JUDGMENT NO. 7 YEAR 2013

In this case the Court considered a challenge to legislation stipulating that any parent convicted of the offence of failing to report a child's birth was to be stripped of parental responsibility for the child, as a mandatory ancillary penalty. The Court ruled that the legislation was unconstitutional on the grounds that it did not leave the courts with the flexibility required in order to give due consideration to the child's best interests, and on the grounds that it breached commitments made by Italy under international law.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 569 of the Criminal Code, initiated by the Court of Cassation in criminal proceedings pending against C.F. and D.M.C. by the referral order filed on 12 June 2012, registered as no. 181 in the Register of Orders 2012 and published in the Official Journal of the Republic no. 37, first special series 2012.

Having heard the Judge Rapporteur Paolo Grossi in chambers on 5 December 2012.

[omitted]

Conclusions on points of law

1.— The Court of Cassation – which was called upon to rule on an appeal filed against an appeal court judgment upholding a conviction for the offence provided for under Article 566(2) of the Criminal Code of two parents of a female child whose birth had been reported after the statutory time limit who had been subject pursuant to Article 569 of the Criminal Code to the ancillary penalty of the loss of parental responsibility for the child – raised a question concerning the Constitutionality of Article 569 of the Criminal Code with reference to Articles 2, 3, 29, 30 and 117 of the Constitution insofar as it provides that the conviction of a parent of the offence of the failure to report a birth pursuant to Article 566(2) of the Criminal Code shall result in the automatic loss of

parental responsibility, thereby denying to the courts any possibility to assess the best interest of the child in the specific case.

In referring to the findings made by this Court in judgment no. 31 of 2012, the lower court considers that the legislative framework, the constitutionality of which is questioned, is at odds with Articles 2, 3, 29 and 30 of the Constitution on the grounds that, since the court is denied any power to assess the interests of the child, its inviolable rights in the specific case, "namely the right to grow up with his or her parents and to be educated by them, unless this results in serious harm", are not safeguarded.

It also argues that Article 117 of the Constitution, referring in this respect to Article 3(1) of the Convention on the Rights of the Child done in New York on 20 November 1989, which provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". It also invokes, as an interposed rule, the European Convention on the Exercise of Children's Rights, adopted by the Council of Europe in Strasbourg on 25 January 1996, which provides that, before taking any decision concerning a child, the judicial authority must "consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child".

Finally, it refers to the Charter of Fundamental Rights of the European Union, Article 24(2) and (3) of which provide on the one hand that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" and on the other that "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests". According to the lower court, international law thus considers the child's interests to be a primary consideration, whilst an analogous focus was placed on this aspect at the heart of the reform of family law and the law on adoption.

2. — The question is well founded.

3. — It is clear that the answer to the question of constitutionality will draw on the principles asserted by this Court in judgment no. 31 on 2012 on the related offence of reporting false information in relation to a birth provided for under Article 567(2) of the Criminal Code.

In fact, as specifically pointed out by the lower court, that judgment ruled Article 569 of the Criminal Code unconstitutional with reference to Article 3 of the Constitution insofar as it provided that the conviction of a parent of the offence of reporting false information in relation to a birth pursuant to Article 567(2) of the Criminal Code should result automatically in the parent's loss of parental responsibility, thereby denying to the courts any possibility to assess the best interest of the child in the specific case. In that case, the question was raised during the course of criminal proceedings against a woman accused of the offence provided for under Article 567(2) of the Criminal Code by reporting false information concerning her newly born daughter when drawing up the birth certificate in declaring her to be a natural daughter whom she knew to be legitimate having been conceived through marital relations. The Court stressed that, in stipulating the loss of parental responsibility as an automatic consequence of the commission of any of the offences provided for under the same chapter, Article 569 of the Criminal Code also compromised "the interest of the underage child to live and grow up within his or her own family, maintaining a balanced and unbroken relationship with each parent, from who he or she is entitled to receive care, education and instruction".

This resulted in a breach of the principle of reasonableness given that, in disregarding entirely the child's interest – through the automatic mechanism provided for – the provision prevented the judge from striking any balance between that interest and "the requirement to apply in any case the ancillary penalty owing to the nature and characteristics of the criminal act, which are such as to justify the said ancillary penalty precisely in order to protect that interest".

The considerations referred to above were further reinforced by the fact that, "in contrast to other offences against children", the offence provided for under Article 567(2) of the Criminal Code "does not imply in itself an absolute presumption of harm to their moral and material interests that is such as to infer always and in all cases that the parent is not fit to exercise parental responsibility".

4. — However, taking account of the ratio decidendi underlying the ruling referred to, it is evident that the same points may also be raised in relation to the offence of the failure to report a birth, which is at issue in the proceedings before the lower court, given that the automatic mechanism which applies the ancillary penalty is detrimental to

the very same interests of the child which the Court's judgment referred to sought to safeguard; moreover, it is certain that the same considerations that the parent is not necessarily "unworthy", which were invoked in relation to the offence of reporting false information in relation to a birth, also apply in relation to the offence of the failure to report a birth.

In fact, it must be pointed out – as the lower court did not fail to stress when considering the relevance of the question – that the birth was in fact reported in this case (albeit more than four years late) whereas as regards the child's interests and the parent's conduct, the appeal court specified that, whilst the offence charged was objectionable, "the accused did not harbour the intention of depriving the newly born child of the material attention, or the affection and care, which she undoubtedly did not lack".

With reference to the legislative framework at issue here, the well known problem related to the lasting effects of the automatic mechanism – and, with regard to the case under examination here, also the inflexible manner in which the ancillary penalty is applied, which is constantly in tension with the requirement that sentencing take account of personal circumstances and the necessary rehabilitative goal of punishment – becomes particularly acute, precisely because the requirement to safeguard the educational and emotional needs of the child arises with its full force as a necessary comparative boundary (and hence as a constitutional limit on the applicability of the penalty): the unnecessary interruption of the relationship between the child and her parents by that automatic mechanism and inflexibility would end up causing unacceptable detriment to these requirements: these features have been objected to by this Court on various occasions, which has also recently held that it would be "advisable for Parliament to take action to reform the system of ancillary penalties" (judgment no. 134 of 2012).

5. — Essentially, since the ancillary penalty impinges upon a power that affects not only the person in whom it is vested, but also necessarily the underage child, it is evident that the interruption of that relationship may be deemed to be legitimate (at least legally, if not also morally) where it is justified precisely in order to protect the interests of the child. Therefore, in order to ensure compliance with constitutional law, the unreasonable automatic legal mechanism must therefore be replaced by a specific

assessment by the courts, thereby granting the courts a power to evaluate the offence as nothing other than an "indicator" within the assessment of whether or not the parent is fit to exercise his or her powers: that is the bundle of duties and powers with reference to which the underage child's interests may fulfilled in actual fact.

6. — However, the question is well founded also with regard to the requirement that the legislative framework comply with the commitments made by Italy under international law with specific regard to the protection of children. Indeed, as was recalled in detail by the referring court on the basis of the findings made in judgment no. 31 of 2012, to which reference is made, a series of important – and for our present purposes entirely unequivocal – provisions of international treaty law are relevant in this case as interposed rules falling under the principle laid down by Article 117(1) of the Constitution. In fact, the contested legislation creates an evident and irremediable breach first and foremost of the Convention on the Rights of the Child done in New York on 20 November 1989, ratified and implemented in Italy by Law no. 176 of 27 May 1991 (Ratification and implementation of the Convention on the Rights of the Child done in New York on 20 November 1989), given that Article 3(1) of that Convention provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Another relevant instrument is the European Convention on the Exercise of Children's Rights, adopted by the Council of Europe in Strasbourg on 25 January 1996, ratified and implemented by Law no. 77 of 20 March 2003 (Ratification and implementation of the European Convention on the Exercise of Children's Rights, adopted by the Council of Europe in Strasbourg on 25 January 1996) which, in governing the decision making process within proceedings affecting a child, lays down in Article 6 the procedures with which the courts must comply "before taking a decision", stipulating that the authority must "consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child".

Finally, within that context, one must also not disregard the specific indications provided in the Guidelines of the Committee of Ministers of the Council of Europe on "child friendly justice", adopted on 17 November 2010 in the 1098th meeting of the Ministers' Deputies given that, amongst other important principles, the document

expressly asserts that “Member states should guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them”.

7. — The Court must therefore declare that Article 569 of the Criminal Code is unconstitutional due to violation of Articles 3 and 117(1) of the Constitution insofar as it provides that the conviction of a parent of the offence of the failure to report a birth pursuant to Article 566(2) of the Criminal Code shall result in the parent’s loss of parental responsibility, thereby denying to the courts any possibility to assess the best interest of the child in the specific case, whereby the grounds for challenge relating to the further principles invoked by the lower court are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 569 of the Criminal Code is unconstitutional insofar as it provides that the conviction of a parent of the offence of the failure to report a birth pursuant to Article 566(2) of the Criminal Code shall result in the parent’s loss of parental responsibility, thereby denying to the courts any possibility to assess the best interest of the child in the specific case.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 16 January 2013.