



Press Office of the Constitutional Court

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THE LAW MUST RECOGNISE THE BOND BETWEEN A CHILD BORN TO A SURROGATE MOTHER AND THE COUPLE WHO SUBSEQUENTLY CARES FOR THE CHILD

The legal system must ensure full protection for the child's interest in being legally recognised by both members of the couple that wanted him or her to be born, and who have committed bring up the child, *de facto* exercising parental responsibility.

This is the essence of the ruling contained in [Judgment no. 33](#), filed today (author of the judgment Francesco Viganò). In this case, as previously mentioned in the [press release of 28 January 2021](#), the Court ruled on the question raised by the Court of Cassation as to whether it is constitutional for the Italian 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 who was born abroad to a surrogate mother.

The Court ruled the question inadmissible, while stressing the need for the urgent enactment of legislation in order to ensure due protection for the child's best interests.

The case at issue in the main proceedings concerned a child born in 2015 in Canada to a surrogate mother using genetic material obtained from an anonymous female donor and a man holding Italian citizenship. The biological father had previously married another man, also an Italian citizen, in Canada. This marriage had been entered into the register of civil partnerships in Italy, and the couple intended to become parents together. Under the terms of a Canadian judgment, the child had therefore been entered into the local civil registry as the child of both men. The two men then sought to obtain the recognition of that judgment under Italian law.

Numerous *amici curiae* filed written opinions with the Constitutional Court, some in support of the question raised by the Court of Cassation (*Associazione Luca Coscioni*, *Associazione Radicale Certi Diritti* and *Avvocatura per i Diritti LGBTI*), and others opposing it (*Associazione Nazionale Famiglie Adottive e Affidatarie*, *Associazione Amici dei*

bambini, Associazione Comunità Papa Giovanni XXIII and Associazione Famiglie per l'accoglienza).

The Constitutional Court started by reiterating that the prohibition on surrogate pregnancy, which is enshrined in criminal law, pursued 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. These interests manifested themselves in terms of his or her relations with the (homosexual or heterosexual) couple that had jointly arranged for the child to be conceived in a country in which surrogate pregnancy is lawful, after which they had moved with it to Italy and had been caring for the child as parents.

Under these circumstances – the Court observed – the child’s best interest is to “obtain recognition, including on a legal level, for the *de facto* bonds already existing with both members of the civil partnership, but without prejudice to any potential legal relationship between the child and the surrogate mother”. These bonds are in fact an integral part of the child’s very identity, as a person raised and cared for by a particular couple, whether heterosexual or homosexual – there being no reason to assume that homosexual couples are not suitable to bear parental responsibilities.

In addition, the child has a clear interest in obtaining recognition for the legal duties that both members of the couple are under in relation to him 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 the recourse to surrogate pregnancy, which is prohibited under Italian law. It also stressed that the European Court of Human Rights itself does not require the automatic recognition of any foreign court order recognising as joint parents a couple (whether heterosexual or homosexual) who have had recourse to surrogate pregnancy abroad.

However, under these circumstances it will be necessary to ensure protection for the child’s best interests in obtaining recognition of the legal relationship also with the non-biological parent “through an effective and swift adoption procedure, which recognises the fullness of the bond between the adopting person and the adopted child, where it has been specifically established that this reflects the child’s best interests”.

The Court pointed out in this regard that the recourse to “adoption under special circumstances” provided for under Article 44(1)(d) of Law no. 184 of 1983, which is already considered by the Court of Cassation to be available, offers a “a level of

protection for the child's best interests that is admittedly significant, but not however entirely consistent with constitutional and supranational principles". Adoption under special circumstances (also known as "non-legitimising adoption") does not involve the adopting person becoming a parent. In addition, it is not clear whether it establishes any family relationship between the adopted child and those persons whom the latter perceives, on a social level, as his or her grandparents, uncles, aunts, brothers or 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 breakdown in the couple's relationship.

In conclusion, the legislator must enact legislation that ensures full protection for the interests of the child in a manner that most closely takes account of the special circumstances of the situation, which are very different from those of "non-legitimising" adoption.

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