JUDGMENT NO. 258 YEAR 2017

In this case, the Court heard a referral order concerning legislation stipulating that Italian citizenship may only be acquired if an oath of allegiance is sworn, and which did not provide for any dispensation from that requirement for persons who were, on account of a mental disability, unable to swear the oath and were thus effectively prevented from acquiring Italian citizenship. The Court struck down the legislation insofar as it did not allow for such a dispensation on the grounds that it gave rise to a form of marginalisation of certain disabled persons that precluded them from accessing fundamental citizenship rights.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 10 of Law no. 91 of 5 February 1992 (New provisions on citizenship), Article 7(1) [correction: (2)] of Decree of the President of the Republic [hereafter, d.P.R.] no. 572 of 12 October 1993 (Regulations implementing Law no. 91 of 5 February 1992 establishing new provisions on citizenship) and Article 25(1) of d.P.R. no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, pursuant to Article 2(12) of Law no. 127 of 15 May 1997), initiated by the guardianship judge of the *Tribunale di Modena* pursuant to the application filed by A. S. in his capacity as the guardian [*amministratore di sostegno*] of S. K. by the referral order of 6 December 2016, registered as no. 63 in the Register of Referral Orders 2017 and published in the *Official Journal* of the Republic no. 19, first special series 2017.

Having heard the Judge Rapporteur Augusto Antonio Barbera in chambers on 25 October 2017.

[omitted]

Conclusions on points of law

1.– The guardianship judge of the *Tribunale di Modena* has questioned the constitutionality of Article 10 of Law no. 91 of 5 February 1992 (New provisions on citizenship), Article 7(1) [correction: (2)] of d.P.R. no. 572 of 12 October 1993 (Regulations implementing Law no. 91 of 5 February 1992 establishing new provisions on citizenship) and Article 25(1) of d.P.R. no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, pursuant to Article 2(12) of Law no. 127 of 15 May 1997) insofar as they do not provide for a dispensation from the duty to swear the oath of allegiance for disabled persons who, on account of their condition, are unable to comply with that obligation.

2.– According to the referring judge, by effect of the contested provisions, a d.P.R. granting citizenship cannot be transcribed into the civil registry unless an oath of allegiance is sworn: compliance with that obligation is stated to be essential for the purpose of acquiring Italian citizenship, which, it is asserted, is not possible in the event that the individual is unable to swear the oath of allegiance prescribed owing to a mental disability. The contested provisions are thus claimed to violate Article 2 of the Constitution on the grounds that "to preclude a mentally disabled person from the acquisition of a fundamental right", specifically status as an Italian citizen, would entail a failure to "guarantee" that right, thereby excluding the mentally disabled person from the collectivity into which he was born and has grown up solely on account of the impediment caused by his individual mental condition.

2.1.– It is further asserted that the contested provisions violate Article 3(2) of the Constitution: the inability to swear the oath of allegiance is in fact argued to constitute a "significant 'obstacle'", which *de facto* precludes the full freedom and equality of a mentally disabled person. It is thus asserted that there is a difference between the treatment of non-disabled individuals, who are capable of swearing the oath of allegiance, and "those who are not healthy insofar as disabled and who, as a result of the failure to swear the oath of allegiance, cannot acquire the *status civitatis*".

2.2.– The contested provisions are claimed to violate also international and supranational law, including in particular Article 18 of the United Nations Convention on the Rights of Persons with Disabilities, ratified and implemented by Law no. 18 of 3 March 2009 (Ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol, done in New York on 13 December 2006 and establishment of the National Observatory on the Circumstances of Disabled Persons), in addition to Articles 21 and 26 of the Charter of Fundamental Rights of the European Union (referred to, due to a merely clerical error, in the operative part of the referral order as the "1975 UN Declaration on the Rights of Disabled Persons"), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007.

2.2.1.– Article 18 of the 2006 United Nations Convention in fact provides that States Parties shall ensure "that persons with disabilities... have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability". It is argued that the centrality afforded to the protection of individual rights is confirmed by Articles 21 and 26 of the EU Charter of Fundamental Rights, which require that citizenship be granted also to disabled –third-country nationals.

3.– The referring judge considers that it is not possible to interpret the contested provisions in a manner that is consistent with the Constitution or to endorse a position adopted within the case law of the merits courts (referring to the Decree of 9 January 2009 of the *Tribunale di Bologna*) which, in line with an opinion issued by the Council of State in relation to the loss of legal capacity, held that a person who has lost legal capacity is not required to swear the oath of allegiance (Council of State, first division, opinion no. 261/85 of 13 March 1987).

In the opinion of the referring judge, such an interpretation is precluded by the fact that it is impossible to apply by analogy the last paragraph of Article 411 of the Civil Code, which extends to guardianship [*amministrazione di sostegno*] the effects, limitations or disqualifications provided for under the legislation governing the loss of legal capacity [*interdizione*] and the partial exclusion of legal capacity [*inabilitazione*]. According to the referring judge, the provision from the Civil Code results in the application, to guardianship, of institutes that are governed by law, but not those resulting from "administrative acts such as the opinions issued by the Council of State".

According to the referring judge, the oath of allegiance entails a moral commitment towards and conscious participation in the state community by the person swearing the oath: assumption of the status of citizen is argued to imply a mindful and informed participation in the exercise of rights and the fulfilment of duties. It is argued that, owing to the highly personal nature of the oath of allegiance, citizenship cannot be acquired by a person who lacks the natural capacity to understand the legal and moral consequences of the oath of allegiance and the meaning which that act has for the society at large.

4.– As a preliminary matter, it must be reiterated that the guardianship judge has standing, within proceedings falling under non-litigious jurisdiction relating to guardianship, to raise questions of constitutionality by interlocutory reference (Judgment no. 440 of 2005).

5.– It must be observed in this regard that the guardian has asked the guardianship judge to authorise the transcription of the d.P.R. granting citizenship to his daughter. This Court has already asserted that, within interlocutory proceedings, the decision as to the jurisdiction and competence of the referring body – and more generally concerning the prerequisites for the existence of the main proceedings – is reserved to the referring body as part of the assessment of the relevance of the case and cannot be reviewed by the Court unless those prerequisites are "manifestly or incontrovertibly lacking" (Judgment n. 262 of 2015; to the same effect, Judgments no. 34 of 2010, no. 241 of 2008 and no. 163 of 1993), which does not appear to be the case within these proceedings.

6.– The question concerning Article 7(2) of d.P.R. no. 572 of 1993 and Article 25(2) of d.P.R. no. 396 of 2000 is inadmissible as it concerns provisions with regulatory status, which do not have the force of primary legislation and thus fall outside the scope of review by this Court (*inter alia*, Orders no. 254 and no. 81 of 2016, no. 156 of 2013).

7.– On the merits, the question concerning the constitutionality of Article 10 of Law no. 91 of 1992, raised with reference to Articles 2 and 3(2) of the Constitution, is well founded.

Article 10 provides that, following the grant of Italian citizenship to a foreign national by decree of the President of the Republic following the fulfilment of the prerequisites laid down by Law no. 91 of 1992, the decree may only be transcribed into the register of civil status after the oath swearing allegiance to the Republic and the undertaking to abide by its Constitution and its laws has been given. It is thus not possible for an individual to acquire citizenship in the event that he or she is unable to swear that oath due to a serious mental disability.

7.1.– Article 54(1) of the Constitution, which imposes on citizens a duty of loyalty towards the Republic and to abide by its Constitution and laws, manifests itself for foreign nationals in the swearing of the oath of allegiance as a solemn endorsement of the values of the Republic. The oath of allegiance required under the contested provision is therefore a personal act, which pertains directly to constitutional law by virtue of the values inherent within its performance. As such, it cannot be given by a legal representative in lieu of the interested party in accordance with the rules set forth in the Civil Code.

7.2.– Therefore, the referring judge's argument that it is not possible to interpret the contested provision in a manner that is consistent with the Constitution appears to be correct.

Specifically, the requirement to arrive at an interpretation that is consistent with the Constitution must be set aside in favour of interlocutory constitutional review where such interpretation is incompatible with the literal meaning of the provision. In fact, as this Court has already held, where it is not able to "infer from the provision any rule that is compatible with the Constitution, the judge is required to refer the respective question of constitutionality to this Court" (Judgment no. 36 of 2016).

8.– The nature of the oath of allegiance provided for under Article 54 of the Constitution directly recalls the fundamental principles of the constitutional order.

In requiring the Republic to recognise and guarantee inviolable rights, "both as an individual and in the social groups where human personality is expressed", Article 2 of the Constitution lays down a fundamental principle, which places the dignity and value of the individual at the pinnacle of the legal order.
In keeping with this perspective, Article 2 of the Constitution cannot be read in isolation from Article 3(2) of the Constitution, which charges the Republic with the task of removing the economic and social obstacles that constrain freedom and equality along with the full development of the individual.
Such a reading, although not expressly mentioned by the referring judge, is reflected by the first paragraph of that Article which, as protection for the inviolability of rights, guarantees the principle of equality irrespective of "personal circumstances". As this Court has held on various occasions, although Article 3 expressly refers only to citizens, the rule contained in it also applies to foreign nationals "with regard to the issue of respect for […] fundamental rights" (Judgment no. 120 of 1967), in particular where, as in this case, a foreign national has been granted citizenship and need only fulfil a prerequisite for its acquisition.
8.1.– The personal circumstances that may limit equality undoubtedly include disability. This phenomenon is expressly considered by the Constitution: it is expressly relevant within Article 38 of the Constitution, the first paragraph of which recognises the right to social assistance to those who are disabled as a result of industrial accidents, whilst the third paragraph recognises the right to education and professional training to the "disabled" and "impaired".
The principles mentioned above were implemented by Law no. 104 of 5 February 1992 (Framework law on assistance to, the social integration of and the rights of the disabled), which sets out the fundamental legislative framework applicable to disability with the aim not only of providing assistance but also of promoting the social integration of the disabled. As this Court has previously stressed, this legislation marked a "radical change in perspective compared to the manner in which the problems of the disabled are dealt with, which are considered […] not only as individual problems but as problems that must be addressed by society as a whole" (Judgment no. 167 of 1999). According to Article 1 of the Law, "disabling circumstances" are obstacles which it is the task of the Republic to remove in order to enable the "greatest possible autonomy" for the disabled along with the full exercise of fundamental rights.
When considering, with reference to the right to education of the disabled, this duty to promote autonomy imposed by the Constitution on public bodies, this Court has held that the legal status of the disabled "results from the confluence of a variety of values pertaining to the fundamental principles inspiring the constitutional architecture" (Judgments no. 275 of 2016 and no. 215 of 1987), having regard to the process of inclusion into society (Judgment no. 80 of 2010).
9.– Where the other conditions laid down by the law governing the acquisition of citizenship are met, such inclusion is evidently precluded by the legislative requirement for the swearing of an oath of allegiance by an individual who, owing to particularly serious mental disability, is incapable of doing so. The requirement for an oath, and the failure to acquire citizenship which results from the failure to swear the oath, may give rise to a form of social marginalisation which unreasonably excludes the seriously handicapped from the enjoyment of citizenship rights, construed as a general precondition for membership of the national community. It may in addition result in a

further form of marginalisation, including compared to other family members who have acquired citizenship.
The contested provision must therefore be declared unconstitutional insofar as it does not dispense any person who is incapable of complying with that obligation on account of a serious and certified disability from the requirement to swear the oath of allegiance.
10.– The dispensation from the requirement to swear the oath of allegiance must apply irrespective of the "type" of legally relevant disability. The important feature is the objective inability to perform the act owing to a serious disability, whereby the specific legal status of the disabled person is not relevant, and is without prejudice to the power of the Public Prosecutor to challenge any acts, omissions or refusals by the civil registrar pursuant to Article 95(2) of d.P.R. no. 396 of 2000 in the event of a perverse application of the rules applicable to dispensation from the requirement to swear the oath of allegiance.
The challenges raised with reference to the provisions of international and supranational law invoked are moot.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

1) *declares* unconstitutional Article 10 of Law no. 91 of 5 February 1992 (New provisions on citizenship) insofar as it does not provide that any person who is incapable of complying with that obligation on account of a serious and certified disability is dispensed from the requirement to swear the oath of allegiance;
2) *rules* inadmissible the question concerning the constitutionality of Article 7(2) of d.P.R. no. 572 of 12 October 1993 (Regulations implementing Law no. 91 of 5 February 1992, new provisions on citizenship) and Article 25(1) of d.P.R. no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, pursuant to Article 2(12) of Law no. 127 of 15 May 1997) raised by the guardianship judge of the *Tribunale di Modena* by the referral order mentioned in the headnote.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 November 2017.