

Anonymised version

Translation

C-112/22 – 1

Case C-112/22

Request for a preliminary ruling

Date lodged:

17 February 2022

Referring court:

Tribunale di Napoli (Italy)

Date of the decision to refer:

16 February 2022

Defendant:

CU

...

TRIBUNALE DI NAPOLI (District Court, Naples)

**SEZIONE DEL GIUDICE PER LE INDAGINI PRELIMINARI (Chamber
of the judge responsible for preliminary investigations)**

UFFICIO IX (Office IX)

The judge conducting the preliminary hearing, ...

... [procedure]

WHEREAS

... [procedure]

Accused: **CU** ... [details of the accused person and legal representative]

Victim: Ministry of Economy and Finance [legal representative]

EN

1. MAIN PROCEEDINGS

(Having regard to Article 94 of the Rules of Procedure and the first paragraph of Point 22 of the Recommendations)

1. Charge

Offence provided for in and punishable under **Article 7(1) of Decreto-legge 28 gennaio 2019 n. 4, convertito con modificazioni dalla legge 28 marzo 2019 n. 26**, (Decree-Law No 4 of 28 January 2019, converted into law and amended by Law No 26 of 28 March 2019), for having, by claiming basic income by an application signed on 27 August 2020, falsely certified that the condition relating to ten years' residence in Italy at the time of the application was satisfied, in particular by having as a first residence that of 29 March 2012 in Naples, ..., thus unduly acquiring sums totalling EUR 3 414.40.

...

2. Succinct presentation of the proceedings

* By request for indictment filed on 1 December 2021, the Office of the Public Prosecutor at the District Court, Naples, ..., requested that the accused be committed for trial on the following charge.

The judge conducting the preliminary hearing set the preliminary hearing for 8 February 2022.

... [procedure]

At today's hearing, ... [procedure] the judge referred the matter to the Court of Justice for a preliminary ruling on interpretation.

2. NATIONAL LAW

(Having regard to Article 94 of the Rules of Procedure and the second paragraph of Point 22 of the Recommendations)

1 Provisions of national law relied on

Article 7(1) of Decreto-legge 28 gennaio 2019 n. 4, convertito con modificazioni dalla legge 28 marzo 2019 n. 26, (Decree-Law No 4 of 28 January 2019, converted into law and amended by Law No 26 of 28 March 2019)

Article 7 (penalties) stipulates in paragraph 1: *Save where the act constitutes a more serious criminal offence, any person who, for the purpose of obtaining unduly the benefit referred to in Article 3, makes or uses declarations or documents which are false or certify matters which are untrue, or fails to supply*

the information required, shall be liable to a term of imprisonment of two to six years.

The scope of the rule of criminal law must be analysed in close conjunction with Article 2(1)(a) of that Decree-Law.

Article 2 (beneficiaries) provides, in paragraph 1: Basic income shall be granted to households who, at the time the application is made and throughout the period for which the benefit is paid, satisfy the following conditions cumulatively: (a) with regard to the conditions relating to nationality, permanent residence or residence, the person claiming the benefit must cumulatively: (1) hold Italian nationality or that of a country forming part of the European Union, or be a family member thereof, as defined in Article 2(1) (b) of Legislative Decree No 30 of 6 February 2007, who has the right of residence or permanent residence, or is a third-country national holding a long-term resident's EU residence permit; (2) be resident in Italy for at least ten years, the final two of which, as at the time the application is made and throughout the period for which the benefit is paid, must be consecutive.

Those provisions, read in conjunction, cover the criminal act imputed to the accused who, on 27 August 2020, claimed basic income, certifying that the condition relating to residence in Italy for ten years at the time of the application had been satisfied, whilst she had registered her first residence on 29 March 2012.

Nor can it be argued that the actual nature of the residence was not investigated (and thus the possibility that she was already resident before that date even though it is not apparent from the population registers) because ... CU states that she arrived in Italy in February 2012 ...

2 Relevant national case-law

The offence of making a false declaration of ten year's residence is not the subject of a maxim of any judgments of the Corte di Cassazione (Court of Cassation) and no precedents relevant to the decision have been found in the case-law on the substance.

The precedents in the case-law of the Corte di Cassazione and the Corte Costituzionale respectively (a) on the interpretation of the condition relating to intent to obtain the benefit, which must attach to a false declaration within the meaning of Article 7 of Decree-Law 4/2019, (b) on the declared unconstitutionality of the regional law of the Region of Lombardy in so far as it made access to public housing subject to residence of over five years, and (c) on the deemed constitutionality of Article 2(1)(a) of Decree-Law 4/2019, in so far as it excludes from the beneficiaries holders of a single work permit and residence permit for at least one year, are set out below.

(a) Corte di Cassazione, Third Chamber, Judgment No 44366 of 15 September 2021 ...

False statements of facts set out in a self-declaration to obtain ‘basic income’ or failures, even partial, to supply information required, where it is instrumental in obtaining a benefit to which there would otherwise be no entitlement, fall within the offence referred to in Article 7 of Decree-Law No 4 of 28 January 2019, converted into law and amended by Law No 26 of 28 March 2019. (In its grounds, the Corte di Cassazione clarified that by the expression ‘for the purpose of obtaining the benefit unduly’, it intended to characterise, in specific terms, the danger arising from the false or incomplete nature of declarations, by limiting the relevance thereof solely to cases where the intent of the agent was to obtain, through them, an undue benefit).

(b) Corte Costituzionale, judgment No 44 of 28 January 2020

In so far as it lays down the condition relating to residence (or employment) of more than five years in the region as a condition for access to public housing, Article 22(1)(b) of Lombardy Regional Law No 16 of 2016 is contrary both to the principles of equality and reasonableness laid down in the first paragraph of Article 3 of the Constitution, in that it gives rise to unreasonable unequal treatment to the detriment of those who, whether Italian nationals or foreign nationals, do not satisfy it, and the principle of substantive equality laid down in the second paragraph of Article 3 of the Constitution, in that that condition is contrary to the social function of public housing.

(c) Corte Costituzionale, judgment No 19 of 25 January 2022

In so far as they exclude from basic income holders of a single work permit provided for in Article 5(8)(1) of Legislative Decree No 286/1998, or a residence permit for at least one year provided for in Article 41 of Legislative Decree No 286/1998 or a residence permit of at least one year provided for in Article 4 of Legislative Decree No 286/1998, the issues relating to the constitutionality of Article 2(1)(a)(1) of Decree-Law No 4 of 2019 (on urgent measures concerning basic income and pensions), converted into law and amended by Law No 26 of 2019, are unfounded. The basic income is not a simple measure to fight poverty but pursues different and more complex objectives of active labour policy and social integration. Since its time frame is not short, the entitlement to reside permanently in Italy is not a condition unrelated to the raison d'être of the benefit provided for.

3. PROVISIONS OF EUROPEAN UNION LAW

(Having regard to Article 94 of the Rules of Procedure and Point 23 of the Recommendations)

Article 18 of the Treaty on the Functioning of the European Union

Article 45 on the Treaty on the Functioning of the European Union

Article 7(2) of EU Regulation 492/11

Article 11(1)(d) of EU Directive 2003/109

Article 29 of EU Directive 2011/95

Article 34 of the Charter of Fundamental Rights of the European Union

Articles 30 and 31 of the Social Charter of the Council of Europe

4. SUCCINCT PRESENTATION OF THE GROUNDS FOR THE REFERENCE FOR A PRELIMINARY RULING

(Having regard to Article 94 of the Rules of Procedure and the third paragraph of Point 22 of the Recommendations)

REFERENCE FOR INTERPRETATION:

There is doubt as to whether the national legislation providing for residence for ten years (the final two of which must be consecutive) in order to have access to a welfare measure such as basic income, which is intended to ensure a minimum level of subsistence, is contrary to the principles laid down in Community law in the abovementioned rules in that it provides for different treatment for third-country nationals, even those having a long-term residence permit, compared to that accorded to nationals residing in national territory.

That is because the benefit made up of the basic income falls within one of the three categories referred to in Article 11(1)(d) of Directive 2003/109 (social security, social assistance and social protection as defined by national law).

Furthermore, paragraph 4 of that article is not applicable as it does not appear that the Italian State, when it adopted the legislation on basic income, set out its intention to limit equal treatment in respect of social assistance and social protection to core benefits. In any event, however, that exclusion would not have applied since Article 1 of the Decree-Law No 4 of 2019 stipulates, in the final sentence of paragraph 1, that *basic income constitutes an essential level of benefits within the limits of available resources*.

In addition, in the preliminary ruling proceedings brought by the Tribunale di Bolzano (District Court, Bolzano), the Court of Justice held, in its judgment of 24 April 2012 (Case C-571/10), that the legislation of the Autonomous Province of Bolzano on housing benefit, was, in so far as it provided for less favourable treatment for long-term resident foreign nationals not belonging to the European Union, contrary to Community law (in particular to Article 1(1)(d) of Directive 2003/109, which provides for equal treatment in respect of social security, social assistance and social protection).

The Court of Justice has also included among the social advantages which must be granted also to workers of other Member States under Article 7(2) of Regulation 492/[2]0[1]1 on freedom of movement for workers the Belgian ‘minimex’, a social assistance benefit similar to the Italian basic income (judgments in Cases 249/83 and 122/84).

On the other hand, there is no ruling by the Court of Justice on the rule relevant rule in the proceedings before this court.

The interpretation of European Union law is relevant for the purposes of the decision since disapplication of the provision requiring ten years’ residence for access to basic income, on the ground that it is contrary to EU law, would mean that the assumption that the declaration of the accused is criminally relevant would cease to exist. The inapplicability of the rule concerning the obligation to declare ten year’s residence would make the untrue content of the declaration irrelevant for the purposes of the rule of criminal law laid down in Article 7(1) of Legislative Decree No 4/2019. It could be regarded as a case of *abolitio criminis*, with application of the principle of retroactivity favourable to the rule of criminal law.

Therefore, the ruling of this court could be converted from a sentence of two to six years’ imprisonment (for having received approximately EUR 3 000 in benefit) to an acquittal on the ground that the act is not a criminal offence.

The answer to the question of interpretation is particularly relevant since, as stated above, the accused admitted to having entered Italy less than ten years before applying for the benefit and thus this court is prevented from putting forward arguments concerning the actual nature of the residence.

5. ESSENTIAL ARGUMENTS OF THE PARTIES IN THE MAIN PROCEEDINGS

(Having regard to Article 94 of the Rules of Procedure and Point 23 of the Recommendations)

The parties, ..., support the initiative of this court to refer the following questions to the Court of Justice for a preliminary ruling since they consider that there is well-founded doubt as to whether the provisions of national law at issue in the proceedings are contrary to the provisions of Community law referred to.

6. POINT OF VIEW OF THE REFERRING COURT

(Having regard to Article 94 of the Rules of Procedure and Point 24 of the Recommendations)

The provision relating to ten years' residence (the final two of which must be consecutive) is detrimental to non-EU nationals who enjoy specific protection under EU law, such as long-term residents, who can acquire a permanent right of residence in an EU State after residing for five years in a host Member State, such as Italy (EU Directive 2003/109, Article 4). The same applies to Italians who return to Italy after a period of residence in another EU State (judgment in Case C-370/90). Also discriminated against are holders of refugee status, whom the EU States are required, under Article 29 of EU Directive 2011/95, to grant the necessary social assistance under the same conditions as nationals of the EU State concerned.

However, it does not appear that a similar limitation is laid down in respect of any of the similar social assistance measures introduced in other European countries.

In an explanatory circular of 14 April 2020, the Ministry of Labour even deemed it necessary to express its view to request the population registry services to ask the beneficiaries of basic income to demonstrate the existence of ten-year's residence (and two years' consecutive residence) which is actual, or can be proved just in fact, contrary to the public registers, pointing out, however, that establishment of residence by population register alone can itself be a source of manipulation. The circular even recalls judgment No 44 of the Corte Costituzionale of 2020, stating that the Consulta (Council) set very strict limits on the possibility of making access to core subsidies or support subject to satisfaction of overly stringent residence conditions.

7. REFERRAL OF THE QUESTIONS TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING

(Having regard to Article 94 of the Rules of Procedure and Point 26 of the Recommendations)

On those grounds, the Tribunale di Napoli, having regard to Article 267 TFEU, rules as follows:

the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

- (1) Does European Union law, and in particular Article 18 of the Treaty on European Union, Article 45 of the Treaty on European Union, Article 7(2) of EU Regulation 492/11, Article 11(1)(d) of EU Directive 2003/109, Article 29 of EU Directive 2011/95, Article 34 of the Charter of Fundamental Rights of the European Union and Articles 30 and 31 of the Social Charter of the Council of Europe, preclude national legislation such as that contained in Article 7(1) of Decree-Law No 4 of 28 January 2019, converted into law and amended by Law No 26 of 28 March 2019, read in conjunction with Article 7(2)(1)(a) thereof, in so far as it makes access to basic income

subject to the condition relating to residence in Italy for at least ten years (the final two of which, as at the time the application is made and for the entire duration of the benefit, must be consecutive), thus affording treatment to Italian nationals, EU nationals with a right of residence or permanent residence, or non-EU long-term residents who have been resident for less than ten years or for ten years, the final two of which were not consecutive, which is less favourable than that accorded to the same categories who have been resident for ten years, the final two of which were consecutive?

If the answer to the previous question is in the affirmative:

- (2) Does European Union law, and in particular Article 18 of the Treaty on European Union, Article 45 of the Treaty on European Union, Article 7(2) of EU Regulation 492/11, Article 11(1)(d) of EU Directive 2003/109, Article 29 of EU Directive 2011/95, Article 34 of the Charter of Fundamental Rights of the European Union and Articles 30 and 31 of the Social Charter of the Council of Europe, preclude national legislation such as that contained in Article 7(1) of Decree-Law No 4 of 28 January 2019, converted into law and amended by Law No 26 of 28 March 2019, read in conjunction with Article 7(2)(1)(a) thereof, in so far as it affords different treatment to long-term residents, who can acquire a permanent right of residence in an EU State after residing for five years in the host Member State, and long-term residents who have been resident for ten years, the final two of which were consecutive?
- (3) Does European Union law, and in particular Article 18 of the Treaty on European Union, Article 45 of the Treaty on European Union, Article 7(2) of EU Regulation 492/11, Article 11(1)(d) of EU Directive 2003/109 and Article 29 of EU Directive 2011/95, preclude national legislation such as that contained in Article 7(1) of Decree-Law No 4 of 28 January 2019, read in conjunction with Article 7(2)(1)(a) thereof, which requires Italian nationals, EU nationals and non-EU nationals to be resident for ten years (the final two of which must be consecutive) in order to access basic income benefit?
- (4) Does European Union law, and in particular Article 18 of the Treaty on European Union, Article 45 of the Treaty on European Union, Article 7(2) of EU Regulation 492/11, Article 11(1)(d) of EU Directive 2003/109, Article 29 of EU Directive 2011/95, Article 34 of the Charter of Fundamental Rights of the European Union and Articles 30 and 31 of the Social Charter of the Council of Europe, preclude national legislation such as that contained in Article 7(1) of Decree-Law No 4 of 28 January 2019, read in conjunction with Article 7(2)(1)(a) thereof, in so far as it, for the purposes of obtaining basic income benefit, requires Italian nationals, EU nationals and non-

EU nationals to declare that they have resided in Italy for ten years, the final two of which must be consecutive, subjecting false declaration to severe consequences of criminal relevance?

CONCLUDING REMARKS

ON THOSE GROUNDS

Stays proceedings pending a ruling of the Court of Justice ... [procedure]

... [*instructions to the registry for forwarding the present order to the Court of Justice*]

... [*indication of the details of the court and the parties*]

Naples, 16 February 2022 ...

... [*signatures*]

WORKING DOCUMENT