Communications and Press Office of the Constitutional Court

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PRISONERS WHO FAIL TO COOPERATE WITH THE JUDICIAL AUTHORITIES ARE NOT ALL THE SAME: A PERSON WHO REMAINS SILENT "BY CHOICE" IS NOT EQUIVALENT TO A PERSON WHO REMAINS SILENT "DESPITE HIS OR HER BEST EFFORTS"

In order to be eligible to submit a request for a bonus period of short release (a request that can therefore be examined on its merits), a person convicted of an "offence with preclusionary effect" must submit to rules concerning the substantiation of his or her circumstances that have varying degrees of rigour, depending upon the reasons why the individual has failed to cooperate with the judicial authorities. These rules are more stringent for those who choose not to cooperate, despite being able to do so; on the other hand, they are less strict where cooperation is impossible (as the criminal offences have already been fully clarified) or unreasonable (due to limited involvement in the commission of the offences), and hence of no benefit for the administration of justice.

Judgment no. 20 of 2022 filed today (author Nicolò Zanon) has held that this difference in treatment does not violate the principle of equality, thus ruling unfounded the questions of constitutionality raised by the Padua Supervisory Judge. It is correct to draw a distinction between "the circumstances of a person who is 'objectively able but subjectively unwilling' (silent by choice) from those of a person who is 'subjectively willing but objectively unable' (silent despite his or her best efforts)".

The Court referred first and foremost to its judgment no. 253 of 2019, which ruled unconstitutional – solely with regard to the grant of bonus periods of short release – the absolute presumption of the dangerousness for any prisoner who chooses not to cooperate (despite being able to do so). That judgment held that, in order for a request for eligibility for a bonus period of short release to be admissible, it is necessary to obtain information to substantiate the position that there are no current links between the prisoner

concerned and organised crime, as well as the risk of such links being re-established.

The Padua Supervisory Judge held, specifically with reference to judgment no. 253 of 2019, that the different rules on evidence that were applicable to prisoners for whom cooperation with the judicial authorities is objectively impossible or unreasonable, for whom only the absence of any current links with organised crime must be assessed, was unjustified and violated the principle of equality.

It was therefore argued that Article 4-*bis*(1-*bis*) of the Law Regulating the Prison System, which seeks to equate the circumstances of the two categories of prisoner, was unconstitutional. In support of this assertion, the referring court stressed that the subjective behaviour of the two groups of prisoners may indeed be identical, as even those for whom cooperation has been established to be impossible might not only not wish to cooperate (if they were able to do so) but may even represent a greater danger compared to those who have intentionally chosen to remain silent, having been induced for example by fears regarding their own safety or that of other persons.

In ruling the objections unfounded, the Constitutional Court observed however that the voluntary nature of the choice not to cooperate represents – based on experience – an objective warning sign of such a nature as to require an enhanced regime of checks . This involves the acquisition *inter alia* of information that is capable of excluding any risk of the re-establishment of links with organised crime, and if no such information is provided the decision concerning the application for a bonus period of short release will be rejected as inadmissible.

On the other hand, where cooperation is not possible under any circumstances, in order to set aside this bar it is sufficient to establish solely that there are no current links with organised crime.

The Court concluded that this difference in treatment was not unreasonable. This constituted a sufficient basis for rejecting the question "without forgetting – the judgment continued – that the provisions applicable to situations in which cooperation is impossible or unreasonable are the result of repeated rulings by this Court (judgments no. 68 of 1995, no. 357 of 1994 and no. 306 of 1993), the aim of which – within the context of a regime that is based, without exception, on an absolute presumption concerning the dangerousness of those who fail to cooperate with the authorities – is to treat

differently, according to less stringent provisions, the circumstances of a prisoner who cannot be held objectively responsible for the failure to cooperate".

Rome, 25 January 2022