JUDGMENT NO. 33 OF 2021

In this case, the Court ruled on the question raised by the Court of Cassation as to whether it is constitutional for the Italian judicial authorities to refuse to give effect to a foreign decree that has recognised two Italian men, who have entered into a civil partnership, as the parents of a child born abroad to a surrogate mother.

The Constitutional Court started by reiterating that the prohibition on surrogate pregnancy, which is enshrined in criminal law, pursues the objective of protecting the dignity of women whilst also seeking to avoid the risk of particularly vulnerable women being exploited due to circumstances of social and economic hardship.

However, the Court observed that the priority issue in the case now before it was the "best interests" of the child, who has an obvious interest to "to obtain legal recognition of the ties which already exist in respect of both of them, without prejudice to the possible establishment of a legal relationship with the surrogate mother". These ties are in fact an essential part of the child's very identity, as a person raised and cared for by a given couple, whether hetero- or homosexual, as there is no reason to assume that homosexual couples are not suited to bear parental responsibilities. In addition, the child has a clear interest in obtaining recognition for the legal duties of both partners towards his or her by virtue of their parental responsibility.

On the other hand, the Court acknowledged that the child's best interests may be balanced against the legitimate aim of discouraging recourse to surrogate pregnancy, which is prohibited in Italy. It also stressed that the European Court of Human Rights does not require States to give effect within their legal orders to foreign birth certificates presented by a couple (hetero- or homosexual) who have had recourse to surrogate pregnancy abroad.

Under these circumstances, the Court held that the legislator certainly enjoys a wide margin of appreciation on how to strike a fair balance between competing interests and legitimate aims, and is undoubtedly in a better position than the Court itself to find an appropriate solution.

As a consequence, the Court ruled the question inadmissible, while stressing the need for urgent legislation to ensure due protection of the child's best interests, including recognition of the legal relationship with the non-biological parent.

The Court underlined that recourse to "adoption under special circumstances", under Article 44(1)(d) of Law No. 184 of 1983, which the Court of Cassation already considers to be available, offers a a level of protection for the child's best interests that is welcomed, but not entirely consistent with constitutional and supranational principles. Adoption under special circumstances does not grant full parental status to the non-biological parent. In addition, it is not clear whether it establishes any family relationship between the adopted child and those whom he or she perceives, on a social level, as his or her grandparents, uncles and aunts – or even brothers and sisters. Finally, this form of adoption is conditional upon the consent of the "biological" parent, which may potentially be denied in the event of a crisis within the couple.

The Court therefore urges a reform capable of ensuring full protection of the interests of a child born from a surrogate motherhood.

THE CONSTITUTIONAL COURT

[omitted]

JUDGMENT

[omitted]

The facts of the case

[omitted]

1.1. – According to the referring court, the case that gave rise to the proceedings concerns a child born in Canada in 2015 to a woman in whom an embryo was implanted, formed from the gametes of an anonymous female donor and a man of Italian nationality (P. F.) married in Canada to another man, also an Italian national (F. B.), with whom he shared the desire for parenthood. The marriage certificate was later transcribed in the Italian civil partnership register.

At the time of the child's birth, the Canadian authorities had drawn up a birth certificate indicating only P. F. as the parent, while no mention was made of F. B., or the surrogate mother who had given birth to the child, or the egg donor. Upholding the appeal of the two men, the Supreme Court of British Columbia declared in 2017 that both applicants should be considered the parents of the child and ordered the rectification of the birth certificate in Canada.

The two men therefore asked the Italian registrar to also rectify the child's birth certificate in Italy on the basis of the decision of the Supreme Court of British Columbia. Upon rejection of this request, they applied to the Venice Court of Appeal for recognition of the Canadian court order in Italy under Article 67 of Law No. 218 of 1995.

In 2018, the Court of Appeal of Venice upheld the appeal, recognising the effectiveness of the order in Italy.

However, the State Counsel's Office [*Avvocatura dello Stato*] applied to the Supreme Court of Cassation on behalf of the Ministry of the Interior and the mayor of the municipality where the child's original birth certificate had been transcribed.

1.2.– Hearing this appeal, the First Civil Division of the Supreme Court of Cassation noted that in the meantime, the Joint Civil Divisions of that same jurisdiction had handed down Judgment No. 12193 of 8 May 2019. This judgment ruled that a foreign decree recognising the parental relationship between a child born as a result of surrogacy and the "intended parent" cannot be recognised in our legal system. According to the Joint Divisions, such recognition would be at odds with the prohibition of surrogate motherhood based on Article 12(6) of Law No. 40 of 2004, which forms parts of the public *ordre public*, as it protects fundamental values such as the dignity of the pregnant woman and the institution of adoption.

However, the referring Division questions the compatibility of this interpretation of the law with a number of constitutional provisions.

1.3.– First of all, the interpretation adopted by the Joint Civil Divisions allegedly breaches Article 117(1) of the Italian Constitution in respect of several fundamental rights of the child recognised by international law, namely the rights to private and family life (Article 8 ECHR), not to suffer discrimination, to have his or her best interests taken into consideration, to be immediately registered at birth and to have a name, to know his or her parents, to be brought up by them and not be separated from them (Articles 2, 3, 7, 8 and 9 of the Convention on the Rights of the Child respectively); in respect to the principle of joint parental responsibility for the upbringing and care of the child (Article 18 of the same Convention); and in respect of the rights of the child recognised by Article 24 CFREU [Charter of Fundamental Rights of the European Union].

The referring court draws the attention to the advisory opinion of the Grand Chamber of the European Court of Human Rights (ECtHR), delivered at the request of the French Court of Cassation on 10 April 2019. In that opinion, the ECtHR observed that the right to respect for a child's private life within the meaning of Article 8 ECHR requires national law to legally recognise the bond between the child born from a surrogate mother and his or her "intended parent". The Strasbourg Court also considered that such

recognition does not necessarily entail the obligation to give effect to the foreign birth certificate within the national legal order, since the right to respect for the child's private life may also be protected by other means, for example through adoption by the "intended parent". In this case, however, the adoption procedures established by national law must enable a decision to be taken rapidly, in accordance with the best interests of the child.

According to the referring Division, the current Italian case law does not meet the standards of protection of the rights of the child established by the Convention. Firstly, the special form of adoption based on Article 44(1)(*d*) of Law No. 184 of 1983, which is open to the "intended parent" according to Judgment No. 12193 of 2019 of the Joint Civil Divisions, does not create a true parent-child relationship, but places instead the non-biological parent in a situation of inferiority to the biological parent. Secondly, this kind of adoption does not create family relationships with the adopting person's relatives and excludes the right to inherit from them. Thirdly, it does not ensure a speedy procedure, as required by the ECtHR in the child's interest. Fourthly, this adoption remains subject to the will of the "intended" parent, thus leaving open the possibility that he or she might "evade the assumption of responsibility already manifested and legitimised in the country of the child's birth"; it also depends on the biological parent giving consent for adoption, which he or she might not give if the couple were to separate.

1.4. – According to the referring court, the case law established by the ruling of the Joint Divisions also conflicts with Articles 2, 3, 30 and 31 of the Italian Constitution.

The child's right to integration and stable residence within his or her own nuclear family, understood as a constitutionally protected social unit, and the right to the child's identity, are infringed without the justification of protecting the 'surrogate' mother, who would in any event derive no advantage from failing to recognise the filial bond between the child and the intended parent.

Furthermore, the child born through surrogacy suffers discrimination with respect to other children due to circumstances for which he or she bears no responsibility.

It would also be unreasonable to allow the biological parent, but not the 'intended' parent, to be recognised as such, given that the former – having provided his or her gametes for the formation of the embryo – is even more involved in the procreative process, but this act, which is unlawful in our legal system, gives rise to the supposed contravention of Italian public order in recognising the parental status of the 'intended' father.

Lastly, it would be unreasonable to preclude a court from assessing the child's interest in the recognition of his or her bond with the 'intended' parent on a case-by-case basis, thereby automatically sacrificing the protection of the child's rights in order to condemn the parents' conduct (see Judgments of this Court No. 7 of 2013, No. 31 of 2012 and No. 494 of 2002).

2. – The President of the Council of Ministers, represented and defended by the State Counsel's Office, intervened asking the Court to declare the questions inadmissible or unfounded.

[omitted]

3. – F. B. and P. F., "in their own right and as parents" of the child P. B. F., entered an appearance requesting that the issues raised by the Supreme Court of Cassation be upheld [omitted].

5.- Several written opinions were filed pursuant to Article 4-*ter* of the Supplementary Rules for Proceedings before the Constitutional Court [omitted].

[omitted]

Conclusions on points of law

[omitted]

2. – In essence, the questions of constitutionality that this Court is called upon to examine concern the civil status of children born through surrogacy, which is prohibited in Italian law by Article 12(6) of Law No. 40/2004.

More specifically, what is at issue here is the possibility of giving effect in Italian law to foreign judicial acts that not only recognise the parenthood of the person who has provided his or her own gametes – the so-called 'biological' parent –, but also the person who has shared in the parental project without providing his or her own genetic contribution – the so-called 'intended' parent –.

The First Civil Division of the Supreme Court of Cassation questions the constitutionality of the 'living law' resulting from the Joint Civil Divisions' Judgment No. 12193 of 8 May 2019, which excludes recognition in Italian law of a foreign court decision declaring a filial relationship between a child born abroad through surrogacy and an 'intended' parent who is an Italian citizen, on the grounds that any such recognition would infringe the prohibition on surrogacy established by Article 12(6) of Law No. 40 of 2004, which, according to the Joint Divisions, is a principle of *ordre public*.

In the view of the referring court, this solution violates all the constitutional and supranational principles referred to above.

Consequently, the First Civil Division of the Supreme Court of Cassation raises questions as to the constitutionality of the combined provisions:

– of Article 64(1)(*g*), of Law No. 218 of 1995, which prohibits the recognition of foreign judgments if they produce effects contrary to *ordre public*;

– of Article 18 of Decree of the President of the Republic No. 396 of 2000, which prohibits the transcription, in Italian civil status registers, of decrees formulated abroad that are contrary to *ordre public*; and

– of Article 12(6) of Law No. 40 of 2004, which establishes criminal penalties for anyone who "carries out, organises or advertises the commercialisation of gametes or embryos or surrogate motherhood in any form".

[omitted]

5. – [The questions] must be declared inadmissible for the following reasons.

5.1.– The case law challenged by the referring court hinges on the judgment by the Joint Civil Division of the Supreme Court of Cassation qualifying the prohibition of surrogate motherhood under Article 12(6) of Law No. 40 of 2004 as a "principle of *ordre public*", which protect fundamental values, including in particular the human dignity of the woman.

This Court has recently pronounced in similar terms, observing that the practice of surrogacy "causes intolerable offence to the dignity of the woman and profoundly undermines human relations" (Judgment No. 272 of 2017). Moreover, it is worth considering – as noted by the State Counsel's Office and some of the *amici curiae* – that surrogacy agreements entail the risk of exploiting the vulnerability of women in difficult social and economic conditions, which could influence their decision to become pregnant in the sole interest of third parties, to whom the child must be handed over immediately after birth.

These concerns are the most likely reason for the condemnation of "any form of commercial surrogacy" expressed by the European Parliament in its Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009-INI) (para. 82).

5.2.– The questions now submitted to this Court, however, focus on the interests of the child born through surrogacy, with regard to its relationship with the couple (whether homosexual, as in the case that gave rise to the referral, or heterosexual) who was

involved in its conception and birth in a State where surrogacy is not illegal, then brought the child to Italy and now cares for it day to day.

More precisely, this Court is being asked whether the current state of the case law, as set out by the Joint Civil Divisions, is compatible with the rights of the child enshrined in the constitutional and supranational provisions invoked by the referring court.

5.3.– This Court has recently recalled that, in all decisions concerning children that fall within the competence of public authorities, including the courts, primary importance must be given to safeguarding the "best interests" of the child (Judgment No. 102 of 2020). This principle was first expressed in the Universal Declaration of the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1959, and has been transposed – inter alia – into Article 3(1) of the Convention on the Rights of the Child and Article 24(2) CFREU. The ECtHR case law has also considered this principle as a facet of the right to family life under Article 8 ECHR (see, among many, Grand Chamber, Judgment of 26 November 2013, X v Latvia, para. 96).

Referring to Article 30 of the Constitution, this Court has reformulated the principle in question as the need, in decisions concerning children, "to seek the most suitable solution for the child's best interests, namely the one that assures, especially from the moral point of view, the best 'care of the person'" (Judgment No. 11 of 1981). Numerous rulings of this Court have held that the principle is also rooted in Article 31 of the Constitution (Judgments No. 272 of 2017, No. 76 of 2017, No. 17 of 2017 and No. 239 of 2014).

5.4.– The constitutional and supranational provisions (relevant to Italian law by virtue of Article 117(1) of the Italian Constitution) invoked in the referral order thus converge around the need to seek the most suitable solution for the best interests of the child. This principle must now be applied to the particular situation at issue.

There is no doubt that the interest of a child who has been cared for from birth by two people (for almost six years, in the case before the Court) who had jointly decided to bring him or her into the world, is to obtain legal recognition of the ties which already exist in respect of both of them, without prejudice to the possible establishment of a legal relationship with the surrogate mother.

Two considerations seem to this Court of paramount importance in this context.

First, these ties are an essential part of the *identity* of a child (ECtHR, Judgment of 26 June 2014, *Mennesson v France*, paragraph 96) who lives and grows up in a given family, or – as far as civil partnerships are concerned – within a given 'community of affection' that is also legally recognised, and certainly falls within the category of social groupings protected by Article 2 of the Constitution (Judgment No. 221 of 2019). It is unquestionable that the child has an interest in having these ties recognised not only on the social but also on the legal level, with regard to all the fundamental aspects of his or her life – as healthcare, education, and inheritance rights. Even more importantly, he or she has a clear interest to be legally identified as a *member* of that family or household, comprising all the persons who are actually part of it. This is also the case when the household in question is structured around a same-sex couple, as the couple's sexual orientation does not in itself affect their suitability to assume parental responsibility (Judgment No. 221 of 2019; Supreme Court of Cassation, First Civil Division, Judgment No. 12962 of 22 June 2016; First Civil Division, Judgment No. 601 of 11 January 2013).

Secondly, and no less importantly, we are not discussing here of an alleged 'right to parenthood' on the part of the child's carers. What is at issue instead is the child's interest in those carers being recognised as carriers of the *duties* linked to the exercise of parental responsibility, and which they should not be able to dismiss by a simple act of will (as underlined also in Judgment No. 347 of 1998, which – albeit in the different

context of heterologous fertilisation – already evoked the rights of the child "vis-à-vis those who have freely undertaken to receive him or her, thereby assuming the corresponding responsibilities").

It is precisely for these reasons that the well-established case law of the ECtHR derives from Article 8 ECHR a State's obligation to legally recognise the "parent-child relationship" (*lien de filiation*) for children born through surrogacy, in respect of both partners who have planned their birth and taken care of them since then; and this is true even for States parties that outlaw surrogacy agreements (*Mennesson v France*, para. 100; *D. v France*, para. 64).

Nor could the child's interest be satisfied by the recognition of a parent-child relationship with the sole "biological" parent, as happened in the case before the Court, in which the original Canadian birth certificate, indicating only P. F. as the parent, had been transcribed as a father in the Italian civil status registers. If a child lives and grows up in a household structured around a couple who have not only agreed upon and jointly set in motion the plan to conceive the child, but have also continuously looked after it, effectively exercising joint parental responsibility, it is clear that the child will have a specific interest in the legal recognition of his or her relationship with both, and not only with the parent who has provided his gametes for the purpose of surrogacy.

5.5.– On the other hand, the child's interest cannot automatically be considered to override any other interest at stake.

Frequent emphasis on the 'pre-eminence' of this interest surely indicates its importance and its special 'weight' in any balancing exercise; but even with respect to the interest of the child, it must be recalled that '[a]ll the fundamental rights protected by the Constitution are mutually related to one another, so that it is incorrect to assume that one of them could prevail over the others [...]. Otherwise, the result would be an unlimited expansion of one of the rights, which would "tyrannise" other legal interests recognised and protected under constitutional law, which constitute as a whole an expression of human dignity' (Judgment No. 85 of 2013).

Therefore, the interests of the child must be balanced, in the light of the criterion of proportionality, against the legitimate aim pursued by the legal system of discouraging recourse to surrogate motherhood, which is criminally sanctioned in Italy. Precisely as a result of such an assessment, the Joint Civil Divisions of the Supreme Court of Cassation ruled out the transcription of a foreign court order attributing parental status to the member of the couple who has participated in surrogate motherhood without contributing his or her gametes.

5.6.– This balancing between the interests of the child and the legitimate aim of discouraging recourse to a practice which is unlawful and indeed is thought to deserve criminal punishment in Italian law (see Judgment No. 272 of 2017) has similarly been undertaken by the ECtHR.

From all the judgments handed down by the Strasbourg Court on this subject, it can be seen that – also in view of the variety of approaches among the States parties to the practice of surrogacy – each legal system enjoys, in principle, a certain margin of appreciation on the matter, without prejudice to the abovementioned need to recognise the "parent-child relationship" with both members of the couple who actually take care of him or her.

The ECtHR allows States parties to refrain from giving effect to foreign civil status documents or decrees recognising the father's or mother's status as the 'intended parent' from the child's birth, precisely in order to avoid providing even indirect incentives for a procreative practice that the States may well consider potentially harmful to the rights and dignity of women who agree to carry a pregnancy to term on behalf of a third party.

Nevertheless, the ECtHR considers that each legal order must ensure the real possibility of legal recognition of the ties between the child and the 'intended parent', at the latest when they have become a practical reality (ECtHR, Decision of 12 December 2019, *C. v France* and *E. v France*, para. 42; *D. v. France*, para. 67), leaving it to the discretion of each State to choose the means to achieve this result, including that of adopting the child.

With regard to this solution, however, the ECtHR emphasises that the adoption procedure may be considered sufficient to guarantee the protection of children's rights insofar as it is able to create a genuine "parent-child relationship" between the adopting person and the adopted child (ECtHR, Judgment of 16 July 2020, *D. v France*, para. 66), and "provided that the procedures established in domestic law guarantee effective and rapid implementation in accordance with the child's best interests" (*ibidem*, para. 51).

5.7.– The balance struck by the EtCHR – now well established in its case law – also appears to be in line with the set of principles enshrined in the Italian Constitution.

On the one hand, these principles are not inconsistent with the solution reached by the Joint Civil Divisions that neither a foreign decree nor, consequently, the original birth certificate indicating the "intended father" as the parent of the child may be transcribed. On the other hand, they require, in such cases, the protection of the child's interest in the legal recognition of his or her relationship with both partners who not only desired its birth in a foreign country in accordance with its laws, but who then looked after it, effectively exercising parental responsibility.

Such protection must, in this case, be ensured by means of an effective and speedy adoption procedure that recognises the fullness of the parent-child relationship between the adopting person and the adopted child, once it has been ascertained that this is in the child's best interests.

Any solution that fails to offer the child the *possibility* of such recognition, even *ex post* and after concrete assesssment by a court, would end up instrumentalising the child for the – per se legitimate – aim of discouraging recourse to surrogacy.

It was precisely this risk that the Court sought to avoid when it declared unconstitutional a provision prohibiting the recognition of children born of incest, precluding them from acquiring full *status filiationis* solely on account of their parents' criminal conduct (Judgment No. 494 of 2002), and when – more recently – it also declared unconstitutional the automatic application of the ancillary penalty of suspension from exercising parental responsibility on the part of a parent who has committed a serious crime that harmed the child, because of the possibility that an automatic consequence of this kind – while also serving as a deterrent to potential offenders – might end up harming the child's interests (Judgment No. 102 of 2020).

5.8.– As the referral order correctly points out, recourse to adoption under special circumstances under Article 44(1)(*d*), of Law No. 184 of 1983, which is considered possible in the cases under consideration by the Joint Civil Divisions Judgment No. 12193 of 2019, is welcomed, but it is not yet a fully adequate solution in the light of the constitutional and supranational principles mentioned above.

This form of adoption does not confer full parental status to the adopting person. Moreover […], it is still not clear […] whether it establishes a family relationship between the child and those whom the latter perceives, on a social level, as his or her grandparents, uncles and aunts – or even brothers and sisters, if the adopting person already has children of his or her own. This form of adoption is also conditional upon the consent of the 'biological' parent (Article 46 of Law No. 184 of 1983), which may be denied in the event of a crisis within the couple, leaving the child permanently deprived

of his or her legal relationship with the person who shared a desire for parenthood from the outset and has effectively taken care of him or her from the moment of birth.

In order to ensure that adoption allows a child born through surrogacy to enjoy the legal protection required by the conventional and constitutional principles set out above, it should therefore be regulated in a way more tailored to the special features of the situation at hand, which are effectively far removed from those that the legislator had in mind when Article 44(1)(d) of Law No. 184 of 1983 was enacted.

5.9.– The task of adapting existing law to the need to protect the interests of children born through surrogacy – in the context of the difficult balance between the legitimate aim of discouraging recourse to the practice and the need to ensure respect for the rights of children, in the terms set out above – can only lie, in the first instance, with the legislator, which must be granted a wide margin of appreciation for finding a solution capable of taking into account all the rights and principles at stake.

Given the range of possible options, all of which are compatible with the Constitution and involve interventions having a potential impact on the whole family law system, the Court must now stand back, and leave it to the discretion of the legislator to provide without any delay, for appropriate remedies to the current lack of protection for the interests of the child.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

declares inadmissible the questions [set out above].

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 28 January 2021.

Signed by:
Giancarlo CORAGGIO, President
Francesco VIGANÒ, Author of the Judgment