BlogDUE

Family allowances only for long-term residents? CJEU and Italian Constitutional Court rule that childbirth and maternity allowances cannot depend on discriminative criteria of long-term residence

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SUMMARY: 1. Introduction. – 2. Direct application of Directive 2001/98. – 3. The Charter and the Constitution: double protection of the right to social benefits. – 4. The interpretation of the CJEU. – 5. Violation of the Constitution and the Charter: the assessment of the Constitutional Court. – 6. Conclusion: discrimination based on long-term residence status violates the Constitution and EU law.

1. In a saga concluded in January 2022, the Italian Constitutional Court was confronted with the crucial question if third-country nationals are discriminated against if their access to social benefits is based on the type of residence status they have. The Italian legislation was found to violate both the Italian Constitution and the Charter of Fundamental Rights of the EU (hereafter "the Charter"). The case is therefore of the highest interest in terms of both procedural and material law. This example of discrimination against third-country nationals on the basis of their residence status shows how fundamental rights protection works in the multi-level system of the EU.

In judgment No. 54/2022, the Italian Constitutional Court ruled that third-country nationals cannot be excluded from maternity and childbirth allowances solely because they do not have a long-term residence permit. The core question is which kind of residence permit gives access to the solidarity community of a Member State and thus entitles to social benefits.

Italian law excluded third-country nationals who did not have a long-term residence permit from two types of family benefits: childbirth allowance ("bonus bébé") and maternity allowance. Art. 1, c. 125° of Law No. 190/2014 linked the disbursement of childbirth allowance to a family income under a certain threshold. Art. 74 of the legislative decree No. 151 from 26 March 2001 restricted maternity allowance to similar criteria that will be outlined now. The beneficiaries of these allowances were Italian and EU citizens as well as third-country nationals with

EU long-term residence. The condition for a long-term residence status for third-country nationals, as stated in Art. 4 of EU Directive 2003/109, is having "legally and continuously" resided within a Members States' territory for five years. Further conditions are "stable and regular resources" sufficient to maintain the third-country nationals and their family members and" complying with integration conditions" (Art. 5 of the Directive).

The EU legal requirement is implemented in Italian law in Art. 9 of the Immigration Act. In this article, the above-mentioned conditions for integration are set out in detail: third-country nationals need an income higher than a certain threshold and housing that follows determined standards. Furthermore, to obtain a long-term residence permit, third-country nationals need to pass an Italian language test.

As the aim of both childbirth and maternity allowances is to provide social assistance to those in need, linking said allowances to a residence permit obtainable only with a minimum income amounted to a flagrant normative contradiction (see W. CHIAROMONTE, *Migrants' Access to Social Protection in Italy*, in J. M LAFLEUR, D. VINTILA (eds.), *Migration and Social Protection in Europe and Beyond*, Vol. 1, Cham, 2020, p. 241 ss.).

Numerous holders of a single work permit went to court because the INPS, the National Institute for Social Security, had excluded them from childbirth and maternity allowances. ASGI, the Italian association for legal studies of migration, has promoted cases for holders of single work permits in strategic litigation all over Italy. Eventually, the legal battle saw the Italian Supreme Court, the Italian Constitutional Court and the European Court of Justice who was asked for a preliminary ruling *ex* art. 267 TFEU, involved. The saga ended with a judgment of the Constitutional Court that declared the legislation on childbirth and maternity allowances unconstitutional as it violated the principle of equality (Art. 3 Constitution), the right to protection of the family and maternity (Art. 31 Constitution) and the right to social security and social assistance via Art. 117c(1) Constitution in combination with Art. 34 of the Charter. This case is not the first, and most likely not the last, in which social benefits become a crucial point of contestation.

2. With several Court orders in June 2019 (one can be accessed here), the Labour Section of the Supreme Court has brought several questions of constitutional legitimacy before the Constitutional Court. The Italian Supreme Court doubted the constitutionality of the two Italian norms regulating allowances for childbirth and maternity because they were granted to third-country nationals solely if they had a long-term residence permit and not a single work permit as defined in the Single Permit EU Directive 2011/98.

Several national judges had disapplied the norms that foresee childbirth and maternity benefits only for third-country nationals with a permanent residence

permit. The Court of Appeal in Brescia, for example, has confirmed the "discriminatory nature" of the refusal to grant childbirth allowance to a citizen with a residence permit for family reunification

Instead, the judge directly applied Art. 12 of Directive 2011/98. According to this article, third-country workers with residence permits referred to in Art. 3 "shall enjoy equal treatment with nationals of the Member State where they reside with regard to branches of social security as defined in Regulation 883/2004 on the coordination of social security systems". Art 3 of the Directive indicates two types of residence status: third-country nationals who apply to reside in a Member State to work, to whom the single application procedure is applicable, and third-country nationals who have already been admitted to a Member State for the purpose of work or purposes other than work and who are allowed to work; family members of migrant workers, students and scientific researchers fall under this second category. Accordingly, third-country nationals that hold one of these two residence statuses have a right to equal treatment when it comes to social benefits within the scope of Regulation 883/2004.

As Art. 12 of the Directive is sufficiently clear and unconditional and hence directly applicable. As a consequence, in such cases the national judge must apply the EU norm directly, disregarding the conflicting Italian norm.

Several judges acted like the judge in Brescia and directly applied Art. 12 of the Directive. The INPS appealed the decisions of several ordinary judges to disapply the Italian norm, and the cases landed before the Supreme Court, which then referred to the Constitutional Court that was asked to carry out an indirect review of the two norms on childbirth and maternity allowance.

The Supreme Court asked the Constitutional Court if these two norms violated the principle of equality enshrined in Art. 3 and Art. 31 of the Italian Constitution ("the right to assistance in the formation of the family and the fulfilment of its duties"). Furthermore, the Supreme Court suspected the legislation to violate Art. 117(1) of the Constitution according to which EU law becomes part of the Italian legal order and that acts as an interposed norm between the EU Law and the conflicting national law. The Supreme Court linked this article to several norms of the Charter: Articles 20 (equality before the law), 21 (non-discrimination), 24 (rights of the child), 33 (family and professional life) and 34 (social security and social assistance) of the Charter.

3. National norms that potentially violate both EU law and the Italian Constitution put the judge in a dilemma whether to turn to the CJEU or the Constitutional Court. Since the *Granital* decision of the Constitutional Court (judgment No. 170/1984), national judges need to refer a question first to the CJEU since the supremacy of EU law obliges them to do so (see A. COSENTINO, *Doppia pregiudizialità, ordine delle questioni, disordine delle idee*, in *Questione giustizia,* 2020).

The same question arose again with the proclamation of the Charter in 2000. Member States are bound to respect the Charter "when they are implementing Union law" (Art. 51(1) of the Charter). Hence, when national law is doubted to be violating both Constitutional law and the Charter and possibly fundamental rights protected through both national and EU law, it is again questionable which Court should be asked first to examine the issue (see F. SPITALERI, *Doppia pregiudizialità e concorso di rimedi per la tutela dei diritti fondamentali*, in *Il diritto dell'Unione europea*, 2019, p. 729 ss.).

In judgment No. 269/2017, the Italian Constitutional Court expressed a now-famous *obiter dictum* concerning this dilemma: "Where a law is the subject of doubts as to its illegality both in relation to the rights protected by the Italian Constitution and those guaranteed by the Charter of Fundamental Rights of the European Union in the context of EU law, the question of constitutionality must be raised" (§ 5.2. of the Consideration in law).

This has been described as a reversal of the previous solution in the case of "double prejudice". The Court justified it with the importance of the *erga omnes* effect of its intervention. When there was disapplication by the ordinary judge, even if justified from an EU law point of view, there would be the risk of a diffuse constitutionality control. In subsequent decisions, the Constitutional court has again softened its position leaving the ordinary judge in uncertainty about which procedure to follow when there might be double prejudice (see F. FERRARO, *Giudice nazionale, centro di gravità e doppia pregiudiziale*, in *I Post di AISDUE*, II, 2020). With order No. 117/2019, the Constitutional Court clarified that in such cases as discussed here, the Constitutional Court "may assess whether the provision censured infringes the guarantees simultaneously recognised by the Constitution and the Charter, activating the preliminary reference to the Court of Justice whenever necessary to clarify the meaning and effects of the European rules; and may, at the outcome of that assessment, declare that provision to be unconstitutional, removing it from the national legal system with *erga omnes* effect" (2. Considerations in law). Nevertheless, the Constitutional Court underlined that ordinary judges shall refer to the CJEU any interpretative question and disapply any national provision contrary to the rights laid down in the Charter.

The Court sees the fact that both the Constitution and the Charter potentially protect the same fundamental rights as an enrichment where the loyal cooperation and the dialogue between Constitutional Courts and the CJEU assure systemic protection of rights.

As the subsequent case law shows, the principle of sincere cooperation is followed by the Italian Constitutional Court by referring prejudicial question to the CJEU where a double violation of the Constitution and the Charter is under consideration (for a comprehensive overview see R. NEVOLA, *L'applicazione della Carta dei diritti fondamentali dell'Unione europea nella giurisprudenza della Corte costituzionale*, Corte Costituzionale Servizio Studi, 2021).

In this spirit, the Constitutional Court referred the question of the compatibility of maternity and childbirth allowances with the Charter to the CJEU (order No. 182/2020). In its order, the Constitutional Court clarified that once the CJEU has given its preliminary ruling, the Constitutional Court itself might assess that the provision is unconstitutional and hence remove it with *erga omnes* effect from the Italian legal order.

4. The Constitutional Court asked if Art. 34 of the Charter read in light of secondary law must be interpreted in a way to include childbirth and maternity allowance in its scope of application. Furthermore, the Court asked if EU law must be interpreted "as not permitting national legislation which does not extend to third-country nationals that hold a single permit the social benefits ex Directive 2011/98/EU granted to third-country nationals holding a long-term EU residence permit".

In its judgment of Case C-350/20, the CJEU held that the question was admissible.

The CJEU started its assessment by declaring that "under Art. 34(2) of the Charter, everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with EU law and national laws and practices". Directive 2011/98 provides for third-country nationals enjoying equal treatment as nationals of the Member State where they reside regarding social security as defined in Regulation 883/2004. By referring to the Regulation, the Directive "gives specific expression to the entitlement to social security benefits provided for in Art. 34 of the Charter" (para 46 of the ruling).

In para 50 the CJEU hints that the question of the Italian Constitutional Court requires interpretation of the right to equal treatment guaranteed by Art. 12(1)(e) of Directive 2011/98. Depending on the interpretation, it will be possible to assess if the Italian legislation on childbirth and maternity allowances violates EU law because it excludes third-country nationals that have a resident status allowing them to work but not a long-term residence status.

This question can only be answered if childbirth and maternity allowances constitute benefits as part of social security set out in Art. 3(1) of Regulation 883/2004. According to this article, family benefits "means all benefits in kind or cash intended to meet family expenses". The regulation has an annexe excluding from its scope certain types of maintenance payments, special childbirth and adoption allowances, set out by the Member States. Italy has not made use of this possibility, and hence these allowances in Italian law cannot be excluded from the concept of "family benefit" (paras 10 and 59).

The CJEU concludes that the two types of allowances "fall within the branches of social security in respect of which the third-country nationals referred to in Art. 3(1)(b) and(c) of Directive 2011/98 enjoy the right to equal treatment" (para 63). As the Italian legislation excluded third-country nationals with

residence permits other than a long-term permit, the right to equal treatment was breached. As a consequence, the Italian legislation is violating EU law.

With this answer to the preliminary ruling, the CJEU played the ball back to the Constitutional Court which now needed to apply the interpretation of the CJEU in its assessment of the concrete case. In its judgment from 11 January 2022, the Constitutional Court examined the questions of constitutionality referred by the Supreme Court in light of the judgment of the CJEU.

5. The Constitutional Court examined the Constitutional norms that the Supreme Court found to potentially be violated.

Art. 3c(2) of the Italian Constitution enshrines the principle of equality, both formal equality, stating that "all citizens have equal social dignity and are equal before the law (…)", and substantive obliging the state to "remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens." Since the judgment No. 120/1967, the Constitutional Court interprets the principle of equality as applying also to non-citizens (see: M. LOSANA, *«Stranieri» e principio costituzionale di uguaglianza,* in *Rivista Associazione Italiana dei Costituzionalisti*, No. 1, 2016).

The Court reiterates this established jurisprudence according to which differential treatment of non-citizens, especially regarding social rights, must be justified and reasonable in this judgment.

The legislator holds the discretion to identify the beneficiaries of social benefits considering the limits of available resources (13.1. Considerations in law). This limitation, though, must be reasonable, stresses the Court. It cites its former case law (judgment No. 222/2013) according to which the introduction of selective requirements is allowed but must have an adequate legal basis and be supported by a rational and transparent justification. The introduction of differentiated regimes is permitted only in the presence of a regulatory cause that is not manifestly irrational or arbitrary.

The Constitutional Court underlines (in 13.1. Considerations in law) that "the protection of the primary values of motherhood and childhood, which are inextricably linked (Art. 31 of the Constitution), do not tolerate arbitrary and unreasonable distinctions."

By providing childbirth and maternity allowances for third-country nationals solely with a long-term residence permit, several criteria are linked to the access to social benefits: stable residence in Italy for at least five years, an income higher than a certain threshold, adequate housing and knowledge of the Italian language.

According to the Constitutional Court, these criteria bear no relation to the state of need that the benefits in question are intended to address.

Thus, the Court declared the violation of Art. 3 and Art. 31 of the Constitution as well as the violation of Art. 117c(1) of the Constitution in combination with

Art. 34 of the Charter in light of the connected secondary law (Directive 98/2011 and Regulation 883/2004).

The other articles of the Charter whose violation the Supreme Court had suspected were not separately examined by the Constitutional Court as they were absorbed by the other considerations already carried out when assessing the violation of the Constitutional norms.

6. By now, both types of allowances have been substituted by the so-called single family allowance that will be paid to families in Italy starting from March 2022. Nevertheless, the decision of the Constitutional Court is highly important as it closes the door for the legislator to restrict family allowances if a third-country national has a type of residence permit other than long-term residence.

Art. 3 of the legislative decree n. 230/2021, which introduced the single family allowance, explicitly includes third-country nationals with an EU long-term residence permit and holders of a single work permit authorised to work for more than six months. The enjoyment of social benefits such as family allowances continues to be limited to those either employed in Italy and hence contributing to the tax revenue that finances these allowances or those who have a prolonged residence permit of two years in the new law.

Following the publication of the new law, the National Institute for Social Security INPS has circulated guidelines that extend the beneficiaries of the unique family allowance to non-EU family members of EU citizens, holders of permits for family reunification, holders of permits for self-employment and several other categories in order to respect the provisions of Directive 98/2011.

Access to social benefits based on the type of residence permit links to the crucial question of who is perceived as being part of the community and who gets the right to be part of the welfare system. There are two ways of determining the members of a welfare system: either through the "personality principle", e.g. citizenship, or through the "territoriality principle", thus residence (see T. KINGREEN, *Soziale Rechte und Migration*, Baden-Baden, 2010, p. 12).

If the entitlement to social benefits depends on the residence status, the question arises as to what length of time is appropriate in order to justify this entitlement. It is an ongoing struggle for third-country nationals not to be discriminated against based on their residence status. The Italian Constitutional Court has already dealt with this issue on several occasions (see S. SCIARRA, *Migranti' e 'persone' al centro di alcune pronunce della Corte Costituzionale sull'accesso a prestazioni sociali*, Consiglio di Stato, 26 maggio 2017).

It is significant that the Constitutional Court stresses that "arbitrary discrimination" is forbidden, with the implicit hint that some forms of discrimination are allowed. Differential treatment is widely accepted when it comes to social benefits. These differences reflect the idea that non-citizens can get welfare in proportion to their possibility to contribute to the host society (see

D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law*, IV ed., Cambridge, 2019, p. 554). According to the Constitutional Court, it is up to the "discretion of the legislator to identify the beneficiaries of social benefits, taking into account the limit of available resources" (13.1 Considerations in law).

The question of who belongs to the welfare community is not only a matter for the Italian judiciary. The German Constitutional Court declared in a case in 2012 that the exclusion of non-EU citizens from the child-raising allowance under the Bavarian State Child-raising Allowance Law was unconstitutional.

EU law now provides more stringent requirements in Directive 2011/98 according to which also third-country nationals with a single work permit must be included as beneficiaries of some core social benefits. National legislation respecting these EU norms cannot discriminate against them because they do not have an EU long-term residence permit. Furthermore, also the Italian Constitution does not permit such discrimination regarding social benefits aimed at supporting families in need.

The legal proceedings reported here contribute to Charter-compliant access to social benefits also for third-country nationals that have lived in Italy for less than five years. Differential treatment can only be lawful if it is reasonable and justified. Excluding third-country nationals in need from allowances that have the scope to give social assistance is not reasonable and therefore discriminatory.