

## Italy, Constitutional Court, judgment 54/2022, constitutional instance, 11 January 2022, published in the Italian Official Journal on 09/03/2022

### Member State

 Italy

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### Topic

Role of higher courts in securing fundamental rights

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### Sector

Judicial Interaction Techniques; Role of national higher courts; Use of the Preliminary Reference Procedure

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### Deciding Court Original Language

Corte Costituzionale

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### Deciding Court English translation

Constitutional Court

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### Registration N

54/2022

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### Date Decision

11 January 2022

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### ECLI (if available)

IT:COST:2022:54

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### National Follow Up Of (when relevant)

National follow-up of the CJEU decision in C-350/20.

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### EU legal sources and CJEU jurisprudence

Sources referred directly: Article 19 TFEU; Articles 20, 21, 24, 33 and 34 of the CFREU; Article 12 of the Directive 2011/98/EU; Article 3(1) of Regulation (EC) 883/2004; Article 3(1) of Regulation (EC) 1030/2002

C-449/16, Kerly Del Rosario Martinez Silva; C-350/21, O.D. and Others; C-302/19; C-350/20; C-302/19, Istituto nazionale della previdenza sociale; C-571/10, Kamberaj

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### ECtHR Jurisprudence

No reference to ECtHR jurisprudence.

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### Subject Matter

Judicial review for the constitutionality of Article 1(125) of Italian Law 190/2014, also called 2015 Budget Law, and the Article 74 of Italian Legislative Decree 151/2001 concerning the protection and support of maternity and paternity.

The Constitutional Court refers a preliminary request to the CJEU on the interpretation of Article 34 of the CFREU, of Article 3(1)(b) and (j) of Regulation 883/2004 and of the Article 12(1)(e) of Directive 2011/98/EU and then follow-up and declares the question of constitutionality founded.

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### Legal issue(s)

Possibility for third-country nationals legally residing and working in Italy and holding a single work permit to benefit from a childbirth allowance and a maternity allowance.

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### Request for expedited/PPU procedures

The Constitutional Court requested the CJEU to review the case under the expedited procedure because this question is subject to extensive debate before the Italian courts, which could give rise to numerous references for a preliminary ruling before the CJEU and to divergent interpretation between, on the one hand, the administrative authorities responsible for granting the allowances at issue and, on the other hand, the Italian courts. The President of the Court refused the request finding that such reasons were not enough to establish the exceptional urgency necessary to justify an expedited procedure.

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### Interim Relief

No interim relief asked

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### National Law Sources

Articles 3, 31 and 117(1) of the Italian Constitution; Article 1(125) of the Law 190/2014; Articles 22, 70 and 74 of the Legislative Decree 151/2001; Article 15 of the Law 53/2000; Articles 9, 41 and 41(1-bis) of the Legislative Decree 286/1998; Article 3(1)(a)(2) of the Law 46/2021; Legislative Decree 230/2021; Article 19 of the Legislative Decree 150/2015; Article 3 of the Law 238/2021; Law 160/2019.

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### Facts of the case

The Constitutional Court is seized of a question concerning the constitutionality of the Article 1(125) of the Italian Law 190/2014 and of the Article 74 of the Legislative Decree 151/2001. Those questions were raised by the Supreme Court of Cassation, seized by the National Social Welfare Institution (Istituto Nazionale della Previdenza Sociale – 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 matter concerned third country nationals,

lawfully resident in Italy and only holding a single work permit provided for by Legislative Decree 40/2014 transposing Directive 2011/98, who filed applications for the childbirth allowance, which was rejected by the INPS due to the fact that they did not hold a long-term residence permit. The refusal was challenged on the grounds of discrimination, following which the merits courts accepted the claimants' objections, directly applying the principle of equal treatment enshrined, with regard to social security, in Directive 2011/98/EU. INPS appealed the decisions of several courts of appeal on points of law before the Court of Cassation, which referred questions on the constitutionality of Article 1(125) of Law No 190/2014 to the Constitutional Court. The Court of Cassation argues that, in requiring that foreign nationals must hold a long-term residence permit, the legislation governing the childbirth allowance violates the principles of equality and reasonableness enshrined in Article 3 of the Italian Constitution, as well as the Article 31 of the Constitution about the protection of the family and of the maternity, and finally the Article 117(1) of the Constitution, in relation to Articles 20,21,24,33 and 34 of the CFREU, concerning the principle of equality and the prohibition on discrimination, right of the child, the right of the family and the right to access social security benefits. The Constitutional Court decided to stay the proceeding and refer a question for preliminary ruling to the Court of Justice in order to it clarify the interpretation of the Article 34 of the CFREU.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

In order 182/2020, the Constitutional Court noted that the questions referred by the Supreme Court of Cassation on the constitutionality of the Article 1(125) of the Italian Law 190/2014 and of the Article 74 of the Legislative Decree 151/2001 in respect to Articles 3, 31 and 117(1) of the Italian Constitution also involved the interpretation of the Article 34 of the CFREU, concerning the right for person lawfully resident in a EU-member State to access social security benefits. Consequently, the Constitutional Court asked the CJEU if the childbirth and maternity allowances concerned fall within the scope of the Article 12 of the Directive 2011/98/EU, which gives concrete form to Article 34 CFREU, and therefore if EU law is to be interpreted as precluding national legislation which fails to extend these benefits, which are already granted to foreign nationals holding a long-term resident's EU residence permit, to foreign nationals who hold only a work permit.

The Constitutional Court recalled that, in responding to that preliminary ruling, the CJEU considered that a Member State cannot exclude third-country nationals, holding the single permit provided for by the Article 12 of the Directive 2011/98/EU, from entitlement to a childbirth allowance and a maternity allowance provided for by the legislation. In the present case, the Constitutional Court was thus called to draw conclusions from the answers of the CJEU and to assess whether the balance struck by the legislator is consistent with the Constitution.

The Constitutional Court also noted that, although the Italian legal framework was substantially amended since the preliminary ruling of the CJEU, these amendments could not be applied to the current case and should therefore not be taken into account.

The Constitutional Court declared the Article 1(125) of the Italian Law 190/2014 and of the Article 74 of the Legislative Decree 151/2001 are unconstitutional. First, the Constitutional Court outlined the salient features of the childbirth allowance and the maternity allowance. The main aim is to encourage the birth rate and to contribute to the costs of supporting it. These allocations are currently delivered every month, since the month of birth or adoption, for each child born or adopted after the 1st January 2018, but the condition for foreigner for access to these benefits is to hold a long-term resident's EU residence permit. At this point the Constitutional Court stressed that, according to the CJEU, this situation falls within the scope of the Directive 2011/98/EU which ensures the fair treatment of third-country nationals who are legally residing in the territory of the Member States. Its aim is to "narrowing the rights gap between citizens of the Union and third-

country nationals legally working in a Member State” (recital 19 of the Directive mentioned in the judgment). The constitutional Court retraced the reasoning of the CJEU in its judgment of the 2 September 2021 concerning the people and the benefits falling within the scope of the Directive and concerning the protection granted by the Article 34 of the Charter. On the basis of the judgment of the CJEU, the Constitutional Court concluded to the unconstitutionality of the challenged provisions by reason of contrast with Article 117 of the Constitution. The Court stressed that it is entrusted with the task of ensuring protection to the rights protected by the Constitution, in synergy with the CFREU.

Second, the Constitutional Court, while maintaining that it is within the legislator’s discretion to identify the recipients of social security benefits, taking into account the limit of available resources, stressed that such a choice is subject to the principle of reasonableness. In the case at issue, in refusing allowances to those who do not hold a long-term residence permit, the legislator refuses adequate protection to those workers who are in the greatest need, because they don’t have the income requirement for this permit. Consequently, the Constitutional Court declared this condition is discriminatory and, thus, in contrast with Articles 3 and 31 of the Constitution.

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### Relation of the case to the EU Charter

In order 182/2020, the Constitutional Court invoked the Articles 20, 21, 24, 33 and 34 of the CFREU because the Articles 3, 31 and 117 of the Constitution concerned reflect these articles of the Charter. These articles of the Charter refer to the equality of rights, the children's rights, the protection of the family life and the right of access to social security benefits. The Constitutional Court mentioned several times the rights protected by the Constitution must be interpreted in synergy with the protection guaranteed by the Charter. Thus, the Charter serves as a tool for interpreting the rights guaranteed by the Italian Constitution. In the end, the Constitutional Court found that the questions raised by the 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 of the Charter, as enshrined in EU secondary law.

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### Relation between the EU Charter and ECHR

The Constitutional Court does not mention the ECHR.

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### Use of Judicial Interaction technique(s)

Preliminary ruling, in a spirit of cooperation.

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### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

In both the order and the judgment of the Constitutional Court only engages with an assessment of the order of the Supreme Court of Cassation and of the judgment of Milan and Brescia Courts of Appeal which were at the origin of the constitutionality review. In the judgement 54/2022 the constitutional Court also mentioned its previous judgment 141/2014 concerning the qualification of allocations.

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### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Constitutional Court applied the answer of the preliminary ruling in C-350/20. It described the analysis of the CJEU in detail. The analysis of the constitutionality of the challenged provisions is based on the CJEU judgment. Indeed, the Constitutional Court decided to interpret the rights

granted by the Constitution in the light of those enshrined in the Charter. Consequently, there is no divergence between the protection of fundamental rights granted by the Constitutional Court and the protection of the CJEU. The Constitutional Court adopts in its entirety the point of view of the CJEU in its judgment C-350/20. In this case, the solution adopted involved a broader protection of fundamental rights.

The Constitutional Court also mentioned Cases C-449/16 and C-302/19 concerning the implementation of the Directive 2011/98/EU, and Cases C-571/10 about the right to social and housing assistance. These mentions were only used to support the reasoning.

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#### Strategic use of judicial interaction technique (purpose aimed by the national court)

The scope likely pursued by the Constitutional Court when using judicial interaction techniques was to solve a conflict of norms involving fundamental rights enshrined in the EU Charter. It declared two Articles unconstitutional on the basis of an interpretation of the Constitution in the light of the Charter.

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#### Impact on Legislation / Policy

The interactions between courts triggered changes to the legislative framework because two articles were declared unconstitutional on the basis of an interpretation of the Constitution in the light of the Charter and of the reference for the preliminary ruling.

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#### Notes on the national implementation of the preliminary ruling by the referring court

The outcome achieved by the national judge is consistent with the decision of the CJEU because the Constitutional Court drew the conclusions from the reference for the preliminary ruling.

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#### Did the national court quote case law of the CJEU/ECtHR (in particular cases not already referred to by the CJEU in its decision) or the Explanations?

The national court quotes case law of the CJEU. See points 9.1, 9.2 and 12.1.

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#### Did the national court quote soft law instruments, such as GRECO Reports, Venice Commission, CEPEJ Reports, or CCEJ Reports?

No reference to soft law.

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#### Did the national court take into account national case law on fundamental rights?

No reference to national case law on fundamental rights.

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#### If the court that issued the preliminary reference is not a last instance court, and the "follow up" was appealed before a higher court, include the information

The court that issued the preliminary reference is a last instance court

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#### Was there a consensus among national courts on how to implement the CJEU's preliminary ruling; and were there divergences between the judiciary and other state powers regarding the implementation of the preliminary ruling?

The court that issued the preliminary reference is a last instance court

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Impact on national case law from the same Member State or other Member States

N/A

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Connected national caselaw / templates

Questions for constitutionality of the Court of Cassation (Orders n. 175, 178, 180, 181, 182, 188, 189 and 190 of 2019); Order for preliminary ruling of the Italian Constitutional Court of 2020 n 182; Judgment of the Court of Cassation, labour division, n. 9305 of 2023.

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Other

N/A

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(Link to) full text

[https://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/SENTENZA%20n.%2054%20red.%20Sciarra%20EN.pdf](https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/SENTENZA%20n.%2054%20red.%20Sciarra%20EN.pdf)

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History of the case: (please note the chronological order of the summarised/referred national judgments.)

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