JUDGMENT NO. 18 YEAR 2020

The Court declares unconstitutional a number of provisions on special house arrest, insofar as they only apply to female inmates having children under the age of ten, and do not apply to incarcerated mothers with severely disabled children of any age.

In fact, the Court considers that the limit of ten years of age violates the constitutional principles of equality, reasonableness and protection of the fundamental rights of the human person (Articles 2 and 3 of the Constitution), along with those laid down in Article 31(2) of the Constitution (also invoked by the referring court), which provides for the protection of maternity, that is the bond between mother and child, which cannot be considered to end after the initial stages of the child's life. These principles require providing for alternative measures to detention having the principal purpose of protecting the child, an innocent third party requiring daily relationship with and care from the inmate; principles that must also apply to situations involving a severely disabled child, who is always in a particularly vulnerable physical and psychological state irrespective of his or her age. In fact, experience shows that the life circumstances and health of persons with a severe disability tend to deteriorate further as they advance in age. As a result, making the prison benefit concerned conditional upon a parameter related only to age is unconstitutional where a severely disabled person is involved.

It must also be noted that according to the Constitutional Court's case law, human relationships, including in particular family ones, are decisive factors in the full development and effective protection of the most vulnerable people.

In fact, this Court has consistently held, in a rich line of settled case law, that "ensuring full protection for weaker individuals" also requires "continuity within the constitutive relationships of the human personality" (Judgment no. 203 of 2013). Moreover, it has also reiterated that the right of a disabled person to "receive assistance within the context of his or her life community" constitutes "the fulcrum of the protections established by the legislator, with the aim of removing the impediments liable to prevent the full development of the human person" (Judgment no. 232 of 2018).

It need hardly be added, the Court notes, that the declaration of unconstitutionality does not impinge upon the further prerequisites for granting the measure according to which female inmates will be eligible for house arrest in their own home, in another private residence, or within a facility offering care, assistance or hospitality only "if there is no tangible risk of the commission of further offences".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 47-*quinquies*(1) of Law no. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty), initiated by the First Criminal Division of the Supreme Court of Cassation within the proceedings concerning A.F. with the referral order of 26 April 2019, registered as no. 109 in the Register of Referral

Orders 2019 and published in the *Official Journal* of the Republic no. 28, first special series 2019.

Considering the entry of appearance by A.F.;

having heard Judge Rapporteur Marta Cartabia at the public hearing of 15 January 2020;

having heard Counsel Simona Polimeni for A.F.;

having deliberated in chambers on 15 January 2020.

[omitted]

Conclusions on points of law

1.– The First Criminal Division of the Supreme Court of Cassation questions the constitutionality of Article 47-*quinquies*(1) of Law no. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty) insofar as it does not provide for the grant of special house arrest also to a convicted person who is the mother of a child with an entirely debilitating disability, as is the case for the inmate who is a party to the proceedings before the referring court, whose daughter has a severe disability within the meaning of Article 3(3) of Law no. 104 of 5 February 1992 (Framework law on assistance to, the social integration of and the rights of the disabled).

In the view of the Court of Cassation, in limiting eligibility for special house arrest to "a convicted person who is the mother of a child under the age of ten" – and provided that the other prerequisites laid down therein are met – the contested provision violates Article 3(1) of the Constitution due to "the inherent unreasonableness of a system that is rigidly based on the age of the child under which, for the purposes of the grant of the house arrest under examination, it is not at all permitted to give any consideration to the existence of circumstances similar to those expressly provided for, which involve the same need to ensure the physical presence of the parent and the provision of meaningful support by the parent to the child, such as, specifically, in situations in which the child appears to have an entirely debilitating disability". The provision is also alleged to breach Articles 3(2) and 31(2) of the Constitution on the grounds that the unreasonable restriction of its scope impedes the full realisation of the personality of an individual with a severe disability.

2.– Since no potential grounds for inadmissibility arise, this Court may proceed directly to an examination of the merits of the questions raised.

3.– The questions are well founded.

3.1.– The provisions governing special house arrest laid down in Article 47-*quinquies* of Law no. 354 of 1975 were introduced by Article 3(1) of Law no. 40 of 8 March 2001 (Alternative measures to incarceration in order to protect the relationship between female inmates and underage children), and were subsequently amended in part by the enactment of Article 3(2)(a) and (b) of Law no. 62 of 21 April 2011 laying down "Amendments to the Code of Criminal Procedure and Law no. 354 of 26 July 1975 and other provisions to protect the relationship between female inmates and underage children". The aim of these rules is to expand the scope, for mothers who have received a custodial sentence, to serve the sentence outside of prison beyond the situations in which ordinary house arrest may be granted pursuant to Article 47-*ter*(1)(a) of the Provisions regulating the prison system in order to better protect their relationship with their children.

In fact, Article 47-*ter*(1)(a) of the provisions governing the law on incarceration, which governs ordinary house arrest, can also be applied if the mother is obliged to

serve a term of imprisonment of up to four years, even if this constitutes the residual period of a longer sentence, or a custodial sentence relating to a minor offence [*arresto*].

Conversely, special house arrest is not subject to any limit as to the duration of the penalty, as Article 47-*quinquies*(1) of the Provisions regulating the prison system establishes, insofar as is relevant for these proceedings, that "[w]here the prerequisites laid down by Article 47-*ter* are not met, a convicted person who is the mother of a child under the age of ten may be eligible to serve the sentence at home or at another private residence, or within a facility offering care, assistance or hospitality, in order to provide care and assistance to the child, unless there is a tangible risk of the commission of further offences and provided that it is possible to re-establish a cohabiting relationship with the child".

In this way, the legislator has thus permitted mothers who have been convicted to a term of imprisonment in excess of four years, or who must serve more than four years' imprisonment, to be eligible for special house arrest, provided however that the children are aged under ten.

3.2.– That precondition relating to the age of the children also originally applied in relation to ordinary house arrest pursuant to Article 47-*ter*. However, by Judgment no. 350 of 2003, this Court altered that provision, extending eligibility for ordinary house arrest to any mother convicted to a term of imprisonment living with a child with an entirely debilitating disability, even if older than ten years of age. At a later stage, when replacing entirely, *inter alia*, the provisions of Article 47-*ter*(1), the legislator restated the substantive content of the legislation considered by Judgment no. 350 of 2003 (Article 7(3) of Law no. 251 of 5 December 2005 laying down "Amendments to the Criminal Code and to Law no. 354 of 26 July 1975 on generic mitigating circumstances, re-offending, assessment of the subsistence of constituent elements of the offence for re-offenders, usury and time barring"). However, this did not undermine the effect of that Judgment, as the "addition" made therein was deemed to refer also to the new provision, which restated the same provision on which this Court had already ruled (as is clearly apparent from the case law of the Court of Cassation: First Criminal Division, Judgments no. 39991 of 14 May-30 September 2019; no. 1029 of 31 October 2018-10 January 2019; no. 25164 of 19 December 2017-5 June 2018; no. 41190 of 18 September-13 October 2015; no. 36247 of 29 May-20 September 2012; and, *inter alia*, Fourth Criminal Division no. 17405 of 4 April-19 May 2006).

The referring court takes the view that the asymmetry that has arisen between ordinary house arrest pursuant to Article 47-*ter* and special house arrest pursuant to Article 47-*quinquies* of the Provisions regulating the prison system is unconstitutional on the grounds that – as things currently stand – whilst the two measures have the same purpose, there are differences between them in terms of the prerequisites for eligibility, which is excluded in relation to special house arrest only (the type at issue in this case) in situations involving a child over the age of ten who has an entirely debilitating disability.

3.3.– In effect, as regards the purposes pursued, this Court has already stressed that the primary aim of both measures, alongside the rehabilitation of the convicted person, is to enable her children to be cared for and to maintain their relationship with their mother (see Judgment no. 211 of 2018; on the equivalence of the two measures in terms of the purposes pursued by the Law and their content, despite the different prerequisites for their application, see also Judgment no. 177 of 2009). In particular, in the ruling on ordinary house arrest, this Court has already held that its purpose is to

promote "the developmental and educational requirements of the child, the satisfaction of which may be seriously harmed by the absence of a parental figure" (Judgment no. 350 of 2003). As regards specifically the institute of special house arrest, this Court has repeatedly held that "the protection of a weak individual different from the convicted person and who is particularly deserving of protection, as is the child" is of priority significance for the purposes of the institute (Judgment no. 76 of 2017 and, by analogy, Judgment no. 239 of 2014).

If this is the purpose that is shared by the two measures – a purpose consisting specifically in the protection of a weak individual, who was moreover not involved at all in the events that led to the conviction – it follows, as the referring court correctly infers, that the ineligibility for special house arrest of mothers with children over the age of ten who have an entirely debilitating disability is unconstitutional.

4.– The arguments developed by this Court in Judgment no. 350 of 2003, cited above, in which it ruled unconstitutional (with reference to Article 3(1) and (2) of the Constitution) Article 47-*ter*(1)(a) of the Provisions regulating the prison system , insofar as it did not provide for the grant of ordinary house arrest "also for a convicted mother, and in the circumstances provided for under paragraph 1(b) a convicted father, cohabiting with a child with an entirely debilitating disability", are also decisive for the matters currently before the Court.

The Court based this decision on a comparison between the care needs of a child under the age of ten and those of a severely disabled child of any age. In this regard, it held that in the scenario involving a severely disabled child "the reference to age cannot take on decisive significance in consideration of the particular need for physical and psychological protection, the satisfaction of which proves to be an essential element within the process of favouring the development of the child's personality. The child's physical and psychological health may in fact be harmed, and significantly so, by the absence of the mother if incarcerated and the lack of care from her; this is because it is a matter of not little import, for a severely disabled person of any age, whether care and assistance are provided by persons other than a parent".

The Court had therefore held that the removal of eligibility for house arrest after the child had reached the age of ten violated both the first and the second paragraphs of Article 3 of the Constitution, in view of an entirely disabled child's enduring need for care and assistance from his or her parents. The Court held that Article 3 of the Constitution had been violated on the grounds that the contested provision provided for "different treatment for family circumstances that were analogous and equivalent, such as, specifically, those of the mother of a child who is incapacitated on the grounds that he or she is under the age of ten, albeit with a certain degree of autonomy, at least in physical terms, and those of the mother of a disabled child who is incapable of attending to his or her own needs, including the most elementary ones, who at any age has a greater and ongoing need for assistance from the mother than does a child under the age of ten". In addition, the legislation also violated Article 3(2) of the Constitution because the enforcement of the sentence in the form of house arrest serves the purpose "of promoting the full development of the child's personality"; as a result, "the eligibility for house arrest of a convicted parent who is cohabiting with an entirely disabled child appears to be conducive to the commitment made by the Republic, and enshrined in Article 3(2) of the Constitution, to remove those social impediments that prevent the full development of an individual's personality".

It is not superfluous to note in this regard that the case law of the Court of Cassation that led to the issue of that judgment subsequently endorsed the arguments made by this Court in pointing out that, for a severely disabled child, the absence of the mother entails "even greater harm" than it does for a healthy child under the age of ten (Court of Cassation, First Criminal Division, Judgment no. 41190 of 18 September-13 October 2015).

5.– Mindful of the entirely analogous considerations to those set out in Judgment no. 350 of 2003 on ordinary house arrest, this Court must now declare unconstitutional the provisions on special house arrest laid down in the contested Article 47-*quinquies*(1) of the Provisions regulating the prison system insofar as it does not apply to incarcerated mothers with severely disabled children of any age, as is the daughter of the inmate who is a party within the main proceedings, who has a severe disability pursuant to Article 3(3) of Law no. 104 of 1992.

By analogy with its findings in relation to ordinary house arrest, this Court considers that the limit of ten years of age provided for under Article 47-*quinquies*(1) of the Provisions regulating the prison system violates the constitutional principles laid down in Article 3(1) and (2) of the Constitution, along with those laid down in Article 31(2) of the Constitution (also invoked by the referring court), which provides for the protection of maternity, that is the bond between mother and child, which cannot be considered to end after the initial stages of the child's life. These principles require that an alternative measure to detention, such as that provided for under Article 47-*quinquies* – the principal purpose of which is to protect the child, as an innocent third party requiring an everyday relationship with and care from the inmate – must also apply to situations involving a disabled child with a "characteristic of severity" pursuant to Article 3(3) of Law no. 104 of 1992, who is always in a particularly vulnerable physical and psychological state, irrespective of age. In situations involving severe disability, individual autonomy is reduced to such an extent "as to require permanent, ongoing and global assistance for individual matters or relationships" at any age (Article 3(3) of Law no. 104 of 1992). In fact, experience shows that the life circumstances and health of persons with a severe disability tend to worsen and deteriorate as they advance in age. As a result, to render the prison benefit concerned conditional upon a merely age-related parameter is unconstitutional where applied in relation to a severely disabled person.

6.– It must also be noted that the case law of the Constitutional Court has held that human relationships, including in particular family relations, are decisive factors for the full development and effective protection of the most vulnerable people. This results from the principle of personal value guaranteed under our Constitution, read also in the light of international law instruments, including in this area above all the United Nations Convention on the Rights of Persons with Disabilities, done in New York on 13 December 2006, ratified and implemented by Law no. 18 of 3 March 2009 (see, regarding this last aspect, Judgments no. 83 of 2019 and no. 2 of 2016).

In fact, this Court has consistently asserted within a rich line of settled case law that "ensuring full protection for weaker individuals" also requires "continuity within the relations that are constitutive of the human personality" (Judgment no. 203 of 2013). Moreover, it has also reiterated that the right of a disabled person to "receive assistance within the context of his or her life community" constitutes "the fulcrum of the protections afforded by the legislator with the aim of removing the impediments liable to prevent the full development of the human person" (Judgment no. 232 of 2018).

It may be of benefit to add that, with the stated purpose of implementing the abovementioned principles of constitutional and international law, by Law no. 112 of 22 June 2016 (Provisions on assistance to severely disabled persons lacking family support), also known as the so-called "After Us" Law, the legislator has recently asserted that the support offered by the parents is essential, specifically for severely disabled persons. Moreover, it took care to state that, upon the death of the parents or in the event that they are no longer able to care for the child, the necessary "measures of assistance, care and protection" must be put in place "in the overriding interest of the severely disabled person" with the aim of ensuring his or her "well-being, full social inclusion and autonomy", over and above the essential levels of assistance and other forms of care and support which are in any case already provided for under applicable law for persons with a disability (Articles 1 and 2).

7.– On the basis of the considerations set out above, Article 47-*quinquies*(1) of the Provisions regulating the prison system must be declared unconstitutional, due to the violation of Articles 3(1) and (2) and 31(2) of the Constitution, insofar as it does not provide for the grant of special house arrest also to a convicted person who is the mother of a child with a severe disability pursuant to Article 3(3) of Law no. 104 of 1992, having been duly ascertained in accordance with the said Law.

It need hardly be added that this declaration of unconstitutionality does not impinge upon the further prerequisites for the grant of the measure. It is therefore without prejudice to Article 47-*quinquies*(1) of the Provisions regulating the prison system, which provides that female inmates may only be eligible for house arrest in their own home, or in another another private residence, or within a facility offering care, assistance or hospitality "if there is no tangible risk of the commission of further offences" (or under the circumstances provided for under Article 47-*quinquies*(1-*bis*) of the Provisions regulating the prison system, only "if there is no tangible risk of the commission of further offences or of flight").

This Court cannot avoid reiterating, as it has previously done on similar occasions (Judgments no. 187 and no. 99 of 2019, no. 211 of 2018, no. 76 of 2017 and no. 239 of 2014) that, when assessing the specific prerequisites for the grant of house arrest and determining the specific arrangements applicable to its implementation, the supervisory court will be called upon to strike a reasonable balance between all of the various interests in play: the disabled person's care needs and the equally indispensable requirements associated with the defence of society and combatting crime. Moreover, along the same lines, the Court of Cassation expressly requires that the decisions assessing applications for house arrest of a convicted mother establish that they have carried out the necessary "overall comparative examination", balancing specifically the requirements associated with the security and defence of society against those of the weak individual different from the convicted person who has a particular need for assistance from his or her mother (see Court of Cassation, First Criminal Division, Judgment no. 26681 of 27 March-17 June 2019; Court of Cassation, First Criminal Division, Judgment no. 53426 of 10 October -24 November 2017; although also, *inter alia*, Court of Cassation, First Criminal Division, Judgment no. 38731 of 7 March-19 September 2013).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 47-*quinquies*(1) of Law no. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and

limitation of liberty) is unconstitutional insofar as it does not provide for the grant of special house arrest also to a convicted person who is the mother of a child with a severe disability within the meaning of Article 3(3) of Law no. 104 of 5 February 1992 (Framework law on assistance to, the social integration of and the rights of the disabled), having been duly ascertained in accordance with the said Law.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 15 January 2020.

Signed:
Marta CARTABIA, President and Author of the Judgment