JUDGMENT NO. 157 YEAR 2021

In this case, the Court heard two referral orders from the Regional Administrative Court of Piedmont questioning the constitutionality of Article 79(2) of Decree of the President of the Republic No. 115 of 30 May 2002. This provision was challenged insofar as it did not allow non-EU citizens applying for free legal aid in administrative proceedings, in the event of being unable, through no fault of their own, to produce the consular certification on foreign income prescribed by law, to submit a declaration in lieu of such documentation on pain of inadmissibility of their application.

The Court held the challenged provision to be unreasonable and contrary to the effectiveness of the right of defence and the principle of personal responsibility. There were no valid reasons for distinguishing between EU and non-EU citizens.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in the proceedings concerning the constitutionality of Article 79(2) of Decree of the President of the Republic No. 115 of 30 May 2002 embodying the "Consolidated law on legislative and regulatory provisions on court costs (Text A)", initiated by the Regional Administrative Court of Piedmont, Division 1, with the two referral orders of 14 June 2020, registered respectively as Nos. 142 and 143 in the Register of Referral Orders 2020 and published in the Official Journal of the Republic No. 42, first special series 2020.

[omitted]

Conclusions on points of fact

[omitted]

Conclusions on points of law

1.– By two referral orders of 14 June 2020, identical as regards their grounds and registered, respectively, as Nos. 142 and 143 in the Register of Referral Orders 2020, the Regional Administrative Court of Piedmont, Division 1, has raised questions concerning the constitutionality of Article 79(2) of Decree of the President of the Republic No. 115 of 30 May 2002 embodying the "Consolidated law on legislative and regulatory provisions on court costs (Text A)". The referring court alleges that the provision violates Articles 3, 24, 113 and 117(1) of the Constitution – the latter in relation to both Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007, and Article 3(3) of the Decree of the President of the Republic No. 445 of 28 December 2000 concerning "Legislative provisions on administrative documentation (Text A)". The referring court has challenged the provision insofar as it does not provide that, in cases where it is impossible to produce the relevant consular certification, non-EU citizens may produce "alternative forms of certification, by analogy with the principles provided for by national law" if they prove "that they have taken all steps that are required by ordinary diligence to obtain the required consular certification".

1.1.– The challenged provision states in fact that "[f]or income earned abroad, a non-EU citizen shall support the application with a certificate from the competent consular authority confirming the truthfulness of the information contained therein".

2.– The referring court states that it must rule, in both cases, on the rejection of the request for legal aid of two Indian nationals, whose application had been rejected by

another judge, having regard to the report of the competent commission. The rejection was based on the fact that the applicant had failed to produce the certification of the consular authorities prescribed by the challenged provision.

As regards relevance, the Regional Administrative Court of Piedmont points out that the application of that provision conditions the outcome of the proceedings before it.

[omitted]

7.– On the merits of the case, it is necessary, first of all, to ascertain whether Article 79(2) of the "Consolidated law on court costs" is contrary to Article 3 of the Constitution, in conjunction with Articles 24 and 113 of the Constitution, insofar as it does not provide that non-EU citizens, when the submission of the required consular certificate is impossible, may submit "alternative forms of certification", "proving that they have done all that is required by ordinary diligence" in order to obtain the required certification.

8.– The questions are well founded.

8.1.– The challenged provision is part of the rules on legal aid provided by the State aimed at implementing the constitutional provision further to which the "indigent shall be assured [...] the means for legal action and defence in all courts" (Article 24(3) of the Constitution).

The institution thus serves to remove, in harmony with Article 3(2) of the Constitution (Judgment No. of 80 of 2020), "the economic hurdles that may militate against the concrete exercise of the right of defence" (Judgment No. 46 of 1957, later cited in Judgment No. 149 of 1983; similarly Judgments Nos. 35 of 2019, 175 of 1996 and 127 of 1979), ensuring the effectiveness of the right to take legal action and defend oneself in court, which Article 24(2) of the Constitution expressly classifies as an inviolable right (Judgments Nos. 80 of 2020, 178 of 2017, 101 of 2012 and 139 of 2010 as well as Order No. 458 of 2002).

"The action in court to defend one's rights", this Court has observed, "is itself the content of a right, protected by Articles 24 and 113 of the Constitution and to be counted among the inviolable rights, stemming from Article 2 of the Constitution [...] and characterising a democratic state under the rule of law" (Judgment No. 26 of 1999; in the same vein, Judgments Nos. 238 of 2014 and 120 of 2014 as well as Order No. 386 of 2004). It is recognised for all by Article 24(1) of the Constitution and all are entitled to avail of it, as is precisely the case for the rights falling within the scope of Article 2 of the Constitution, referred to human beings in crystal clear terms.

8.2.– On the other hand, the inviolable nature of the right of access to effective protection, within the meaning of Article 24(3) of the Constitution, does not exempt it from the balancing of interests which, as a result of the scarcity of resources, is necessary in relation to the multiplicity of rights seeking the same protection.

This Court "has emphasised that, on the subject of legal aid, it is crucial to strike a balance between guaranteeing the right of defence for the indigent and the need to contain public expenditure on justice (Judgment No. 16 of 2018)" (Judgment No. 47 of 2020).

From this "perspective it is explained", continues Judgment No. 47 of 2020, "that for all proceedings other than criminal ones (civil, administrative, accounting, tax and voluntary jurisdiction), the granting of the aid requires [...] that the grounds for bringing or defending an action 'not be manifestly unfounded'", in order to avoid a situation whereby the poor are induced "to bring clearly unfounded cases without having to take into account their economic weight". Otherwise, "[i]t seems justified [that, in the case of criminal proceedings, in which the action is brought against a person seeking legal aid], [...] greater protection be ensured by removing, as a condition of receiving the aid, any

filter to the effect that the grounds pleaded by the person concerned not be manifestly unfounded" (Judgment No. 47 of 2020).

It is evident that it may not be unreasonable to vary certain rules depending on the proceedings that the application for access to legal aid at the expense of the State concerns (see, in a similar vein, also Orders Nos. 270 of 2012, 201 of 2006 and 350 of 2005, with reference to the payment of fees and expenses to defence counsel under Article 130 of the "Consolidated law on court costs", and Judgment No. 237 of 2015, with reference to quantification of income limits under Article 92 of the "Consolidated law on court costs"). It is not an allegedly different axiological rank of the right to judicial protection associated with the different proceedings that is taken into consideration but rather the characteristics of the latter that may condition the balancing of interests with respect to specific provisions.

"It goes without saying", this Court has also noted, "that [the] diversity between 'civil interests' and the 'protected situations arising from the exercise of criminal proceedings' does not imply the determination of an improbable hierarchy of values between them, but only the affirmation of their undoubted distinction, such as to rule out a valid comparability between institutions that concern both the one and the other (in particular, Orders Nos. 270 of 2012, 201 of 2006 and 350 of 2005)" (Judgment No. 237 of 2015).

8.3.– Having said this, Article 119 of the "Consolidated law on court costs" provides, with reference to legal aid in civil, administrative, accounting and tax proceedings, that "foreigners legally residing in the national territory at the time of the arising of the relationship or the occurrence of the event that is the subject of the proceedings to be instituted" are to be afforded the same aid as Italian citizens.

However, Article 79(2) of the "Consolidated law on court costs" provides, solely as regards non-EU citizens, that "income earned abroad [must be certified by] the competent consular authority, which certifies the truthfulness of the information provided", without contemplating any remedy for the possible uncooperative conduct of that authority and, therefore, for the impossibility of producing the relevant certification.

By contrast, as regards criminal proceedings, Article 94(2) of the "Consolidated law on court costs" provides that "in the event of impossibility to produce the documentation required under Article 79(2), the citizen of States not belonging to the European Union shall replace it, on pain of inadmissibility, by a declaration in lieu of certification".

8.4.– First of all, it should be noted that the challenged provision reveals significant distortions, given that, using the mere criterion of citizenship, it requires, according to its wording, certification by the competent consular authorities for income earned abroad only by non-EU citizens and not also by Italian or EU citizens who may have earned income in non-EU countries. At the same time, the provision in question seems to require that non-EU citizens obtain consular certification for any income earned abroad, including income earned in EU countries.

Above all, even leaving aside these anomalies, it is impossible to ignore the manifest unreasonableness arising from the lack of provision in the challenged norm for a mechanism for civil, administrative, accounting and tax proceedings allowing one to counter a lack of cooperation on the part of consular authorities. On the contrary, such a mechanism is provided for in the same piece of legislation for criminal proceedings (see Article 94(2)). Such a mechanism would balance the need to request a more rigorous verification of income produced in countries outside the EU, for which it is more complex

to ascertain the truthfulness of the declarations made by the applicant, with the need not to burden the applicant with the risk of not being able to obtain the specific certification requested.

8.5.– The distinction between criminal proceedings and other proceedings (civil, administrative, accounting and tax) may therefore justify – as illustrated above – that certain differentiations in the rules governing legal aid are considered not unreasonable, if related to the different characteristics and implications of the various proceedings. However, this dichotomy can in no way justify, with regard to the constitutional provisions cited, the failure to provide for a corrective measure in the challenged provision to overcome the obstacle created by acts of omissions or generally uncooperative conduct on the part of consular authorities.

8.5.1.– At odds with reasonableness and the principle of self-responsibility, the challenged provision undermines the possibility of effective access to judicial protection, making non-EU citizens run the risk of being unable to produce the only documentation considered necessary, under penalty of inadmissibility, to prove income earned abroad.

More precisely, according to established case law, the challenged provision implies a presumption that the foreigner has income abroad (see Regional Administrative Court of Campania, Naples Division, Judgments Nos. 2913 of 3 May 2021, 2887 of 30 April 2021 and 2777 of 28 April 2021; Regional Administrative Court of Lazio, Rome Division, Judgment No. 298 of 13 January 2002 and Orders Nos. 10237 of 22 October 2018 and 8135 of 19 July 2018; Regional Administrative Court of Tuscany, Judgment No. 1350 of 11 October 2019; Supreme Court of Cassation, Second Civil Division, Judgment No. 16424 of 30 July 2020; with the sole exception of the Supreme Court of Cassation, Fourth Criminal Division, Judgment No. 6529 of 9 February 2018). This presumption implies a heavy burden, especially when having to prove a negative, in case there is no income at all. This is far from a rare case: in fact, people often emigrate exactly because of their state of indigence. In addition, the challenged provision allows the presumption to be rebutted only by means of the documentary forms provided for therein, namely certification by the competent consular authorities, regardless of the possible existence of other evidence of the actual amount of one's income abroad. But above all, and this is the aspect that most clearly discloses a constitutional infringement, the challenged provision places on the applicant the risk of the third party (i.e. the consular authority) where the possible inertia of the consular authority or its inadequate cooperation makes it impossible to produce the correct certification requested in a timely manner.

This Court, on the other hand, has also recently reiterated, with regard to the documentation required to avail of public housing benefits, that the applicant cannot "be made to bear the consequences of the delay or difficulty in acquiring the documentation in question, which would make it unconstitutional as unreasonably discriminatory" (Judgment No. 9 of 2021).

The same principles have also been affirmed in the matter of service of process. In that case, the Court has held that "it is manifestly unreasonable, as well as prejudicial to the right of defence of the party serving process, that a time bar may arise [...] from the delay in the performance of an activity not attributable to the said party but to other parties [...] and which, therefore, remains entirely beyond the former's control" (Judgment No. 447 of 2002, extending to all service of process the rules already envisaged by Judgment No. 69 of 1994 for service abroad. The general principle was later endorsed in Judgments Nos. 3 of 2010, 318 of 2009 and 28 of 2004 as well as in Orders Nos. 154 of 2005, 118 of 2005, 132 of 2004 and 97 of 2004).

Ultimately, the challenged provision is contrary to Articles 3, 24 and 113 of the Constitution, insofar it places on the applicant the risk of being unable to produce the specific documentary evidence required in order to obtain legal aid at the State's expense. It prevents – for those who do not have means – effective access to justice, with the consequent sacrifice of the intangible core of the right to judicial protection.

8.5.2.– In view of the above, the referring court's request for an additive ruling should be granted. Such a ruling would avoid a conflict with the principle of self-responsibility through adding a provision of a type that is already reflected in the rules laid down by Article 94(2) of the "Consolidated law on court costs", for criminal proceedings, as well as by Article 16 of Legislative Decree No. 25 of 2008, for court challenges to decisions on refugee status, which Article 94 refers to. The problem relating to the documentation of income produced in non-EU countries does not actually exhibit any reasonable correlation with the nature of the proceedings for which the legal aid is sought.

In line, therefore, with the aforementioned provisions, the constitutionality of the challenged provision can be restored, by including in the provision on the burden of proof the possibility for the applicant to produce, under penalty of inadmissibility, a "declaration in lieu of certification" concerning income produced abroad, once it has been demonstrated that it is impossible to present the required certification.

In this way, similarly to what is provided for in criminal proceedings and court challenges to refugee status decisions, the challenged provision can be brought into line with the general rules giving concrete effect to the principle of self-responsibility.

That principle, which implies as a corollary that of *ad impossibilia nemo tenetur*, not only eliminates the risk of the applicant having to bear the consequences of the impossibility to obtain consular documentation but also prevents a situation whereby the applicant is required to prove what is often impossible in absolute terms. In this respect impossibility takes on a relative meaning, which can be deduced having regard to the conduct that can be expected, i.e. conduct that can be demanded on the basis of the rule of fairness from one who has behaved diligently. From this perspective, relative impossibility begins (and is implicitly demonstrated) where the requisite diligent conduct (in good faith) ends (in similar terms Judgment No. of 9 of 2021).

Also in the interpretation of the challenged provision offered by the Supreme Court of Cassation, a non-EU citizen does not have to prove impossibility in absolute terms to be able to rely on self-certification. On the contrary, it is sufficient to prove relative impossibility, which can be presumed from the circumstance that "the applicant has acted in a suitable and timely manner in order to obtain the required certifications" (Supreme Court of Cassation, Fourth Criminal Division, Judgment No. 21999 of 26 May 2009). Proof of absolute impossibility is, in fact, considered "per se incompatible with a procedure aimed at ensuring the defence of the indigent" (Supreme Court of Cassation, Fifth Criminal Division, Judgment No. 8617 of 22 February 2018).

In the face, therefore, of the impossibility of complying with the obligation to produce the consular documentation, the chance to avail of a declaration in lieu of certification must be extended to also cover the applicant.

9.– In conclusion, Article 79(2) of the "Consolidated law on court costs" is unconstitutional insofar as it does not allow non-EU citizens to present, under penalty of inadmissibility, a declaration in lieu of certification on income earned abroad, if they demonstrate – in the terms described above, that is, by proving that they have done all that can be demanded of them according to fairness and diligence – that it is impossible

to produce the required documentation.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

declares that Article 79(2) of Decree of the President of the Republic No. 115 of 30 May 2002 embodying the "Consolidated law on legislative and regulatory provisions on court costs (Text A)" is unconstitutional insofar as it does not allow non-EU citizens, in the event of being unable to produce the documentation required under Article 79(2), to produce, on pain of inadmissibility, a declaration in lieu of such documentation.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 10 June 2021.

Signed by: Giancarlo CORAGGIO, President

Emanuela Navarretta, Author of the Judgment