JUDGMENT NO. 54 YEAR 2022

In this case the Court considered a referral from the Supreme Court of Cassation questioning the constitutionality of the rule stipulating that the eligibility of third-country nationals for the childbirth allowance and the maternity allowance is conditional upon the holding of a long-term resident's EU residence permit, and not for instance on the holding of a residence and work permit for at least one year.

Since the challenge also revolved around the interpretation of number of provisions of EU law whose meaning was disputed, the Court decided to lodge a reference for a preliminary ruling to the Court of Justice of the European Union. The outcome of those proceedings was a ruling that the allowances in question fell within the scope of the EU notion of social security benefit and were thus subject to the principle of equal treatment as regards third-country nationals.

Resuming the proceedings before it, the Court held that there was no reasonable correlation between the prerequisite of a long-term residence permit and eligibility for benefits designed to safeguard maternity and infancy and address the state of need that arises after the birth or adoption of a child. It ruled that the challenged provisions infringed Articles 3, 31 and 117 of the Constitution because they established, solely for third-country nationals, a system that is irrationally more cumbersome, reaching beyond the albeit legitimate goal of granting welfare benefits only to those with a valid residence permit and who are just occasionally in the country, whilst denying adequate protection precisely to those who are in the greatest need.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(125) of Law No. 190 of 23 December 2014 laying down provisions for drawing up the annual and multiannual State budget (2015 Budget Law) and of Article 74 of Legislative Decree No. 151 of 26 March 2001 consolidating the provisions concerning the protection and support of maternity and paternity pursuant to Article 15 of Law No. 53 of 8 March 2000, initiated by the Supreme Court of Cassation, Labour Division, with the referral orders of 17 June 2019, registered as Nos. 175, 177 to 182 and 188 to 190 in the Register of Referral Orders 2019 and published in the Official Journal of the Republic, Nos. 44 and 45, first special series 2019.

Having regard to the entries of appearance filed by O. D., R. I. H. V., S. E. A., B. O., F. G., M. F. K. B., E. S., P. N. and the Italian National Social Welfare Institution [*Istituto nazionale della previdenza sociale*, INPS], and the intervention filed by the President of the Council of Ministers;

after hearing the Judge-Rapporteur Silvana Sciarra at the public hearing on 11 January 2022;

after hearing Counsel Alberto Guariso for O. D. and Others, Counsel Vittorio Angiolini for P. N., remotely in accordance with point 1) of the Decree of the President of the Court of 18 May 2021, Counsel Mauro Sferrazza for INPS and State Counsel Paolo Gentili for the President of the Council of Ministers;

after deliberation in chambers on 11 January 2022.

[omitted]

Conclusions on points of law

1.– By means of the referral orders registered as Nos. 175, 178, 180, 181, 182, 188, 189 and 190 in the Register of Referral Orders 2019, the Supreme Court of Cassation, Labour Division, has raised a question, with reference to Articles 3, 31 and 117(1) of the Constitution, in relation to Articles 20, 21, 24, 33 and 34 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, concerning the constitutionality of Article 1(125) of Law No. 190 of 23 December 2014 laying down provisions for drawing up the annual and multiannual State budget (2015 Budget Law), insofar as, for third-country nationals only, it makes the granting of the childbirth allowance conditional upon the holding of a long-term resident's EU residence permit.

1.1.– The referring court assumes that the childbirth allowance is a benefit intended to meet the "essential needs of the family unit" in less well-off conditions.

1.1.1.– It is claimed that the challenged provision conflicts, first of all, with Article 3 of the Constitution.

It is argued that the legislator identified the beneficiaries of the childbirth allowance on the basis of a criterion, the holding of a long-term resident's EU residence permit, that has "no relationship whatsoever" with the "immediate and non-deferrable" needs that the benefit is intended to satisfy. By requiring "prior residence of at least five years, income that is in any case at least equal to the figure paid as income support, a suitable home and knowledge of the Italian language", the challenged provision is alleged to exclude precisely "those in a situation of greatest need" and to nullify the very function of the benefit, which is not only an "incentive for increasing the birth rate" but "above all" economic support for less well-off families.

1.1.2.– The referring court also alleges a conflict with Article 31 of the Constitution.

It is argued that families residing in the national territory "in a manner that is not ephemeral or temporary" and living "in the same, if not worse, economic conditions" than families in which at least one of the parents holds long-term resident's EU residence permit would be affected. It is alleged that such a situation would have "disruptive effects on the social fabric of the nation in the original and essential core of the family".

1.1.3.– Finally, it is claimed that the selective requirement identified by the legislator constitutes discrimination on grounds of nationality and infringes the right to equal treatment which – in the field of social security and, in particular, of benefits intended to alleviate the costs of the maintenance of children – is due to third-country nationals, holders of a single permit within the meaning of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for issuing a single permit (reference is made to the case-law of the Court of Justice of the European Union and, in particular, the judgment of 21 June 2017 in Case C-449/16 *Kerly Del Rosario Martinez Silva*).

It is argued that Article 117(1) of the Constitution is thus infringed, in relation to Articles 20, 21, 24, 33 and 34 CFREU. The said CFREU provisions enshrine "the principle of equality and the prohibition of discrimination, including on grounds of nationality, recognise the right of children to 'such protection and care as is necessary for their well-being', ensure 'the family shall enjoy legal, economic and social protection'" and safeguard "the right to access social security benefits and social services that guarantee protection".

1.2.– The questions of constitutionality were raised in the proceedings brought by INPS seeking to overturn court of appeal judgments holding that a refusal to grant the childbirth allowance to those not holding a long-term resident's EU residence permit was discriminatory.

The referring court maintains that it is for this Court to review the "reasonableness of the legislative discretionary choice, which is the result of balancing opposing interests" and that a ruling with *erga omnes* effects is indispensable, to the effect that the holding of a residence card or permit valid for at least one year is the only "justified and reasonable selective criterion".

The Supreme Court of Cassation points out that it is permissible to raise questions of constitutionality centred both on the violation of domestic provisions and on conflict with the corresponding CFREU provisions.

[omitted]

1.4.– Therefore, the referring court requests this Court to declare that Article 1(125) of Law No. 190 of 2014 is unconstitutional "insofar as, in order to receive the childbirth allowance, it requires only non-EU nationals" to hold a long-term resident's EU residence permit "instead of holding a residence and work permit for at least one year in application of Article 41" of Legislative Decree No. 286 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals.

2.– By means of the referral orders registered as Nos. 177 and 179 in the Register of Referral Orders 2019, the Supreme Court of Cassation, Labour Division, has raised a question, with reference to Articles 3, 31 and 117(1) of the Constitution, in relation to Articles 20, 21, 24, 33 and 34 CFREU, concerning the constitutionality of Article 74 of Legislative Decree No. 151 of 26 March 2001 consolidating the provisions concerning the protection and support of maternity and paternity pursuant to Article 15 of Law No. 53 of 8 March 2000.

2.1.– The referring court includes the maternity allowance among the measures aimed at "meeting essential needs related to the birth or adoption of a child, in a context of low income" and "lack of other maternity related benefits".

2.1.1.– It is argued that the challenged provision leads to "an unjustified and unreasonable difference in treatment between Italian nationals and foreigners legally residing in Italy", contrary to Article 3 of the Constitution. Solely for third-country nationals does the law require a long-term resident's EU residence permit in order to receive the maternity allowance, which is a criterion not only lacking any reasonable correlation with the state of necessity but also one that leads to discrimination against "those in a situation of greatest need".

The referring court rules out that the requirement of long-term residence is related to the purpose of a measure aimed at satisfying "immediate and non-deferrable needs", "primary needs linked to the birth or adoption of a child".

2.1.2.– The Supreme Court of Cassation also alleges a conflict with Article 31 of the Constitution.

It argues that the decision to make the payment of the maternity allowance conditional on the holding of the permit referred to in Article 9 of Legislative Decree No. 286 of 1998 thwarts "effectively and irremediably the realisation of the constitutional guarantee for those children and families in which no parent holds a long-term residence permit, even though those same families reside within the national territory in a manner that is not ephemeral or temporary and live in the same, if not worse, economic

conditions".

2.1.3.– Finally, the referring court argues that there is a violation of Article 117(1) of the Constitution, in relation to Articles 20, 21, 24, 33 and 34 CFREU. The principle of equality, the prohibition on discrimination, the right of children to avail of the care necessary for their well-being, the legal, economic and social protection of the family and the right to access social security benefits are all alleged to be infringed.

[omitted]

2.4.– Therefore, the referring court requests this Court to declare that Article 74 of Legislative Decree No. 151 of 2001 is unconstitutional insofar as it makes the payment of the maternity allowance subject to the requirement of holding a long-term resident's EU residence permit rather than "holding a residence and work permit for at least one year".

3.– By Order No. 182 of 2020 this Court joined the proceedings, on the grounds that it was appropriate to deal with the questions raised by the referring courts as a whole (points 1 and 2 of the *Conclusions on points of law*), and sought a preliminary ruling from the Court of Justice of the European Union as to whether the childbirth allowance and the maternity allowance fell within the scope of the protection enshrined in Article 34 CFREU and the related principle of equal treatment in the field of social security.

4.– The Court of Justice of the European Union, Grand Chamber (judgment of 2 September 2021, in Case C-350/2021, *O. D. and Others*), gave an affirmative answer to the questions referred for a preliminary ruling by this Court and recognised that both benefits fall within the scope of the right to equal treatment, on the basis of Article 12 of Directive 2011/98/EU, which gives concrete form to Article 34 CFREU specifically cited by the referring court.

In the present proceedings this Court is called upon to draw the necessary conclusions from the answers given in the wake of the reference for a preliminary ruling and to examine, including from that wider perspective, whether the balance struck by the legislator is consistent with the Constitution.

5.– First of all, the development of the legal framework must be examined in order to assess its impact on the questions submitted for scrutiny to this Court.

After lodging the reference for a preliminary ruling to the Court of Justice of the European Union, the challenged legislation was substantially amended in two respects: firstly, the rules on child benefits and, secondly, the rules on foreigners' access to social assistance.

5.1.– Regarding the first aspect, it should be noted that under Law No. 46 of 1 April 2021 (Delegation of power to the Government to reorganise, simplify and strengthen measures in support of dependent children through a single and universal allowance), "[in order] to encourage the birth rate" the Government was delegated power to adopt "one or more legislative decrees aimed at reorganising, simplifying and strengthening, including progressively, the measures in support of dependent children through a single and universal allowance", based on a "universal principle" and adjusted – according to a criterion of progressiveness – in relation to the economic conditions of the family unit (Article 1).

Article 3(1)(a)(2) of Law No. 46 of 2021 provides for the abolition or phasing out of the childbirth allowance, which is under scrutiny today.

That delegation of power was implemented through Legislative Decree No. 230 of 29 December 2021 (Establishment of the single and universal allowance for dependent

children, implementing the delegation of power conferred on the Government pursuant to Law No. 46 of 1 April 2021). That piece of legislation, as of 1 March 2022, established "the single and universal allowance for dependent children, which constitutes an economic benefit granted, on a monthly basis, for the period between March of each year and February of the following year, to family units on the basis of the economic condition of the family unit" (Article 1).

5.1.1.– The new legislation dealing with a single and universal allowance, a benefit paid from 1 March 2022, does not affect these present proceedings, which concern situations that occurred under the previous rules and as such must be assessed in the light of those rules.

There is therefore no need for this Court to return the case to the referring court in order to allow it to renew its assessment as to relevance.

5.2.– For the same reasons, there is no such need also with regard to the amendments introduced by Article 3 of Law No. 238 of 23 December 2021 (Provisions for the fulfilment of obligations deriving from Italy's membership of the European Union - European Law 2019-2020), which redefined the conditions for third-country nationals' access to social security benefits in general terms and with specific regard to the childbirth allowance and the maternity allowance.

5.2.1.– In its original wording, also considered by the referring court, Article 41 of Legislative Decree No. 286 of 1998 equated "foreigners holding a residence card or residence permit of not less than one year as well as minors registered on their residence card or residence permit" with Italian nationals as regards access to social welfare benefits, including economic benefits.

By virtue of the amendments introduced by Article 3(1)(a) of Law No. 238 of 2021, the equivalence now concerns "foreigners holding a long-term resident's EU residence permit, the holders of a residence permit of not less than one year's duration other than those referred to in paragraphs 1-*bis* and 1-*ter* of this article and foreign minors holding one of the residence permits referred to in Article 31".

5.2.2.– As for the cited Article 41(1-*bis*) of Legislative Decree No. 286 of 1998, inserted by Article 3(1)(b) of Law No. 238 of 2021, it regulates the "enjoyment of the benefits constituting rights to which Regulation (EC) No 883/2004 of the European Parliament and Council of 29 April 2004 on the coordination of social security systems applies". In that context "foreigners holding a single work permit and the holders of a residence permit for study purposes, who carry out a work activity or who have carried it out for a period of not less than six months and have declared their immediate availability to carry it out pursuant to Article 19 of Legislative Decree No. 150 of 14 September 2015 as well as foreigners holding a residence permit for research purposes" are equated with Italian nationals.

5.2.3.– As for Article 41(1-*ter*) of Legislative Decree No. 286 of 1998, inserted by the previously mentioned Article 3(1)(b) of Law No. 238 of 2021, it derogates from the general provision of the previous paragraph with specific reference to the "family benefits referred to in Article 3(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004".

As regards those benefits, only "foreigners holding a single work permit who are authorised to work for a period of more than six months as well as foreigners holding a residence permit for research purposes who are authorised to stay in Italy for a period of more than six months" are equated with Italian nationals.

5.2.4.– Article 3(3)(a) of Law No. 238 of 2021 amends the provisions on the maternity allowance, which is now granted "to resident women who are Italian or EU nationals or family members who hold a residence card pursuant to Articles 10 and 17 of Legislative Decree No. 30 of 6 February 2007 or who hold a residence permit and equated with Italian nationals pursuant to Article 41(1-*ter*) of Legislative Decree No. 286 of 1998, or holders of a long-term resident's EU residence permit".

The maternity allowance is thus no longer granted solely to mothers holding a long-term resident's EU residence permit, in accordance with the limitation complained of in these present proceedings, but also to mothers holding a single work permit authorised to work for a period of more than six months and to mothers holding a residence permit for research purposes authorised to stay in Italy for a period of more than six months.

5.2.5.– The same broadening of eligibility requirements also applies to the childbirth allowance, further to the changes introduced by Article 3(4) of Law No. 238 of 2021.

5.3.– Applications for the childbirth allowance and the maternity allowance must be assessed in the light of the rules in force at the time they were submitted. Therefore, of no relevance is the new legislation, which, according to general principles (Article 11 of the Preliminary Provisions of the Civil Code), only provides for the future in the absence of unequivocal indications to the contrary.

[omitted]

8.– In order to address the doubts of constitutionality, it is helpful to begin by outlining the salient features of the childbirth allowance and the maternity allowance.

8.1.– Introduced with the aim of "encouraging the birth rate and contributing to the costs of supporting it", the childbirth allowance was initially granted "for each child born or adopted between 1 January 2015 and 31 December 2017" to parents belonging to a family unit whose "economic condition measured in terms of an equivalent economic situation indicator (ISEE) score [...] does not exceed €25,000 per year" (Article 1(125) of Law No. 190 of 2014).

The amount, paid monthly from the month of birth or adoption "until the child reaches the age of three or for a period of three years after the child becomes part of the family unit following adoption", is € 960 per year, doubled when the family unit of the parent requesting it is in an economic condition corresponding to an ISEE [i.e. means-tested] score not exceeding € 7,000 per year.

INPS monitors the costs resulting from the implementation of the provisions of Law No. 190 of 2014 (Article 1(127) thereof). If there are or are about to be deviations from the expenditure forecast, a decree of the Minister of Economy and Finance, in conjunction with the Minister of Labour and Social Policy and the Minister of Health, will have to redetermine the annual amount of the allowance and the ISEE scores triggering eligibility for the benefit (Article 1(127) of Law No. 190 of 2014).

8.1.1.– Article 1 (248) of Law No. 205 of 27 December 2017 on the estimated State budget for the financial year 2018 and the multiannual budget for the three-year period 2018-2020 also granted the benefit to "each child born or adopted between 1 January 2018 and 31 December 2018", although limiting its disbursement, initially for a three-year period, until the child reaches the age of one or for a period of one year after the child becomes part of the family unit following adoption.

8.1.2.– The childbirth allowance was then granted – again until the child reaches the age of one or for a period of one year after the child becomes part of the family unit

following adoption – to "each child born or adopted between 1 January 2019 and 31 December 2019" (Article 23-*quater*(1) of Decree-Law No. 119 of 23 October 2018 laying down urgent provisions on tax and financial matters, converted, with amendments, into Law No. 136 of 17 December 2018). The amount of the allowance is to be increased by twenty percent for each child subsequent to the first child born or adopted between 1 January 2019 and 31 December 2019.

8.1.3.– The childbirth allowance was subsequently granted for the benefit of "each child born or adopted between 1 January 2020 and 31 December 2020", again until the child reaches the age of one or for a period of one year after the child becomes part of the family unit following adoption (Article 1(340) of Law No. 160 of 27 December 2019 on the estimated State budget for the financial year 2020 and the multiannual budget for the three-year period 2020-2022).

The benefit, inspired by a universalistic principle, corresponds to an amount adjusted in proportion to the family's income and increased, according to a provision already introduced by Decree-Law No. 119 of 2018, for each child after the first.

8.1.4.– Finally, the rules laid down in Law No. 160 of 2019 were extended to "any child born or adopted between 1 January 2021 and 31 December 2021" (Article 1(362) of Law No. 178 of 30 December 2020 on the estimated State budget for the financial year 2021 and the multiannual budget for the three-year period 2021-2023).

8.1.5.– The referring court's objections concern the holding of the long-term resident's EU residence permit, issued to a foreigner who proves that he "has held a valid residence permit for at least five years and has an income not lower than the annual figure paid as income support and, for applications relating to family members, income that is sufficient according to the parameters laid down by Article 29(3)(b) and suitable housing" (Article 9(1) of Legislative Decree No. 286 of 1998). Applicants are also required to pass a test establishing their knowledge of the Italian language (Article 9(2-*bis*) of Legislative Decree No. 286 of 1998).

8.2.– The holding of a long-term resident's EU residence permit is also a condition for entitlement to the maternity allowance, as per the wording of Article 74 of Legislative Decree No. 151 of 2001 applicable *ratione temporis* to the case at issue.

The maternity allowance is granted to women who do not receive the maternity benefit provided for female employees in the public/private sector or for female members of cooperatives (Article 22 of Legislative Decree No. 151 of 2001), for self-employed women or female farmers (Article 66 of Legislative Decree No. 151 of 2001) and for female free professionals (Article 70 of Legislative Decree No. 151 of 2001).

This allowance, which is linked to the income of the woman's family unit (Article 74(4) of Legislative Decree No. 151 of 2001), is granted by the municipalities and disbursed by INPS (Article 74 (8) of Legislative Decree No. 151 of 2001).

9.– The questions raised concern as well the issue of equal treatment for third-country nationals, as defined by Directive 2011/98/EU, which is in turn closely linked to Article 34 CFREU.

As for those issues relevant to the ruling on the raised questions of constitutionality, this Court referred the matter to the Court of Justice of the European Union, in a spirit of loyal cooperation aimed at safeguarding "effective judicial protection in areas governed by European Union law" (Article 19 of the Treaty on European Union, as consolidated by the Treaty of Lisbon, which was signed on 13 December 2007 entered into force on 1 December 2009).

In interpreting the effectiveness of judicial protection in a spirit of cooperation, the Court of Luxembourg has pointed out that questions relating to the interpretation of European Union law "enjoy a presumption of relevance" (Case C-350/20, *O. D. and Others*, judgment of 2 September 2021, *cit.*, paragraph 39). This presumption is even stronger when "the referring court itself is not the court called upon to rule directly in the disputes in the main proceedings, but rather a constitutional court to which a question of pure law has been referred".

Hence, this Court, in addressing the questions raised, dealing with both the rules of national law and the rules of EU law (in this present case associated with the provisions of the CFREU), must then "provide not only to its own referring court but also to all the Italian courts a decision having erga omnes effect, which those courts must apply in any relevant dispute upon which they may be called to adjudicate" (paragraph 40).

9.1.– In the overall consideration of the legal framework, the above-mentioned Directive 2011/98/EU plays a crucial role. Its aim is to "ensure fair treatment of third-country nationals who are legally residing in the territory of the Member States", with a view to "a more vigorous integration policy" (recital 2), and to "narrowing the rights gap between citizens of the Union and third-country nationals legally working in a Member State" (recital 19).

The Directive grants "a set of rights" to third-country nationals who already "contribute to the Union economy through their work and tax payments" (recital 19) and requires Member States to safeguard them when organising their social security schemes (recital 26) in the manner they deem most appropriate (CJEU judgment of 25 November 2020 in Case C-302/19, paragraph 23).

9.2.– And it is consistent with those aims that one must interpret the requirements set out in Article 12 of the Directive for "third-country nationals who have been admitted to a Member State for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002" (Article 3(1)(b)) and for "third-country nationals who have been admitted to a Member State for the purpose of work in accordance with Union or national law" (Article 3(1)(c)).

Article 12(1)(e) of the Directive provides that such workers "shall enjoy equal treatment with nationals of the Member State where they reside" with regard to the "branches of social security, as defined in Regulation (EC) No 883/2004".

Equal treatment is therefore not limited to holders of a single work permit but is also afforded to holders of a residence permit for purposes other than work who are authorised to work in the host Member State (CJEU, Grand Chamber, judgment of 2 September 2021, in Case C-350/20, paragraph 49).

The right to equal treatment is recognised in the areas covered by Regulation (EC) No 883/2004. That source applies – insofar as it is relevant here – to "maternity and equivalent paternity benefits" (Article 3(1)(b)) and to "family benefits" (Article 3(1)(j)), which Article 1(z) defines as "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I".

9.3.– Against this background, the Court of Justice examined the childbirth allowance and the maternity allowance in order to ascertain whether they fall within the scope of Regulation (EC) No 883/2004 and the right to equal treatment.

9.3.1.– With reference to the childbirth allowance, it noted, firstly, that it is a social

security benefit. It is granted on the basis of objective criteria relating to the income and composition of the family unit without any individual and discretionary assessment of the personal needs of the recipients (judgment of 2 September 2021 in Case C-350/20, paragraphs 54, 55 and 56).

The childbirth allowance must also be classified as a family benefit, in the terms outlined in Regulation (EC) No 883/2004. Despite the different configurations it has taken over the years, the benefit is a public contribution to the family budget, designed to alleviate the burden involved in the maintenance of new-born or adopted children (paragraphs 57 and 58), and does not fall within the strict exclusions mentioned in Part II of Annex I to Regulation (EC) No 883/2004, concerning special childbirth and adoption allowances (paragraph 59).

Nor are these characteristics contradicted by the fact that the allowance also serves as a premium intended to encourage the birth rate (paragraph 60).

9.3.2.– The maternity allowance, granted to mothers who meet certain criteria defined by law, irrespective of any individual and discretionary assessment of the needs of the person concerned, is also a social security benefit and falls within the branches of social security and, in particular, maternity benefits under Article 3(1)(b) of Regulation (EC) No 883/2004.

9.4.– Article 12(2)(b) of Directive 2011/98/EU allows Member States to restrict equal treatment in the social security field, except "for third-country workers who are in employment or who have been employed for a minimum period of six months and who are registered as unemployed".

With regard to family benefits, Member States may deny equal treatment to "third-country nationals who have been authorised to work in the territory of a Member State for a period not exceeding six months, to third-country nationals who have been admitted for the purpose of study, or to third-country nationals who are allowed to work on the basis of a visa".

9.4.1.– In the system set out in Directive 2011/98/EU the right to equal treatment is the general rule, from which Member States may derogate only within strict limits. The restrictive interpretation of possible derogations is counterbalanced by the need for Member States to unequivocally demonstrate their intention to limit the application of equal treatment (CJEU judgments of 25 November 2020, in case C-302/19, *Istituto nazionale della previdenza sociale*, paragraph 27, and 21 June 2017, in case C-449/16, *Kerly Del Rosario Martinez Silva*, paragraph 29).

The burden of expressly stating any exceptions during the transposition process is clear from the regulatory framework, considered as a whole and in terms of the aims that inform it. It is related not only to safeguarding the effectiveness of the Directive but also to ensuring a fruitful and transparent transposition phase, which the EU legislator wishes to be characterised by the commitment of the Member States to constant dialogue with the Commission and "notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments" (recital 32 of Directive 2011/98/EU).

The Court of Justice of the European Union, in its above mentioned judgment of 2 September 2021, recalled that the Italian Republic had not availed itself in any way of the option of restricting equal treatment (paragraph 64).

10.– This is the legal framework at national and EU level within which the referring

court's questions are raised.

They must be scrutinised in the light of the "inseparable link between the constitutional principles and rights invoked by the Supreme Court of Cassation and those recognised by the Charter, as enriched by secondary law, which bodies of law complement each other and operate in harmony" (Order No. 182 of 2020, point 3.2. of the *Conclusions on points of law*).

Between the prohibition on arbitrary discrimination and the protection of motherhood and childhood (Articles 3 and 31 of the Constitution), on the one hand, and the binding requirements of European Union law on the equal treatment of third-country nationals, on the other hand, there is "a dynamic of mutual implication and fruitful supplementation" (Order No. 182 of 2020, point 3.2. of the *Conclusions on points of law*).

That relationship emerges clearly from the very provisions invoked by the referring court.

In recognising the right of access to social security benefits, Article 34 CFREU expressly refers to "national laws and practices". From this perspective, it cannot fail to take into account the guarantees enshrined in constitutions. On the other hand, European Union law offers a contribution to the "constant evolution of constitutional principles" stemming from Articles 3 and 31 of the Constitution that cannot be overlooked (Order No. 182 of 2020, again point 3.2. of the *Conclusions on points of law*). Such in order to revitalise – in changing and often unprecedented contexts – the principle of equality and the broader protection of motherhood and childhood.

In a legal framework characterised by multiple interacting sources, this Court is entrusted with the task of ensuring systemic and unfragmented protection for the rights protected by the Constitution, in synergy with the Nice Charter, and of assessing the balance struck by the legislator, with a view to ensuring the broadest scope of the rights.

11.– The questions raised by the Supreme Court of Cassation are well-founded, with reference to Articles 3, 31 and 117(1) of the Constitution, the latter in relation to Article 34 CFREU, as enshrined in EU secondary law.

12.– The Grand Chamber's judgment of 2 September 2021 found that national legislation granting the childbirth allowance and the maternity allowance solely to holders of a long-term resident's EU residence permit is not compatible with European Union law and, in particular, with the right to equal treatment laid down in Article 12(1)(e) of Directive 2011/98/EU. With regard to enjoyment of the above-mentioned benefits, EU law requires equal treatment to be afforded to third-country nationals who have been admitted to a Member State for the purposes of work in accordance with EU or national law and to third-country nationals who have been admitted to a Member State for purposes other than work in accordance with EU or national law, who are allowed to work and who hold a residence permit in accordance with Council Regulation (EC) No 1030/2002 of 13 December 2002 laying down a uniform format for residence permits for third-country nationals.

12.1.– The restriction of the benefits provided for by the challenged provisions is therefore contrary to Article 117(1) of the Constitution, in relation to EU secondary law and to Article 34 CFREU.

This latter provision, in enshrining the right to social and housing assistance, aims to "ensure a decent existence for all those who lack sufficient resources" (CJEU, Grand Chamber, judgment of 24 April 2012, in Case C-571/10, *Kamberaj*).

Pursuant to Article 34(1) CFREU, the Union recognises and respects the entitlement to

social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

Article 34(2) CFREU recognises the right of everyone residing and moving legally within the European Union to social security benefits and social advantages in accordance with Union law and national laws and practices.

The Court of Justice of the European Union has examined both the childbirth allowance and the maternity allowance as a whole in order to bring them both within the sphere of protection provided by Article 34 CFREU.

It has held that the right to equal treatment in the field of social security, the essentials of which are defined in Directive 2011/98/EU, "gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter" (CJEU, Grand Chamber, judgment of 2 September 2021, paragraph 46).

13.– The principle of equal treatment in the field of social security, in the terms outlined by the CFREU and secondary law and reiterated by the Court of Justice of the European Union, is linked to the principles enshrined in Articles 3 and 31 of the Constitution and enhances and illuminates their axiological content, with the aim of promoting the broader and more effective integration of third-country nationals.

13.1.– The protection of the primary values of motherhood and childhood, which are inextricably linked (Article 31 of the Constitution), cannot stand arbitrary and unreasonable distinctions.

This Court has consistently held that it is within the legislator's discretion to identify the recipients of social security benefits, taking into account the limit of available resources. However, that choice is subject to the principle of reasonableness. The introduction of selective requirements is thus possible, provided that they are underpinned by adequate legislative grounds and supported by a rational and transparent justification (Judgment No. 222 of 2013, point 7 of the *Conclusions on points of law*).

This justification must be investigated in the light of the characteristics of each single provision and the purposes that condition its recognition and delimit its rationale (Judgment No. 172 of 2013, point 3 of the *Conclusions on points of law*; recently, on the subject of public housing, Judgment No. 112 of 2021, point 6 of the *Conclusions on points of law*).

13.2.– The childbirth allowance and the maternity allowance are intended to meet a special need arising from the birth or adoption of a child.

The childbirth allowance, originally granted to the poorest families, is graduated and varies considerably in proportion to family income even in its universal format introduced by Law No. 160 of 2019 and confirmed by Law No. 178 of 2020.

The maternity allowance is a residual protection, which only operates in cases where the family unit is in a precarious economic situation and the mother cannot claim maternity benefit on the basis of a specific employment relationship.

Both allowances are intended to help remove economic and social obstacles which, by limiting freedom and equality of citizens, prevent the full development of the human person (Article 3(2) of the Constitution). In particular, the allowances represent the implementation of Article 31 of the Constitution, which commits the Republic to facilitating, through economic measures and other benefits, the creation of the family and the fulfilment of its duties, with special regard to large families, and to protecting mothers,

children and the young by adopting the necessary measures. The allowances in question ensure a core of guarantees and cannot be equated with the additional benefits that have occasionally – and with different prerequisites – been granted by regional laws, previously scrutinised by this Court (Judgment No. 141 of 2014).

It should also be noted that today's measures in support of the family unit and mothers, also covering the adoptive family, serve the primary purpose of protecting the child, alongside the protection of the mother, in harmony with the constitutional design that places both the mother and the child within a common horizon of special adequate protection (Judgment No. 205 of 2015, point 4 of the *Conclusions on points of law*).

13.3.– By making entitlement to the childbirth allowance and the maternity allowance conditional upon holding a residence permit valid for at least five years, income not lower than the annual figure paid as income support and the availability of suitable housing, the law has set requirements that have no connection with the state of need that the benefits in question are intended to address.

By introducing stringent income requirements for entitlement to support measures for the neediest families, the challenged provisions establish solely for third-country nationals, a system that is irrationally more cumbersome, reaching beyond the albeit legitimate goal of granting welfare benefits only to those who reside regularly and not just occasionally in the country.

Such a selective criterion denies adequate protection to those who are lawfully present in the national territory but do not meet the income requirements for the issue of a long-term resident's EU residence permit. Such a system undermines those workers who are in the greatest need.

[omitted]

13.5.– The above elements confirm that a criterion for entitlement based on holding a long-term resident's EU residence permit arbitrarily discriminates against both mothers and the new-born and bears no reasonable relation to the purpose of the benefits in question.

14.– In light of the foregoing it is necessary to declare that Article 1(125) of Law No. 190 of 2014 is unconstitutional as regards its wording prior to the amendments introduced by Article 3(4) of Law No. 238 of 2021 and likewise Article 74 of Legislative Decree No. 151 of 2001 as regards the version thereof prior to the entry into force of Article 3(3)(a) of Law No. 238 of 2021. Such to the extent that those provisions exclude from the granting – respectively – of the childbirth allowance and the maternity allowance third-country nationals who have been admitted to the State for the purpose of work in accordance with European Union or national law and third-country nationals who have been admitted for purposes other than work in accordance with European Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002.

15.– The other questions raised by the referring court, with reference to Article 117(1) of the Constitution, in relation to other provisions of the CFREU (Articles 20, 21, 24 and 33) are absorbed.

16.– This Court's scrutiny – as noted in Order No. 182 of 2020 – also concerns the extensions of the childbirth allowance, most recently until 31 December 2021.

In fact, even the supervening provisions, albeit with a different modulation of the benefit, make that allowance subject to holding a long-term resident's EU residence permit, which is at the origin of the criticisms voiced by the referring court.

In application of Article 27 of Law No. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), it is a necessary consequence to declare unconstitutional the provisions that have extended the childbirth allowance until 31 December 2021, making its payment conditional on the unlawful requirement of holding a long-term resident's EU residence permit.

That consequent declaration of unconstitutionality applies, in particular, to Article 1(248) of Law No. 205 of 2017, Article 23-*quater*(1) of Decree-Law No. 119 of 2018, as converted, Article 1(340) of Law No. 160 of 2019 and, finally, Article 1(362) of Law No. 178 of 2020 as regards the wording prior to the entry into force of Article 3(4) of Law No. 238 of 2021.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

1) *declares* that Article 1(125) of Law No. 190 of 23 December 2014 laying down provisions for drawing up the annual and multiannual State budget (2015 Budget Law), as regards its wording prior to the entry into force of Article 3(4) of Law No. 238 of 23 December 2021 (Provisions for the fulfilment of obligations deriving from Italy's membership of the European Union - European Law 2019-2020), is unconstitutional insofar as it excludes from the granting of the childbirth allowance third-country nationals who have been admitted to the State for the purpose of work in accordance with European Union or national law and third-country nationals who have been admitted for purposes other than work in accordance with European Union or national law, who are allowed to work and who hold a residence permit in accordance with Council Regulation (EC) No 1030/2002 of 13 December 2002 laying down a uniform format for residence permits for third-country nationals;

2) *declares* that Article 74 of Legislative Decree No. 151 of 26 March 2001 consolidating the provisions concerning the protection and support of maternity and paternity pursuant to Article 15 of Law No. 53 of 8 March 2000, as regards the version thereof prior to the entry into force of Article 3(3)(a) of Law No. 238 of 2021, is unconstitutional insofar as it excludes from the granting of the maternity allowance third-country nationals who have been admitted to the State for the purpose of work in accordance with European Union or national law and third-country nationals who have been admitted for purposes other than work in accordance with European Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002;

3) *declares*, pursuant to Article 27 of Law No. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), the consequent unconstitutionality of Article 1(248) of Law No. 205 of 27 December 2017 (Estimated State budget for the financial year 2018 and the multiannual budget for the three-year period 2018-2020), Article 23-*quater*(1) of Decree-Law No. 119 of 23 October 2018 (Urgent provisions on tax and financial matters), converted, with amendments, into Law No. 136 of 17 December 2018, Article 1(340) of Law No. 160 of 27 December 2019 (Estimated State budget for the financial year 2020 and the multiannual budget for the three-year period 2020-2022), and Article 1(362) of Law No. 178 of 30 December 2020 (Estimated State budget for the financial year 2021 and the multiannual budget for the three-year period 2021-2023), as regards the wording prior to the entry into force of

Article 3(4) of Law No. 238 of 2021, insofar as those provisions exclude from the granting of the childbirth allowance third-country nationals who have been admitted to the State for the purpose of work in accordance with European Union or national law and third-country nationals who have been admitted for purposes other than work in accordance with European Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 January 2022.

Signed by: Giuliano AMATO, President
Silvana SCIARRA, Author of the Judgment