JUDGMENT NO. 272 YEAR 2017

In this case, the Court heard a referral order concerning legislation which did not provide that a challenge to the recognition of an underage child on the grounds that he was not in actual fact the biological child may only be accepted where this reflects the child's best interests. The Court dismissed the question as unfounded holding that, whilst it would be unconstitutional to construe the legislation as requiring the child's best interests to be considered as a mandatory prerequisite for an order of de-recognition, it would also be unconstitutional to disregard such interests entirely.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 263 of the Civil Code, initiated by the Milan Court of Appeal in the civil proceedings pending between A.L. C. and the guardian *ad litem* of L.F. Z. by the referral order of 25 July 2016, registered as no. 273 in the Register of Referral Orders 2016 and published in the Official Journal of the Republic no. 4, first special series 2017.

Considering the entries of appearance by A.L. C. and the guardian *ad litem* of L.F. Z., along with the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Giuliano Amato at the public hearing of 21 November 2017;

having heard Counsel Grazia Ofelia Cesaro in her capacity as the guardian *ad litem* of L.F. Z., Counsel Francesca Maria Zanasi for A.L. C. and the State Counsel [*Avvocato dello Stato*] Chiarina Aiello for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– Within proceedings concerning a challenge to recognition as a biological child on the grounds that he was not in actual fact the biological child, the Milan Court of Appeal has raised a question concerning the constitutionality of Article 263 of the Civil Code with reference to Articles 2, 3, 30, 31 and 117(1) of the Constitution, the last-mentioned in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, ECHR), signed in Rome on 4 November 1950 and ratified and implemented by Law no. 848 of 4 August 1955.

The provision has been contested insofar as it does not provide that a challenge to the recognition of an underage child on the grounds that he was not in actual fact the biological child may only be accepted where this reflects the child's best interests.

2.– According to the legal representative of the President of the Council of Ministers, who intervened in the interlocutory proceedings, the question is inadmissible in that it seeks to introduce, through an expansive ruling, an exclusive prerequisite (the child's best interest) for any challenge to recognition as a biological child. It should on the contrary fall to the legislator to establish whether the acceptance of such a challenge should be subject to the child's interest in being a member of the family.

The objection that the question is inadmissible is groundless.

It must be pointed out in this regard that the remedy sought by the referring court seeks an acknowledgement of the ability to assess the child's best interest, when deciding on the challenge to recognition. Were that possibility to be denied, the acceptance of the

claim would be conditional only upon a finding that the fact of recognition did not reflect the actual parentage. Ultimately, the question objects that the automatic mechanism within the decision-making process that precludes a consideration of the interests in play is unreasonable. The constitutional review referred to this Court is thus limited to a verification of the constitutional basis for the contested decision-making mechanism, without making any inference concerning the discretionary choices reserved to the legislator.

3.– Again as a preliminary matter, it is necessary to delineate the scope of the inquiry which the referring court wishes to refer to this Court on this occasion.

According to this perspective, the proceedings before the referring court concern an application seeking a ruling that there is no parent-child relationship with regard to a child born abroad through recourse to a surrogate mother. However, the proceedings do not concern the legitimacy of the prohibition on that practice pursuant to Article 12(6) of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), or even its absolute status. The issue of the limits on the possibility of registering foreign birth certificates in Italy also falls outside the scope of these constitutionality proceedings.

The question raised by the Milan Court of Appeal in fact concerns the legislation governing challenges pursuant to Article 263 of the Civil Code that seek to revoke status as a son or daughter that had been previously attributed to a child by virtue of recognition, on the grounds that the minor is not in actual fact the biological child.

4.– On the merits, the question concerning the constitutionality of Article 263 of the Civil Code is unfounded.

According to the interpretation endorsed by the referring court, the contested provision violates the principles laid down by Articles 2, 3, 30, 31 and 117(1) of the Constitution because, within proceedings to challenge recognition as a biological child, it does not permit specific consideration to be given to the child's interest "in obtaining recognition for and the maintenance of his or her parent-child relationship as most closely reflects his or her life needs". However, such an interpretation cannot be endorsed, not even in cases in which the legislator imposes a requirement to refrain from disregarding the truth.

4.1.– Whilst it is necessary to acknowledge a marked preference expressed by the legal order that the status of an individual should reflect the actual circumstances of his or her procreation, it cannot be asserted that the establishment of the biological and genetic parentage of an individual is a value of absolute constitutional significance, as such immune to any balancing operation.

Indeed, the current legislative and systemic framework, under both internal and international law, does not require within actions seeking de-recognition of filiative status, that such a finding should have absolute priority over all other interests at stake.

In all cases in which genetic identity may differ from legal identity, the requirement to strike a balance between the need to establish the truth and the best interests of the child is apparent from the evolution of the law over time. This requirement also applies with regard to the interpretation of the provisions that must be applied in the case under examination.

4.1.1.– In this regard, it must be observed as a preliminary matter that Article 263 of the Civil Code has been contested by the referring court in the version that was in force prior to the amendments introduced by Legislative Decree no. 154 of 28 December 2013 (Amendment of the provisions applicable to filiation, adopted pursuant to Article 2 of Law no. 219 of 10 December 2012), which is applicable *ratione temporis*.

In particular, in amending Article 263 of the Civil Code, Article 28 of Legislative Decree no. 219, which has been in force since 7 February 2014, limited the exclusion on time-barring exclusively to actions brought by the child. A similar provision has been incorporated – with regard to actions seeking the de-recognition of paternity – into Article 244(5) of the Civil Code, as amended by Article 18(1) of Legislative Decree no. 154 of 2013. Where they seek to bring any of the above-mentioned actions to challenge the status of a child, the other entitled parties are now required to comply with the time-barring periods provided for under the new legislation.

The secondary legislator has thus guaranteed, without limitation in time, the primary and inviolable interest of the child in establishing his or her own biological identity and parentage. Conversely, the imposition of time-barring limits on other entitled parties has circumscribed within strict temporal limits the ability to bring actions to challenge a child's parentage, thereby ensuring protection for the child's right to stability of the status acquired.

The need to balance the interests of the child with the public interest in certainty of status is also expressly acknowledged by the legislator in the provision made for actions to recognise a child (Articles 250 and 251 of the Civil Code), which seek to extend the parental relationship to a particular child.

4.1.2.– On the other hand, Article 9 of Law no. 40 of 2004 provided that a spouse or cohabitee who had consented to the recourse to heterologous medically assisted reproduction techniques could not bring an action for de-recognition or challenge recognition pursuant to Article 263 of the Civil Code.

In this regard, this Court held that it was possible "to confirm both that any action seeking de-recognition of paternity […] and any challenge pursuant to Article 263 of the Civil Code (as amended by Article 28 of Legislative Decree no. 154 of 2013) will be inadmissible, and that birth as a result of heterologous MAR [medically assisted reproduction] will not result in the establishment of legal relations of parentage between the gamete donor and the newly born child, as the key aspects of the legal status of the latter will thus be regulated" (Judgment no. 162 of 2014).

Also in such cases, in the event of a discrepancy between genetic parentage and biological parentage, the balance struck by the legislator affords priority to the principle of the conservation of the parent-child relationship, or the *status filiationis*.

4.1.3.– Precisely in order to guarantee protection to any child conceived through heterologous fertilisation, this Court has however taken care – although without calling into question the legitimacy of such a practice, "or […] the principle of the non-transactable status of the parent-child relationship, a principle which is liable to be affected by the various techniques of reproduction that are currently *de facto* available" – even prior to the enactment of Law no. 40 of 2004, "to protect also individuals born as a result of assisted fertilisation, which inevitably impinges upon multiple constitutional requirements. Priority significance is given in this regard to the guarantees provided to the newly born child […], not only in relation to the rights and duties stipulated in relation to his or her upbringing, including in particular under Articles 30 and 31 of the Constitution, but first and foremost – pursuant to Article 2 of the Constitution – to his or her rights against the individual(s) who freely undertook to accept the child, thereby taking on the related responsibilities: and it falls to the legislator to specify these rights" (Judgment no. 347 of 1998).

4.1.4.– As has been highlighted by the referring court itself with reference to the violation of Article 117(1) of the Constitution, the European and international framework governing the protection of the rights of the child also highlights the central

nature of the assessment of the child's best interests when making choices that affect him or her.
This principle has been solemnly asserted first in 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, according to which "[i]n 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" (Article 3(1)).
Provision to the same effect is made by the European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996, ratified and implemented by Law no. 77 of 20 March 2003, and the Guidelines of the Committee of Ministers of the Council of Europe on "child-friendly justice", adopted on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.
Finally Article 24(2) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and adopted at Strasbourg on 12 December 2007, enshrines the principle that "[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".
On the other hand, even though there is no specific textual provision to this effect, the need to guarantee the best interests of the child has been asserted within the interpretation, by the European Court of Human Rights, of both Article 8 and Article 14 ECHR. Moreover, it is precisely in cases involving surrogacy, when assessing the refusal to register such births within the French registers of civil status, that the European Court of Human Rights has held that the need to respect the best interests of children must be of paramount significance in relation to any decisions concerning them (judgments of 26 June 2014, given in the cases of *Mennesson v. France* and *Labassee v. France*, applications no. 65192 of 2011 and no. 65941 of 2011).
4.1.5.– It must also be recalled that, in line with the principles set forth in the case law of the ECtHR, Law no. 173 of 19 October 2015 (Amendments to Law no. 184 of 4 May 1983 on foster children's right to affective continuity) has afforded primary importance to the interests of the child in maintaining affective bonds, which without doubt apply irrespective of blood relations, by granting legal significance to *de facto* relations established between a child who has been declared eligible for adoption and the foster family.
On the other hand, a discrepancy between genetic identity and legal identity is a premise specifically for the legislation governing adoption (Law no. 184 of 4 May 1983 on the "Right of the child to a family"), as an expression of the principle of responsibility of any person who chooses to become a parent, thus giving rise to a legitimate expectation in the continuity of the relationship.
4.1.6.– It has also been recognised for some time within the case law of this Court that the child's best interest is a pre-eminent consideration within actions seeking de-recognition of the parent-child relationship (Judgments n. 112 of 1997, no. 170 of 1999 and no. 322 of 2011; Order no. 7 of 2012).
That case law contains findings concerning the particular value of the biological truth. However – contrary to the assertions of the referring court – it has by no means held that it is not possible to assess the child's best interests within actions that seek to de-recognise the parent-child relationship. It has been recognised that the biological facts relating to procreation constitute "an essential component" of the child's personal identity, which contributes, alongside other components, to defining its content.

Thus, in stating the general hope that there should be a "general overlap" between formal certainty and biological truth, it has been acknowledged that the assessment of the biological truth also forms part of the overall assessment which falls to the court, which must be conducted having regard to all other aspects which, along with biological truth, contribute to defining the child's overall identity, including also the maintenance of his or her existing status, which may potentially conflict with the former aim.

In fact, it is a "primary task of the children's court […] to verify whether any change in the status of the child will reflect his or her best interests and will not be detrimental for him or her; at the same time, it is also necessary to verify, also merely according to a summary procedure, the plausibility of the parent-child relationship alleged, as the child's right to his or her own identity must be guaranteed" (Judgment no. 216 of 1997 on the legislation previously applicable to actions seeking the de-recognition of paternity pursuant to Articles 273 and 274 of the Civil Code).

Moreover, the legislative and systemic evolution of the concept of family, which has been such as to confirm the legal significance of the parent-child relationship as a social fact, even where it does not coincide with biological parentage, also features express recognition by this Court that "the issue of genetic origin is not an essential prerequisite for the existence of a family" (Judgment no. 162 of 2014).

4.1.7.– The requirement to strike an adequate balance between the interests in play, in the light of the specific circumstances of the individuals involved, including in particular those of the child, has recently been acknowledged also by the Court of Cassation with reference to actions seeking the de-recognition of paternity.

The case law of that court has in fact held that the presumption in favour of the truth (*favor veritatis*) is not a value of absolute constitutional significance to be asserted always and under all circumstances, given that Article 30 of the Constitution has not afforded absolutely predominant status to biological truth over legal truth. In providing that "[t]he law shall establish rules and constraints for the determination of paternity", Article 30(4) of the Constitution has vested the legislator with the power to afford priority to legal paternity over biological paternity while nevertheless respecting other constitutional values, and to set the conditions under which and the procedures according to which the latter may be asserted, thereby also leaving to it the general assessment as to the most suitable solution for realising the child's best interests (Court of Cassation, first civil division, judgments no. 13638 of 30 May 2013, no. 26767 of 22 December 2016 and no. 8617 of 3 April 2017).

4.2.– It is in the light of these principles, which are inherent also within the changed legislative and systemic context, that the question concerning the constitutionality of Article 263 of the Civil Code has arisen.

The assertion of the need to give specific consideration to the child's best interests within all decisions affecting him or her is strongly rooted within both national and international law, and this Court has long contributed to this degree of consolidation (see *inter alia* Judgments no. 7 of 2013, no. 31 of 2012, no. 283 of 1999, no. 303 of 1996, no. 148 of 1992 and no. 11 of 1981).

It is consequently not apparent why, when confronted with an action pursuant to Article 263 of the Civil Code, with the exception of those brought by the child him- or herself, the court should not assess: whether the applicant's interest in giving effect to the truth should prevail over that of the child; whether that action is genuinely capable of realising that interest (as is the case under Article 264 of the Civil Code); whether the interest in the truth also has a public aspect (for example insofar as it relates to practices that are prohibited by law, such as surrogacy, which causes intolerable offence to the

dignity of the woman and profoundly undermines human relations) and requires that the child's best interests be protected insofar as consistent with that truth.
There are also cases in which a comparative assessment of the interests is carried out by the law directly, as is the case for the prohibition on de-recognition following heterologous fertilisation. In other cases, on the other hand, the legislator imposes a mandatory requirement to acknowledge the truth by imposing prohibitions such as the ban on surrogacy. However, none of this entails the negation of the child's best interests.
After all, the court is required to carry out an assessment within the very procedure provided for under Article 264 of the Civil Code for the appointment of a guardian *ad litem* for the underage child, where the action seeking de-recognition has been initiated in his or her own interest. In fact, in these circumstances too the legislator has charged the specialist court with the task of assessing the child's interest in the initiation of such action even before the action is brought, albeit subject to the limits resulting from the non-public status of the proceedings.
4.3.– Thus, whilst it is not acceptable under constitutional law for the requirement of truth concerning parentage to prevail automatically over the child's best interests, it must also be asserted that the balancing of that requirement against that interest must not entail the automatic negation of one in favour of the other.
On the other hand, this balancing operation entails a comparative assessment of the interests underlying the ruling concerning the true status along with the consequences that such a finding may have for the legal status of the child.
It has been noted above that the decision-making standard that the court is required to apply in these cases must take account of variables that are much more complex than the rigid true-false dichotomy. Amongst these interests, alongside the duration of the relationship that has been established with the child and thus the feeling of identity already acquired by the latter, particular relevance must today be afforded on the one hand to the manner of conception and gestation and on the other hand to the existence of legal instruments enabling the establishment of a legal relationship with the disputed parent which, whilst differing from that resulting from recognition, such as adoption in specific cases, ensures that the child is adequately protected.
It is therefore necessary to carry out a comparative assessment which, as the law is silent concerning this matter, necessarily involves a consideration of the high level of social harm which our legal system associates with surrogacy, which is prohibited by a dedicated provision of criminal law.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

declares unfounded the question concerning the constitutionality of Article 263 of the Civil Code, raised by the Milan Court of Appeal by the referral order mentioned in the headnote with reference to Articles 2, 3, 30, 31 and 117(1) of the Constitution, the last-mentioned in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified and implemented by Law no. 848 of 4 August 1955.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 22 November 2017.