court of Justice, with its Judgment of 25 November 2020, in Case C-303/19, *INPS*, ruled that Article 11(1)(*d*) of Council Directive 2003/109/EC requires Member States to extend the social security allowance to third-country nationals who are long-term residents on the same terms provided for citizens, unless the State has expressed, upon receiving the directive, the intent to rely upon the derogations from the right to equal treatment allowed by Article 11(2) of the directive itself (which the Italian Republic had not).

1.3.2.– In its 25 November 2020 Judgment in Case C-302/19, *INPS*, the Court of Justice held that Article 12(1)(*e*) of Directive 2011/98/EU of the European Parliament and of the Council, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, must be interpreted as requiring Member States to extend social security benefits, which include the family unit allowance, to third-party nationals who hold single permits, on the same terms on which they are provided to citizens of the Member State.

[omitted]

4.– The referral orders were issued in the context of two cases brought by the Italian National Social Security Institute (INPS) to overturn the earlier judgments on the merits, which ruled that the family units of two third-party nationals, one from Pakistan and the other from Sri Lanka, who respectively hold a long-term residence permit and a single residence and work permit, are entitled to the allowance, including for the period

when members of the families had returned to their countries of origin.

The triers of fact had proceeded to disapply the provision contained in Article 2(6-*bis*) of Decree-Law No. 69 of 1988, as converted, which would have prevented extending the right to the family unit allowance for periods of time during which the family members are absent from Italian territory, because of its conflict with European Union law, which, at Article 11(1)(*d*) of Directive 2003/109/CE and Article 12(1)(*e*) of Directive 2011/98/EU, requires Member States to extend the same social security services they provide for their own citizens to third-party nationals.

[omitted]

6.– The Supreme Court of Cassation explained, both in its reference for a preliminary ruling and in the referral orders in which it raises questions as to constitutionality, that the family unit allowance [ANF Assegno nucleo familiare] has characteristics that qualify it for inclusion in the sphere of the provisions of Articles 11(1)(*d*) of Directive 2003/109/CE and 12(1)(*e*) of Directive 2011/98/EU.

Both of the cited provisions require equality of treatment of the categories indicated therein and Italian citizens when it comes to social security benefits.

Article 11(1)(*d*) of Directive 2003/109/EC provides that, "long-term residents" shall enjoy the same benefits as national citizens when it comes to social security, social assistance, and social protection as defined by national law.

Article 12(1)(*e*) of Directive 2011/98/EU provides that "third-country workers as referred to in points (b) and (c) of Article 3(1)" shall enjoy equal treatment with nationals of the Member State in which they reside with regard to the branches of social security, as defined in Regulation (EC) No. 883/2004 of the European Parliament and of the Council, of 29 April 2004 on coordinating the social security systems.

[omitted]

8.– In both Judgments handed down after the twofold reference for preliminary judgment, the Court of Justice held that Article 2(6-*bis*) is incompatible with the provisions contained in Articles 11(1)(*d*) of Directive 2003/109 and with Article 12(1)(*e*) of Directive 2011/98/EU.

8.1.– In its Judgment in Case C-303/19, referring to Directive 2003/109/EC, the Court held that the European Union law does not detract from the Member States' power to organize their social security systems. However, in exercising that power, Member States must comply with EU law (point 20).

The Court of Justice explained that, for the benefit of third-party nationals who are long term residents, Article 11 of the Directive provides, as a general rule, the right to equal treatment in the specified areas and on the terms provided therein, and it goes on to list the derogations to that right that the Member States have the power to establish. These derogations must be interpreted strictly and may be invoked only where the authorities in the Member State concerned responsible for the implementation of that directive have stated clearly that they intended to rely upon them (point 23, with reference to the judgment of 24 April 2012, C-571/10, *Kamberaj*).

The Court then determined that no such intention to rely upon the derogations had been expressed by the authorities responsible for implementing the directive in Italian law (points 37 and 38).

As for the question expressed by the referring court, the Court of Justice specified that, "[a]lthough members of the family unit are entitled to that allowance, which is the very purpose of a family benefit, it is clear […] that the payment is made to a worker or pensioner, who is also a member of the family unit" (point 36).

Therefore, where the power to derogate permitted under Article 11(2) is not exercised, the enjoyment of a social security benefit for long-term residents may not be refused or reduced due to the fact that some or all of their family members reside in a third country, when, on the contrary, the same benefit is provided to Italian citizens regardless of where their family members reside.

8.2.– In its judgment in Case C-302/19, on Directive 2011/98/EU, after laying out analogous arguments concerning the powers of the Member States to organize their social security regimes, the Court of Justice referred to Article 12(1)(*e*), which requires Member States to ensure equal treatment with regard to the branches of social security set out in Regulation No. 883/2004 to third-country nationals who have been admitted to a Member State for the purpose of work, in accordance with Article 2(*c*) of the same Directive.

Indeed, the family unit allowance constitutes a social security benefit that falls under the category of family benefits referred to in Article 3(1)(*j*) of Regulation No. 883/2004 (point 40, with reference to the judgment of 21 June 2017, C-449/16, *Martinez Silva*).

Analogously to the aforementioned ruling in case C-303/19, the Court of Justice explained that, despite the fact that the members of the family unit are the beneficiaries of the allowance, the allowance itself is paid to the worker or pensioner, who is also a member of the family unit (point 45).

Concerning limitations on the right to equal treatment, in this case, too, the Court held that the list of derogations found in the directive, which must be interpreted strictly, can be relied on only if the authorities in the Member State concerned responsible for the implementation of that directive have stated clearly that they intended to rely on them (point 26, with a reference to the *Martinez Silva* judgment).

The Court then held that "none of the derogations from the rights conferred by Article 12(1)(e) of Directive 2011/98/EU, laid down in Article 12(2) thereof, allow Member States to exclude from the right to equal treatment a worker holding a single permit whose family members reside not in the territory of the Member States concerned but in a third country" (point 27).

Referring to the purposes of the directive, the Court underscored that ensuring a right to equal treatment for third-country workers entails recognition of their contribution to the EU economy through "their work and tax payments," and serves as a safeguard to reduce unfair competition between a Member State's own nationals and third-country nationals resulting from the possible exploitation of the latter (points 34 and 35).

9.– The matters initiated with the references for a preliminary ruling having been concluded with the judgments of the Court of Justice, the Court of Cassation then raised questions as to the constitutionality of Article 2(6-*bis*) of Decree-Law No. 69 of 1988, as converted, for its alleged conflict with the parameters that safeguard the relationship between the national system and European Union law, Articles 11 and 117(1) of the Constitution, the latter with the aforementioned, interposed directives.

10.– The questions, as presented, must be declared inadmissible as irrelevant, as the defense for the private parties has objected.

10.1.– The referring Court assumes that it cannot implement EU law, as interpreted in the judgments handed down by the Court of Justice in response to the references for a preliminary ruling it made.

After ruling out making use of the tool of finding a conforming interpretation, due

to the unequivocal content of the rules under Article 2 (6-*bis*) of Decree-Law No. 69 of 1988, as converted, the Supreme Court of Cassation holds that it cannot proceed to disapply the provision because, with regard to the social benefit at issue, European law does not lay down a complete set of rules to be applied in place of the one declared incompatible.

10.2.– To refute this latter argument, it is useful to look at the Supreme Court of Cassation's choice to appeal to the Luxembourg Court prior to raising the question as to constitutionality before this Court.

This option fits within a procedure that identifies the Court of Justice as interpreter of EU law, for purposes of ensuring its uniform application throughout all the Member States (Article 267 TFEU).

The exclusive competence of the Court of Justice to interpret and apply the Treaties, which this Court has recognized in its references for a preliminary ruling (most recently Orders Nos. 216 and 217 of 2021, at points 8 and 7, respectively, of the *Conclusions on points of law*; Order No. 182 of 2020, point 3.2 of the *Conclusions on point of law*), entails, by virtue of the principle of effectiveness of protections, that its rulings are binding, first of all upon the court that made the reference (Court of Justice, Judgments of 16 June 2015, in case C-62/14, *Gauweiler and others*, point 16, and 3 February 1977, in case 52/76, *Benedetti*, point 26).

In the system as designed, the preliminary ruling procedure, in addition to providing a channel for interconnection among the national courts and the Court of Justice for resolving interpretive uncertainties, also helps to ensure and reinforce the primacy of European law.

Starting with the *Simmenthal* judgment (of 9 March 1978, in Case 106/77, *Amministrazione delle Finanze dello Stato*), the Court of Justice has held that national courts are bound to ensure the full efficacy of European provisions with direct applicability, by "if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means" (point 24).

Much more recently, the same Court again affirmed the centrality of references for preliminary rulings for guaranteeing the full effectiveness of EU law and to ensure the useful effect of Article 267 TFEU, under which the power to "disapply" conflicting domestic provisions is consolidated (Judgment of 20 December 2017 in case C-322/16, *Global Starnet Ltd.*, points 21 and 22; Judgment of 24 October 2018 in case C-234/17, *XC and others*, point 44; Judgment of 19 December 2019 in case C-752/18, *Deutsche Umwelthilfe*, point 42; Judgment of 16 July 2020 in case C-686/18, *OC and others*, point 30). The Court of Justice also explained that the failure to disapply a national provision that is held to conflict with European law violates "the principle of equality between the Member States and the principle of sincere cooperation between the European Union and the Member States, recognized by Article 4(2) and (3) TEU, with Article 267 TFEU and […] the principle of the primacy of EU law" (Judgment of 22 February 2022 in case C-430/21, *RS*, point 88).

11.– Therefore, the principle of the primacy of EU law and Article 4(2) and (3) TEU are the cornerstone on which the community of national courts rests, held together by convergent rights and duties. This Court has consistently upheld that principle, affirming the value of its driving effects with regard to the domestic legal system. Within this system, the centralized review of constitutionality enshrined in Article 134

of the Constitution is not an alternative to the widespread mechanism for implementing European law (Judgment No. 269 of 2017, points 5.2 and 5.3 of the *Conclusions on points of law* and Judgment No. 117 of 2019, point 2 of the *Conclusions on points of law*), but rather merges with them to build an increasingly well integrated system of protections.

12.– In light of the primacy of EU law, contrary to the assumptions of the Supreme Court of Cassation, the provisions of European law contained in Articles 11(1)(*d*) of Directive 2003/109/EC and 12(1)(*e*) of Directive 2011/98/EU, must be recognized as having direct effect insofar as they prescribe the duty of equality of treatment among the categories of third-country nationals identified by the same directives and the citizens of the Member State in which they reside.

To this duty corresponds the right of third-country nationals – if they hold a long-term residence permit or a single residence and work permit – to receive social security benefits on the same terms under which they are provided for citizens of the Member State. The protection afforded this right, together with its enforceability, recall the conditions identified by the Court of Justice throughout its case law to affirm the direct effect of the provisions upon which such rights are based (starting with Judgment of 19 November 1991, in the joined cases C-6/90 and C-9/90, *Francovich*).

Thus, the object of the aforementioned directives is not to regulate social security benefits – specifically the family unit allowance. As the Court of Justice explained in its judgments in response to the twofold reference for a preliminary ruling, organizing the social security systems falls under the competences of the Member States, which may conform and modify the benefits system in keeping with domestic needs to attain overall sustainability.

The aforementioned directives merely lay down the duty of equal treatment, on the basis of the provisions of Article 79(2)(*b*) TFEU, which allows the European Parliament and the Council to adopt, as part of their ordinary legislative procedure, measures defining the "set of rights for third-country workers legally residing in a Member State."

The substance of the European Union's intervention is, therefore, to establish the duty not to distinguish the treatment of third-party nationals from that reserved for citizens of the states where they legally work.

The duty is imposed by the directives cited above in a clear, precise, and unconditional way, and is, thus, endowed with direct applicability.

[omitted]

12.2.– In light of the above, this Court concludes that it is appropriate for the referring court to disapply the challenged provisions, which the Court of Justice has held to be incompatible with EU law.

13.– The Supreme Court of Cassation's additional argument that disapplication of the domestic provision incompatible with EU law is not practicable, rests on its positive evaluation of legislative discretion. The court alleges that the legislator is entitled to choose the appropriate remedy for the discriminatory effects and to choose to limit equality of treatment.

This argument, too, is unconvincing.

13.1.– The legislator may well choose the methods by which to eliminate the detected discrimination, even for the past. Nonetheless, the task of eliminating the discriminatory effects that have already occurred falls to the court.

As the Court of Justice held in its Judgment of 14 March 2018, in case C-482/16,

*Stollwitzer*, point 30, eliminating discrimination must be ensured by means of extending the same advantages enjoyed by persons in the privileged category to persons who belong to the underprivileged category. The regime which applies to the privileged category is the only regulatory reference point to take into consideration until the national legislator acts to reestablish equality of treatment, thus reestablishing the compliance of domestic law with that of the EU.

[omitted]

14.– This Court observes, moreover, that as regards the derogations to equality of treatment under Directive 2011/98/EU, defense counsel for the State has observed that, in the Judgment of the Grand Chamber of 2 September 2021, in case C-350/20, *O.D. and others*, following after the Judgment in Case C-302/19, the European Court held that, "the Italian Republic has not availed itself of the option available to Member States of restricting equal treatment, as provided for in Article 12(2)(b) of Directive 2011/98" (point 64). There is, however, some contradiction surrounding this point within the case law of the European Court.

After the ruling just mentioned, which was handed down in response to a reference for a preliminary ruling, this Court held that exercising the power to derogate "is correlated not only with safeguarding the useful application of the directive, but also with a fruitful and transparent reception phase, which the EU legislator wants distinct from the Member States' duty to engage in constant dialogue with the Commission" (Judgment No. 54 of 2022, point 9.4.1. of the *Conclusions on points of law*).

What is more, the Court of Justice had already spoken to the non-exercise of the option to make recourse to the derogations when receiving Directive 2011/98/EU in the aforementioned *Martinez Silva* Judgment (point 30), making the point that the rules limiting the right to equal treatment were contained in provisions enacted prior to reception of the Directive (Article 65 of Law No. 448 of 1998), and could not be considered to establish the limitations the permitted under the Directive.

The legislation on family unit allowances provided by Legislative Decree No. 69 of 1988, as converted, presents an analogous situation, since it, too, was passed prior to reception of the Directive and, thus, in the absence of any derogation, the provision contained in Article 2(6-*bis*) of the decree has discriminatory effect, in conflict with EU law.

15.– In conclusion, this Court observes that the cases in the pending proceedings meet the conditions necessary to disapply Article 2(6-*bis*) of Legislative Decree No. 69 of 1988, as converted. Moreover, the questions as to the constitutionality of that provision must be declared inadmissible as irrelevant.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

having joined the proceedings,

*declares* that the questions as to the constitutionality of Article 2(*6-bis*) of Decree-Law No. 69 of 13 March 1988 (Provisions governing social security, for improvement of the management of port bodies and other urgent provisions), converted, with modifications, into Law No. 153 of 13 May 1988, raised by the labor division of the Supreme Court of Cassation with the referral orders indicated in the headnote, in reference to Articles 11 and 117(1) of the Constitution, the latter in relation to Articles 2(1)(*a*), (*b*), and (*c*) and 11(1)(*d*) of Directive 2003/109/EC of the Council, of 25 November 2003, concerning the status of third-country nationals who are long-term

residents, and to Articles 3(1)(*b*) and (*c*) and 12(1)(*e*) of Directive (EU) 2011/98 of the European Parliament and of the Council, of 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State, are inadmissible.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 8 February 2022.

Signed by:

Giuliano Amato, President

Silvana Sciarra, Author of the Judgment