JUDGMENT NO. 102 YEAR 2020

The judgment holds that a criminal provision imposing a mandatory suspension of parental responsibility in case of conviction for the offence of child abduction is unconstitutional.

The main proceedings concerned a mother who had abducted her two children and taken them to Austria without their father's permission. She had therefore been convicted of the criminal offence established by Article 574-*bis* of the Criminal Code and sentenced, *inter alia*, to four years' suspension of her parental responsibility towards the children. She had then appealed against the sentence before the Supreme Court of Cassation, which raised a question as to the constitutionality of the mandatory application of this ancillary penalty in case of conviction for this offence.

The Constitutional Court reiterates here that, in accordance with national and international law, any decision concerning a child should be primarily based on his or her best interests, and that, in principle, every child has the right to maintain a personal relationship and direct contact with both of his or her parents. While stressing the seriousness and special harmfulness for the child of the offence of parental child abduction, the Court observes that the mandatory nature of the penalty at issue does not allow the trial court to assess whether the measure is actually in the best interests of the child, also in the light of the evolution of the relationship between parent and child that might have occurred after the commission of the offence.

Therefore, the Court declares that the provision is unconstitutional insofar as it provides for a mandatory, and not merely discretional, suspension of parental responsibility in the event of a conviction for the offence at issue.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 34(2) and 574-*bis*(3) of the Criminal Code initiated by the Sixth Criminal Division of the Supreme Court of Cassation in the criminal proceedings against A. F. with referral order of 21 June 2019, registered as No. 209 in the Register of Referral Orders of 2019 and published in the Official Journal of the Republic No. 48, first special series, of the year 2019,

having regard to the intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Viganò in chambers on 6 May 2020, a session held in accordance with Article 1(a) of the Decree issued by the President of the Court on 20 April 2020;

after deliberation in chambers on 6 May 2020.

The facts of the case

[…]

1.1. – The referring court states that on 30 April 2016, the Ordinary Court of Grosseto sentenced Mrs A. F. to a term of imprisonment of two years and one month, together with the ancillary penalty of suspension of parental responsibility for having eluded, on several occasions, the decision of the Juvenile Court of Florence concerning the shared custody of her two minor children (Articles 81(2) and 388(2) of the Criminal Code) and for having taken them away from their father, bringing them to Austria against his will (Articles 81(2) and 574-*bis* of the Criminal Code).

On 6 April 2018, the Court of Appeal of Florence dismissed the defendant's appeal, upholding her conviction for the offences established by the first instance court, and in granting the appeal that had been filed by the Public Prosecutor, changed the sentence to one of imprisonment for two years and six months.

A. F. proceeded to appeal to the Supreme Court of Cassation claiming, *inter alia*, that the automatic nature of the application of the ancillary penalty of suspension of parental responsibility envisaged by the challenged provision was unconstitutional.

[…]

Conclusions on points of law

[…]

4. – On the merits, it is appropriate to jointly examine the questions on the constitutionality of Article 574-*bis*(3) of the Criminal Code with reference to Articles 2, 3, 30 and 31 of the Constitution.

In light of those constitutional provisions, the referring court essentially questions the constitutionality of the challenged provision in three respects, on the basis that it allegedly a) requires the criminal court to impose the ancillary penalty of suspension of parental responsibility even when this is contrary to the best interests of the child, b) violates the child's right to maintain relations with both parents and c) introduces an automatism incompatible with the need for a case-by-case assessment of the adoption of a measure directly affecting the child.

4.1. – As regards the first aspect, the references to Articles 30 and 31 of the Constitution are certainly relevant.

The principle that in all decisions relating to children falling within the remit of public authorities, including the courts, paramount importance must be afforded to protecting the child's "best interests" or "*intérêt supérieur*", to cite the wording employed in the respective official versions in English and French, arose in the context of international human rights law, starting with the Universal Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1959. The principle was thereafter incorporated, *inter alia*, into Article 3(1) of the Convention on the Rights of the Child and Article 24(2) of the Charter of Fundamental Rights of the European Union (CFREU). Furthermore, the same principle is also considered as one of the aspects of the right to family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as it was established by the case law of the European Court of Human Rights (Grand Chamber, judgment of 6 July 2010, *Neulinger and Shuruk v Switzerland*, paragraphs 49-56 and 135; Grand

Chamber, judgment of 26 November 2013, *X v Latvia*, paragraph 96; Third Section, judgment of 19 September 2000, *Gnahoré v France*, paragraph 59).

That principle – already espoused by this Court with reference to Article 30 of the Constitution in terms of it being necessary that decisions concerning the child always seek the "best solution 'in practice' for the child's interests, that is to say the one which best guarantees, especially from the moral point of view, the best 'personal care'" (Judgment No. 11 of 1981) – has moreover been considered in several judgments of this Court, as embodied also within the scope of application of Article 31 of the Constitution (Judgments No. 272 of 2017, No. 76 of 2017, No. 17 of 2017 and No. 239 of 2014), the content of which thus appears to be enriched and supplemented by that reference from international law (Judgment No. 187 of 2019).

4.2. – With regard to the right of the child to maintain a relationship with both parents, it should also be noted that this right – now recognised in primary legislation by Article 315-*bis*(1) and (2) of the Civil Code, establishing the right of the child to be "educated, instructed and morally assisted" by his or her parents, and by Article 337-*ter*(1) of the Civil Code, recognising the right of the child "to maintain a balanced and continuous relationship with both parents" and "to receive care, education and moral assistance from both" – is also affirmed by a number of international and European Union instruments, to the observance of which our country is bound.

Article 8(1) of the Convention on the Rights of the Child recognises the child's right to his or her own "family relations". Article 9(1) requires States Parties to ensure "that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child". Article 9(3) further clarifies that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

Article 24(3) CFREU, for its part, provides 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".

And the ECtHR itself, when interpreting Article 8 ECHR, equally recognises the right of each parent and the child to "mutual enjoyment" of each other's company (European Court of Human Rights, Grand Chamber, judgment of 10 September 2019, *Strand Lobben and Others v Norway*, paragraph 202; First Section, judgment of 28 April 2016, *Cincimino v Italy*, paragraph 62; Grand Chamber, judgment of 12 July 2001, *K. and T. v Finland*, paragraph 151; Grand Chamber, judgment of 13 July 2000, *Elsholz v Germany*, paragraph 43; Third Section, judgment of 7 August 1996, *Johansen v Norway*, paragraph 52).

In the light of these international obligations, the referring court rightly cites Article 30 of the Constitution as the legal basis of the right in question in the Italian constitutional system. The first paragraph of that article establishes the duty of parents to "educate" their children, from which one can infer the corresponding right of the child to be educated by both parents. That necessarily implies his or her right to live a direct and personal relationship with them unless this is actually detrimental to his or her interests.

4.3. – The reference to Article 2 of the Constitution is also appropriate. The above-mentioned two rights of the child, on which the referral order is centred, must undoubtedly be considered as falling within those "inviolable rights of the person" that the Republic undertakes to recognise and guarantee. Moreover, the 'personalist' principle, which permeates the whole of the Italian Constitution and finds expression also and above all in that article, requires the rights of the person to be recognised and guaranteed not only as an individual, but also in the relationships in which he or she finds himself or herself, and only in which he or she can develop.

4.4. – Finally, the criticisms regarding the automatic application of the ancillary penalty, which allegedly prevents the court from seeking the best solution for the child in the actual situation, and the possible existence of a violation of the child's right to a personal relationship with both parents, also give rise to an admissible challenge of the impugned provision under Article 3 of the Constitution. That article prohibits unreasonable equal treatment of different situations, and it is no coincidence that it has already been invoked by this Court as the (sole) basis for a ruling of unconstitutionality of a provision envisaging automatic preclusion of home detention, which was held to be incompatible with the overriding need to protect the convicted person's minor child (Judgment No. 211 of 2018).

5. – The questions raised by the referring court are well founded.

5.1. – Undoubtedly, a parent who abducts and detains a child abroad commits a very serious offence, which offends both the right of the other parent and the child's right to enjoy his or her relationship with the latter (*supra*, 4.2. and 4.3.).

The child's possible consent to or, in any event, his or her lack of opposition to the conduct by the offender obviously does not exclude the harmful nature of the behaviour also with regard to the child himself or herself, who has the right, even in contexts marred by family strife or a problematic relationship with the other parent, to be kept in a situation that in the future allows for a more harmonious development of the relationship with the latter, unless this relationship appears clearly detrimental for the child and must, for that reason, be interrupted. Such a dramatic decision, however, must be made on the basis of an assessment which falls within the responsibility of the competent judicial authority, following a thorough investigation, and certainly should not be unilaterally made by the other parent, even though motivated by the best intentions (except perhaps in an extreme case of necessity).

[…].

5.2. – Nevertheless, the intrinsically harmful nature of the offence under Article 574-*bis* of the Criminal Code as regards the child's own interests is not sufficient to support the constitutionality – by the yardstick of the constitutional provisions cited – of the mandatory application of the ancillary penalty in question in the event of a non-suspended sentence.

It is necessary, in fact, to consider that this ancillary penalty has very peculiar features compared to the other punishments provided for by the Criminal Code. By impinging on a relationship, the penalty directly affects not only the convicted person but also the child, who is a party to that relationship.

Therefore, the penalty in question necessarily affects also a person *other* than the offender. This happens, as rightly noted in the referral order, *de jure* and not only *de facto*,

as is the case with other penalties, whose effects can also reverberate – but as a mere eventuality – on the family members of the convicted person (in this vein, see Judgment No. 7 of 2013: the ancillary penalty then under examination impinged upon "a power that affects not only the person in whom it is vested, but also necessarily the underage child").

The impact of this penalty on the child is, on the other hand, far from negligible.

As has already been pointed out (*supra*, 2.1.), the suspension of the exercise of parental responsibility entails not only the temporary loss of that parent's power to legally represent the child in economic relations but – much more radically – the deprivation, for the entire duration of the suspension, of the entire range of rights, powers and obligations inherent in the legal concept of "parental responsibility", with the ensuing loss of all power to make decisions "for" the child, including those relating to his or her daily life needs and that Article 357 of the Civil Code, in regulating the powers of the guardian, summarily embodies in the expression "personal care".

Although the ancillary penalty in question does not *ipso iure* imply the prohibition to live with or visit the child, it is clear that the deprivation of any decision-making power in the child's interests will effectively prevent the parent suspended from exercising his or her responsibility from enjoying his or her relationship with the child outside the immediate sphere of supervision of the other parent […].

Such a situation, which makes it objectively more difficult for a parent to maintain the same relationship with the child as a result of the application of the ancillary penalty in question, is thus likely to harm – precisely and above all – the child. This is in itself hardly reconcilable, *inter alia*, with the very principle under Article 27(1) of the Constitution that criminal responsibility is personal, the core tenet of which prohibits punishing a person for an offence committed by another (Judgment No. 364 of 1988).

5.3. – Admittedly, the reasons for protecting a child's right to maintain personal relations and contact on a regular basis with his or her parent are no longer valid when, as both Article 9(1) of the Convention on the Rights of the Child and Article 24(3) CFREU acknowledge, the continuation of such a relationship is contrary to the best interests of the child. But it is unreasonable to unrebuttably presume that the suspension of parental responsibility of a person convicted of an offence under Article 574-*bis* of the Criminal Code is always and necessarily, as the legislator seems to assume, the best solution for the child.

5.3.1. – In this regard, it should first of all be considered that the situations encompassed by Article 574-*bis* of the Criminal Code may be very different as to the degree of harm actually caused to the child.

It is sufficient to consider that the third paragraph now challenged provides for the same (automatic) ancillary penalty of suspension of parental responsibility both for the cases referred to in the first paragraph, which attract a heavier punishment (imprisonment ranging from one to four years) and for those referred to in the second paragraph, which attract a lighter punishment (imprisonment ranging from six months to three years). The latter cases are characterised by the consent of children over 14 years of age to the conduct of the abducting or detaining parent. The offence remains seriously detrimental to the rights of the other parent, but the degree to which it actually harms the interests of the child, which still remain in terms of the need to guarantee him or her the possibility of a more harmonious future development of his or her relationship with that parent, is

certainly mitigated. After all, the child himself or herself, by now an adolescent, evidently experiences that relationship as a problem.

But even within the situations covered by the first paragraph, it is not uncommon that the conduct constituting the offence is committed by a foreign parent in contexts of family strife, in which it happens that the offender takes the child abroad – or simply detains him or her beyond the period permitted by the other parent or otherwise authorised by court order – in the belief that the conduct of the other parent is detrimental to the child. This of course does not justify the conduct, which still remains an offence, because a parent's assessment cannot supplant that of the competent judicial authority. But it would be wrong to mechanically infer from the commission of the offence that the maintenance of the relationship between the offender and the child is certainly detrimental to the latter's interests.

Nor, again, can it be argued that the suspension of parental responsibility is intended to operate only in the face of very grave conduct in practice, relying on the fact that – under the last paragraph of Article 34 of the Criminal Code – the ancillary penalty at issue does not apply in the case of a suspended custodial sentence. Indeed, a custodial sentence of less than two years may not always be suspended, for reasons that have possibly nothing to do with the seriousness of the individual offence. The offender may, for example, have already benefited from a suspended sentence in the past for a completely different offence and accordingly cannot benefit from a suspension even for a prison sentence of just a few months, imposed for a delay of a few days in repatriating the child after a holiday in his or her country of origin. Even in such a case, the challenged provision would require the court to apply the ancillary penalty in question.

5.3.2. – However, the main problem that arises from providing for automatic suspension of parental responsibility as an ancillary penalty in the event of a conviction for an offence under Article 574-*bis* of the Criminal Code is how blind that consequence – conceived in terms of a sanction by the legislator – is with respect to the development, subsequent to the offence, of the relationship between the minor child and the parent who committed the offence.

A measure that poses significant obstacles to the relationship between the child and the parent can be warranted only insofar as that relationship is actually detrimental to the child (Articles 8(1) and 9(1) of the Convention on the Rights of the Child and Article 24(3) CFREU). In accordance with the general principle that any decision concerning the child must be guided by the criterion of the child's best interests, it follows that the ancillary penalty now under consideration can be justified only if it is in the child's best interests, to be assessed according to the factual circumstances existing *at the time of its application*, taking into consideration all the events occurring after the commission of the offence. These circumstances could well have shown that maintaining a relationship with the parent who abducted or detained the child abroad is *not* detrimental to the child and might even serve his or her specific interests, which the State would then be under a duty to safeguard and prioritise over the need to punish those who have violated the criminal law.

This is all the more so when – as in fact happened in the case at hand – the Italian courts hearing the parallel civil proceedings concerning the protection of the child's interests, following the abduction or illegal detention abroad, decide to entrust him or her – jointly

or even exclusively – to precisely the parent who committed the offence, considering him or her to be best suited to furthering the child's interests.

5.3.3. – The unreasonableness of the automatism provided for in the challenged provision, when judged against the primary need to find the best solution for the child, is all the more evident from the fact that the ancillary penalty in question will inexorably be implemented only after the judgment has become final, often many years after the offence.

Before that moment, the legal system affords the various judicial authorities that succeed one another in the course of criminal proceedings – the judge for preliminary investigations, the single-member court at first instance, and finally the court of appeal – a wide margin of evaluation with regard to the possible adoption of the precautionary measure of suspension of the exercise of parental responsibility. The content of such a measure may, in accordance with Article 288(1) of the Code of Criminal Procedure, be appropriately tailored according to the specific needs of the actual case since the court may deprive the accused "in whole" or even "in part" of the powers inherent in such responsibility.

This margin of discretion granted to criminal courts during the criminal proceedings gets completely lost when the sentence comes to be enforced, whatever has happened in the meantime, and regardless of any assessment of the child's current interests at that time. This is in blatant contrast with the previously mentioned rights of the child.

5.4. – It follows from all of the above that the automatic application of the ancillary penalty of the suspension of parental responsibility provided for in Article 574-*bis*(3) of the Criminal Code is incompatible with all the constitutional provisions indicated above, interpreted also in the light of international obligations and European Union law on the protection of children that bind the Italian legal system.

The fact that this Court's powers of review are limited by the scope of referral orders does not enable it to address the question – which could well be food for thought for the legislator – as to whether the criminal courts are the most appropriate forum for assessing if a measure concerning the child is in his or her best interests […]. For the time being, the need to ensure coordination between the criminal court and all the judicial authorities (juvenile courts or, as the case may be, ordinary civil courts) already dealing with the child's situation must be stressed, also in order to ensure compliance with the provision – expressly enshrined in Article 12 of the Convention on the Rights of the Child and Articles 3 and 6 of the European Convention on the Exercise of Children's Rights, and adopted in principle at the level of primary legislation in Italy by Articles 336-bis and 337-*octies* of the Civil Code – to hear the views of a child that has sufficient understanding and to give due weight to the views expressed by the child in relation to all decisions concerning him or her.

The constitutional constraints mentioned above do, however, require this Court to afford a remedy to the breach found, in continuity with the spirit of Judgments Nos. 31 of 2012 and 7 of 2013, by replacing the current automatism with a duty for the criminal court to assess, on a case-by-case basis, whether the application of the ancillary penalty in question is actually the best solution for the child, according to the criterion that such application "may be deemed to be legitimate [...] only insofar as it is necessary to protect the interests of the child" (Judgment No. 7 of 2013). This assessment can only be made in relation to the situation existing at the time of the judgment of conviction, and therefore

necessarily also taking into account developments occurring after the offence was committed.

[…]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 574-*bis*(3) of the Criminal Code is unconstitutional insofar as it provides for a mandatory rather than a discretionary suspension of parental responsibility in the event of a parent's conviction of the offence of abducting and keeping a child abroad, to the detriment of the child.

[…]

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 April 2020.

Signed by: Marta CARTABIA, President

Francesco VIGANÒ, Author of the Judgment