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JUDGEMENT NO. 252
YEAR 2001

ITALIAN REPUBLIC
IN THE NAME OF THE ITALIAN PEOPLE
THE CONSTITUTIONAL COURT

Composed by:
- Fernando SANTOSUOSSO President
- Massimo VARI Judge
- Cesare RUPERTO Judge
- Riccardo CHIEPPA Judge
- Gustavo ZAGREBELSKY Judge
- Carlo MEZZANOTTE Judge
- Fernanda CONTRI Judge
- Guido NEPPI MODONA Judge
- Piero Alberto CAPOTOSTI Judge
- Annibale MARINI Judge
- Franco BILE Judge
- Giovanni Maria FLICK Judge

has issued the following

RULING

in the constitutional legitimacy judgement of art. 19, par. 2, of legislative decree 25 July 1998 no. 286 (Consolidating act on Immigration and Norms concerning the Status of Foreigners), proposed through the Order of the Court of Genoa on 4 March 2000 at the request of D.S. against the Genoa Prefect, number 367 of the Register of Court Orders and published on the Gazzetta Ufficiale of Republic no. 27, first special series, of the year 2000.

In consideration of the intervention of the President of the Council of Ministers;

having heard the Reporting Judge Fernanda Contri in the jury room held on 13 December 2000.

Having considered the facts

1. The Court of Genoa, through its Order of 4th March 2000, raised a question – in relation to articles 2 and 32 of the Constitution – of constitutional legitimacy of art. 19, par. 2, of legislative decree 25 July 1998 no. 286 (Consolidating act on Immigration and Norms concerning the Status of Foreigners) for not setting a prohibition to expel a foreigner, illegally entered the Italian State, who decides to stay in the Italian territory with the only intent of completing an essential therapeutic treatment.

The *a quo* judge has been invested with the exam of an appeal proposed by a Senegalese citizen against the prefectorial decree of expulsion issued against him for having entered Italy without

undergoing security border controls; the remittent judge notices that the recurrent, as the only claim for the annulment of the measure, affirms that he had had his left foot amputated, and he had entered Italy – although not having a regular passport – with the only intent to replace his foot-prosthesis, as he did not have the chance to receive such a medical treatment in his country of origin; according to the remittent judge, the facts presented in support of the appeal – regarding the insufficiency of the foot-prosthesis, the fact that the foreigner is currently in the care of a national care service facility and is monitored by a voluntary organization, and the circumstance that he is waiting for a new surgical appliance adequate to his medical conditions – have all been proved in the preliminary investigation carried out.

The *a quo* judge notices that art. 35, par. 3, of legislative decree no. 286 of 1998 – which recognises a series of health care interventions in favour of foreigners present on the national territory, even if they do not comply with the mandatory provisions concerning the entrance and residence – is not stringent, and contains examples of medical and health care services which are "urgent or however essential, even if continuative, due to sickness and accident". The article though refers only to cases of foreigners who become sick in the State's territory, since parr. 1 and 2 of the same provision contemplate the different case of a foreigner requesting a permit to stay with the intent to come to Italy to receive medical treatments.

According to the remittent judge – being impossible to question the essentiality of the medical treatment needed by the claimant as stated in the legislative decree, "as recovery of walking is strictly inherent to the basic postulates of human dignity", and being present a legitimate expectation by the stranger to complete the undertaken therapy – the circumstance that the article object of this present constitutional legitimacy control does not prohibit the expulsion of individuals in similar conditions would violate art. 2 Const., which recognises fundamental human rights as the grounding value of a pluralist democracy, and art. 32 Const., which qualifies health as a fundamental human right not circumscribable only to national citizens.

2. The President of the Council of Ministers intervened in the present judgement, represented and defended by the State Legal Advisory Service, asking this Court to declare the question of legitimacy inadmissible or groundless.

The State Legal Advisory Service preliminarily notices how art. 32 Const. is a programmatic norm and not immediately binding, and sets "external boundaries" to the right to health through "negative obligations", but does not identify the content in positive terms of such a specific right which is also a primary interest of civil society.

In this field, according to the State Legal Advisory Service, a state's action can therefore engrave subjective individual situations in ways that depend on the ordinary legislator's discretion through decisions which – if taken within reasonable limits – can take into account financial, economic and social demands, and other constitutionally guaranteed interests as well.

The State Legal Advisory Service therefore observes how the regulations on immigration which are currently in force have made an adequate balance of two different constitutionally guaranteed interests: the foreigners' right to health, and the protection of public order and security as connected to the fight against illegal immigration. In this context, according to the State Legal

Advisory Service, the legislator has on the one hand set treatment-equality between Italian citizens and regularly residing foreigners – who are part of the national medical and health care service – and, on the other hand, established a specific entry visa for foreigners planning to receive necessary medical treatments in the country. The law guarantees to the illegal alien present in the Italian territory a minimum level of health care, and allows him, with the guarantee of anonymity, to access to "essential and urgent" medical treatments. By emphasising these features the legislator aimed at excluding any relevant medical therapy, and rather focused on the need to guarantee only those medical treatments that are fundamental for the safeguard of human life and public health: these treatments are guaranteed also when an individual's situation would require the execution of a decree of expulsion.

In the opinion of the State Legal Advisory Service, by not completely expanding the right to any long-term medical treatment to the illegal alien, the legislator has considered the need to guarantee public security: a choice that meets both the protection of fundamental human rights, and the norm of reasonableness.

Finally, according to the State Legal Advisory Service, the execution of a decree of expulsion would not compromise a foreigner's right to come back to Italy to undergo medical treatments, which is a chance guaranteed even before the termination of the five-year term set by the law, subject to authorisation by the Minister of the Interior.

Having considered the law

1. The question of constitutional legitimacy raised by the Court of Genoa refers to art. 19, par. 2, of legislative decree 25 July 1998 no. 286 (Consolidating act on Immigration and Norms concerning the Status of Foreigners) for not setting a prohibition to expel a foreigner from outside the European Community, illegally entered into the Italian territory, who decides to stay in the country with the only intent of completing an therapeutic treatment deemed to be essential in relation to his/her pre-existing health conditions; according the remittent judge, the omitted provision of such a specific prohibition of expulsion would violate articles 2 and 32 of the Constitution because the chance for a foreigner from outside the European Community, who does not comply with the mandatory provisions concerning the entrance and residence, to access "medical and health care services which are urgent or however essential", provided by national care service accredited facilities, set by the Art. 35 of of legislative decree no. 286 quoted, would concern the only hypothesis in which the foreigner contracted the illness in Italy and not those in which he previously contracted the disease, as in the case in front of the *a quo* judge.

2. The question of constitutional legitimacy is groundless.

It must be stated beforehand that, according to a principle constantly affirmed by the jurisprudence of this Court, the right to access to medical and health care services, necessary for the protection of health, is "constitutionally contingent on" the need to balance with other constitutionally guaranteed interests; however, it must be guaranteed an "irreducible core part of the right to health, protected by the Constitution as an inviolably bound to human dignity, which imposes the Constitution to avoid creating situations without protection, which could therefore

jeopardize the implementation of the aforementioned right ” (see, *ex plurimis,* rulings n. 509 del 2000, n. 309 del 1999 e n. 267 del 1998, of this Court).

This “irreducible core” of protection of health, as a fundamental right of the individual, must therefore apply also to foreigners, whatever their status in relation to the rules governing entrance and residence in the state, however, the legislature could provide different modes of operation of the same right.

3. In accordance with this principle, the legislator - according to art. 2: “aliens, however present at the border or in the territory of the State, are entitled to the fundamental human rights provided for by the rules of domestic law and by the international agreements in force and by generally recognized principles of international law” - has stated, for what concerns the protection of the right to health, relevant here, some specific provisions, in which the way of the exercise of the same right are differentiated according to the position of the individual with the respect to obligations relating to entry and residence. Article 34 in fact provides that an alien and his family, lawfully resident in the State, are necessarily registered with the National Health Service, with full equality of rights and duties, even contributory, to Italian citizens. Art. 35 par 1 and 2, covers the case in which an alien is present in the State on a regular basis but is not enrolled into the National Health Service, while art 36, d. lgs cit. provides the possibility to obtain a specific entry visa and a residence permit for a foreigner who intends to enter Italy in order to receive medical treatment.

For foreigners present in the country but not in accordance with the rules on entry and residence, art. 35 , paragraph 3, of the Decree cit. provides that they are "insured, at public and accredited outpatient care or hospital, however urgent or essential, even for continuing illness and injuries and are extended to preventive medicine programs to safeguard the individual and collective health"; to the same alien, "in particular", are guaranteed social protection of pregnancy and motherhood, and the protection of the health of the child, as well as vaccinations and prophylaxis interventions with particular regard to infectious diseases, according to a list that - contrary to the view of the *a quo* judge - cannot be considered exhaustive of health interventions, in regards to the person who is, in whatever capacity , in the territory of the State.
It should be noted that even in this respect, paragraph 5 of the same Article 35 , precisely in order to protect the right to health of aliens in the territory of the State, provides that "access to health facilities may not result in any type of reporting to the relevant authority, except in cases where it is mandatory to report, on equal terms with the Italian citizens". This clause confirms the favor towards the person's health that characterizes all this area of the law.

4.- The law provides an articulated health care system for aliens, which is guaranteed in all circumstances to all, even those who have not legitimately entered the territory of the State. The "irreducible core" principles of the right to health, guaranteed by art. 32 of the Constitution, given the literal meaning and the *ratio* of the provisions, provides these subjects not only the extreme and urgent care and those indicated by art. 35, paragraph 3, second sentence, but all necessary treatment, whether E.R. or hospital, however essential, even continuing to illness and injuries.

It is not without significance that, in the implementation of this law, art. 43, paragraph 2 following the Decree of the President of the Republic 31 August 1999, n. 394 (Regulations for the implementation of the consolidated text of provisions governing immigration and the status of aliens, pursuant to art. 1, paragraph 6, of the legislative decree of 25 July 1998 no. 286) has provided details on how to avoid that, since the irregular situation in the State, resulting in a barrier to the provision of therapeutic services to art. 35, paragraph 3 above, including through the allocation for administrative purposes of the proper identification code provisional health, according to provisions which were subsequently clarified by the circular of the Ministry of Health no. 5 of 24 March 2000.

5.- Consideration of the above provisions shows why the erroneous interpretation of the assumption that motivates the *a quo* judge, according to whom the inviolable right to health of the alien illegally present on national territory, guaranteed by Articles 2 and 32 of the Constitution, could only be safeguarded through the provision of - to be inserted in art. 19 of Legislative Decree no. 286 of 1998 - a specific prohibition of expulsion for the person who is in need to benefit from a therapy which is essential to his/her health. On the contrary, the alien present, even irregularly, in the State has the right to enjoy all the benefits that are urgent and can not be postponed, according to the criteria set out in Article 35, paragraph 3 above. It is a fundamental human right that must be guaranteed, as required in general by art. 2 of the Legislative Decree n. 286 of 1998.

The assessment of the health status of the subject and in-deferability and urgency of the treatment must be made on a case by case basis, according to the doctor's discretion; facing an appeal against a deportation order on will have to previously assess his/her profile, if the interested party invokes health needs, - taking into account the entire provisions contained in legislative Decree no. 286 of 1998. If necessary all the evidence allowed by law should be taken into account, considering the restraint that such a fast judicial process may impose.

Should the appellant, with regard to the protection of his constitutional right to health, prove enough grounds for his claim, the court will have to act accordingly, not being able to execute the deportation order against a person who may suffer an irreparable injury to that right, due to the immediate execution of the measure.

FOR THESE REASONS THE CONSTITUTIONAL COURT

declares groundless the question of constitutional legitimacy of art. 19, par. 2, of the legislative decree 25 July 1998 no. 286 (Consolidating act on Immigration and Norms concerning the Status of Foreigners) raised, in relation to articles 2 and 32 of the Constitution, by the Court of Genoa through the order below.

Held, by the Constitutional Court, Palazzo della Consulta, on July 5th, 2001.

Fernando SANTOSUOSSO President
Fernanda CONTRI, Editor
Filed in the Chancery on July 17, 2001