JUDGMENT NO. 24 YEAR 2014

In this case the President of the Council of Ministers raised a jurisdictional dispute between branches of state, objecting to a judgment by the Court of Cassation and two subsequent orders issued within the proceedings following remittal to the Milan Court of Appeal which held that, since classification as an official secret is limited only to official acts carried out by the intelligence services, it cannot apply to acts carried out by members of the intelligence service on their own personal initiative. The Court struck down the contested acts, holding that the power of classification was an exclusive prerogative of the President of the Council of Ministers and could not be altered or circumvented by other branches of state, and that the scope of an official secret could not be limited by the absence of specific governmental decisions defining their precise scope, as such decisions may in themselves be classified. In any case, the accused persons cannot have been acted in a personal capacity as they were charged with the aggravating circumstance of abuse of office.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning a jurisdictional dispute between branches of state arising following Judgment no. 46340 of the fifth criminal division of the Court of Cassation of 19 September 2012, the Orders of the fourth criminal division of the Milan Court of Appeal of 28 January 2013 and of 4 February 2013 and Judgment no. 985 of the fourth criminal division of the Milan Court of Appeal of 12 February 2013, initiated by the President of the Council of Ministers by the applications served on 24 April and 24 October 2013, filed in the Court Registry on 9 May and 31 October 2013 and registered as nos. 4 and 8 in the Register of Jurisdictional Disputes between Branches of State 2013, merits stage.

Having heard the judge rapporteur Paolo Grossi at the public hearing of 14 January 2014;

having heard the *Avvocati dello Stato* [State Counsels] Massimo Giannuzzi and Raffaele Tamiozzo for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– Although the applications filed by the President of the Council of Ministers – the admissibility of which is confirmed as a preliminary matter – are directed against different acts adopted by the judiciary – which are claimed to breach the constitutional prerogatives of the applicant pertaining to the classification of official secrets and the specific decisions as to their relative operational extent – they nonetheless share a common core, as both relate to the same proceedings and are based on challenges which largely coincide.

Taking account of the evident linkages as regards the individuals involved and the facts, it is necessary to treat the relative proceedings together: they must accordingly be joined for resolution in one single ruling.

2.– With regard to the Judgment issued by the Court of Cassation on 19 September 2012, the applicant considers that the prerogative vested in the President of the Council of Ministers in the area of official secrets has been violated in a number of ways at various points of the decision to annul the acquittals at both instances of the merits proceedings and to remit the proceedings, which had by contrast held that there was a procedural bar resulting from classification as an official secret in accordance with the clarification provided by Judgment no. 106 of 2009 of this Court in relation to the same proceedings.

First and foremost, it is asserted that the assumption – which is central to the decision reversing the judgments of the lower courts – that the classification as an official secret should be deemed to be limited only to the operations that officially involved national and foreign intelligence services lawfully approved at the highest levels of the Italian intelligence services is arbitrary, and thus encroaches upon the prerogatives of the applicant: such an assertion – which is based exclusively on a note of 11 November 2005 in which it was stated that the Italian Government and intelligence services had nothing whatsoever to do with the abduction of Abu Omar – would amount to a direct impingement on the power to establish the actual scope of the facts and information classified as secret by a body different from that to which that task is reserved.

This claim is closely related to another which asserts that a similar breach was caused also by the annulment of the judgment of the Milan Court of Appeal of 15 December 2010 (upholding the ruling that criminal action could not be pursued against the Italian defendants who had invoked the fact of classification as an official secret in their defence), and the orders of 22 and 26 October 2010 in which the local court had ruled inadmissible the statements made during the course of the preliminary investigations by Mancini, Ciorra, Di Troia and Di Gregori.

Thus – the applicant argues – since the Court of Cassation was not entitled to conclude that classification as an official secret was limited only to official acts carried out by the intelligence services, and therefore that the matters classified as official secrets could not be deemed to exclude the issue of relations between the Italian intelligence service and the CIA, as well as the internal affairs (known as the *interna corporis*) of the Italian intelligence service insofar as these did not relate to activities lawfully approved at the highest levels of the intelligence services, the decision was also unlawful insofar as it limited the inadmissibility of the witness statements and of the other evidence acquired in relation to the internal affairs, asserting that such evidence could be used in the proceedings in relation to acts carried out in a personal capacity without the approval of the SISMI.

For that reason, also the order issued within the remitted proceedings by the Milan Court of Appeal on 28 January 2013, which – acting on the ruling of the Court of Cassation – accepted the submission of the reports concerning the questioning of the defendants during the preliminary investigations, breached the prerogatives of the applicant, as those sources were undoubtedly classified.

That breach is also objected to with regard to the order of 4 February 2013 by which the Milan court failed to seek confirmation of the official secret raised in their defence by the defendants and did not suspend all activities relating to the acquisition of information classified as secret, thereby permitting a discussion, which was reported by the media, during which the Public Prosecutor General drew widely on evidence classified as secret.

Finally, it is considered that also the assumption that Judgment no. 106 of 2009 of this Court is to be interpreted to the effect that the use within proceedings of documents subsequently redacted was not prohibited, provided that appropriate precautions are

taken in order to prevent the disclosure of the redacted parts, encroaches upon the prerogatives of the applicant: in fact, the applicant considers that – in contrast with the findings made by this Court in the Judgment referred to – such an assertion would in any case enable "documents that have been alleged to constitute official secrets and have been confirmed as such to be disclosed as part of the trial procedures".

3.– The full range of challenges was then also adopted in the second application directed against the Judgment issued following the remittal of the proceedings to the Milan Court of Appeal on 12 February 2013 under which the defendants Pollari, Di Troia, Ciorra, Mancini and Di Gregori were convicted of the abduction of Abu Omar, and against the other orders referred to above which placed on the case file the questioning of the defendants during the investigations without consulting the President of the Council of Ministers with a view to confirming the official secret raised by the defendants in their defence during the course of the hearing of 4 February 2013.

The only new challenge arising in that second application relates to the alleged violation of the principle of loyal cooperation supposedly committed by the Milan Court of Appeal in that it failed to stay the proceedings pending a decision on the first application concerning a jurisdictional dispute between branches of state raised by the President of the Council of Ministers, the filing of which at the Registry of this Court had already been intimated to the judge in those proceedings by the Office of the State Counsel on the day before the contested judgment was issued.

4.– The core of the objections raised by the referring court in both applications thus essentially turns upon the assumption ultimately adopted by the Court of Cassation when annulling the Judgment of the Milan Court of Appeal of 15 December 2010 (which amongst other things – and insofar as is of interest here – upheld the judgment at first instance insofar as the criminal proceedings against the defendants referred to above could not be pursued pursuant to Article 202 of the Code of Criminal Procedure) and remitting the proceedings on the grounds that "the invocation and confirmation of an official secret had made it impossible to make any decision as the evidence collected had been covered by a 'black curtain' (see page 16 of the Judgment of the Court of Cassation).

There can be no doubt that the "conclusions" arrived at by the Court of Cassation in the ruling reversing the judgments of the referring courts subsequently constituted the

"principle of law" with which the Milan Court of Appeal complied, as the court to which the proceedings had been remitted, in adopting the orders and the convictions, which have also been objected to.

Thus, according to the Court of Cassation, classification as an official secret was ordered "in relation to documents and information concerning relations between Italian and foreign intelligence services […] and concerning the internal relations within the services, including specifically their organisation and the directions issued by the head of the intelligence services, even if these relate to the issue of renditions and the abduction of Abu Omar" (see page 121 of the Judgment).

However, contrary to the findings of the merits court, the fact of classification as an official secret was not raised "in relation to the actions of individual officials operating beyond the scope of their duties" (see page 122 of the Judgment). Thus, considering that the President of the Council of Ministers had asserted in his note of 11 November 2005 that the Government and the SISMI had played no part in the events relating to the abduction of Abu Omar, it could only be concluded that the involvement of officials from the intelligence service in that action had occurred "in a personal capacity" (see page 123 of the Judgment under examination).

The corollary of this is that "the sources of evidence relating to any specific individual criminal conduct committed by officials from the SISMI, acting also in concert with members of foreign intelligence services but not in the course of their duties and without any authorisation from senior officials of the SISMI, had not been classified as an official secret. By contrast, relations between Italian and foreign intelligence services may be classified, along with the exchange of information and acts of mutual assistance carried out in relation to specific individual operations, whereby the term operation must be deemed to refer to actions lawfully approved at the highest levels of the SISMI" (see pages 123-124 of the Judgment).

The President of the Council of Ministers has disputed this argument – which, as mentioned above, constituted the "basis" for the annulment and remittal order and had a knock-on effect on the resulting decisions adopted following the reversal – as groundless.

In fact, it is stressed that Judgment no. 106 of 2009 correctly held that relations between the SISMI and the CIA were classified as an official secret, albeit in relation to

extraordinary renditions, with the result that it would be entirely arbitrary to circumscribe the scope of classification "solely to relations between intelligence services which manifested themselves in involvement in operations managed by both intelligence services, which were lawfully approved at the highest levels of the Italian intelligence services". In this way, the Italian judiciary allegedly ended up taking the place of the "political authorities in the specific decision as to what is classified as an official secret in relation to the Abu Omar abduction".

5.– The applicant's argument is well founded. As in fact was specifically recalled by the government representative, in Judgment no. 106 of 2009 – which (it is recalled once again) ruled on five jurisdictional disputes between branches of state raised by various judicial authorities and by the President of the Council of Ministers in relation to the same case – this Court took the opportunity to stress the need to confirm the enduring relevance of the principles traditionally asserted within the case law of the Constitutional Court, since Judgment no. 86 of 1977, in relation to official secrets, even following the introduction of the new provisions contained in Law no. 124 of 3 August 2007 (Information system to ensure the security of the Republic and new provisions governing official secrets). In particular, it was confirmed that the provisions governing official secrets relate to the supreme interest of the security of the state and the national community in upholding its own integrity and independence, as is stipulated in Article 52 of the Constitution in relation to Articles 1 and 5. On the other hand, taking account of the scope and intensity of the restriction resulting from classification and confirmation as an official secret, that regime inevitably gives rise to aspects of interference with other constitutional principles, including those underpinning the operation of the judiciary. Within this specific context, it has been observed on various occasions by this Court that the classification of matters as an official secret by the President of the Council of Ministers – who is vested with the exclusive power to exercise the relative constitutional powers (subject to the powers laid down by Articles 30 et seq and 41 of Law no. 124 of 2007) insofar as they relate to the protection of the *salus rei publicae*, and are thus liable to confer pre-eminent status on one interest above any other as it relates to "the very existence of the state, of which the judiciary is an emanation" (see Judgment no. 86 of 1977) – cannot prevent the public prosecutor from investigating criminal offences, but may prevent the courts from acquiring and using

evidence classified as an official secret. This is an area in which the President of the Council of Ministers enjoys a broad power of discretion, the exercise of which is immune from any review by the ordinary courts, as the judgment on the means appropriate for guaranteeing the security of the State is political in nature.

On the other hand, even if the source of evidence classified as secret proved to be essential and in the absence of any other evidence – with the result (as was correctly held both by the trial court and at second instance) that the provisions requiring the adoption of a judgment of *nolle prosequi* due to the existence of an official secret pursuant to Article 202(3) of the Code of Criminal Procedure and Article 41(3) of Law no. 124 of 2007 should apply – this could not be at odds with the parallel principles of constitutional law in play, precisely because such an outcome – which is expressly provided for by law – is nothing other than [a manifestation of] the scope of the pre-eminent status mentioned above of the interest of national security, the safeguarding of which is the duty of the State, above the requirements of judicial scrutiny (see Judgment no. 40 of 2012).

The inherently harmful content of the offence is therefore not altered, as is the power and duty of the public prosecutor to conduct investigations with a view to an eventual prosecution: however, the investigating and adjudicatory authorities are prohibited from carrying out any acts that impinge upon – and essentially remove – the perimeter set out by the President of the Council of Ministers in the document or documents in which he indicated the subject matter classified as secret; it is clear that the identification of this subject matter falls to that authority alone, and its scope cannot be redefined by other bodies or branches of state by engaging in acts that essentially circumvent the restrictions resulting from classification – with regard to that specific subject matter – also in relation to the prosecution of criminal offences, which is nonetheless mandatory.

6.– Moreover, the assertion by the Court of Cassation according to which the classification of an official secret does not extend to acts carried out "not in the course of official duties" allegedly by officials from the SISMI since, in the light of the aforementioned note of 11 November 2005, the Abu Omar operation was not attributable to the Government or the SISMI, is tantamount to a subjective modification (in terms of content and scope) of what had, on the contrary, been the clear subject

matter of the classified secret. In fact, considering that the decision to classify had applied to documents and information concerning relations between the Italian and foreign intelligence services, as well as the internal affairs of the Italian service, specifically its organisation and the directives issued by the head of the service, even if those related to renditions and the abduction of Abu Omar, no limitation could be inferred in relation to these "facts" depending upon whether or not they were attributable to formal "resolutions" by the Government or the highest levels of the intelligence services given that – by the same token – the existence or not of such decisions would *a fortiori* have been classified as secret.

On the other hand, the argument that classification was not applicable as the accused had acted "in a personal capacity " and not as part of a functional relationship with the intelligence services is contradicted by the fact that they were charged with and convicted of the aggravating circumstance provided for under Article 605(2) no. 2 of the Criminal Code (the offence of kidnapping is aggravated if committed by a public official through an abuse of the powers relating to his or her position): as is clear from the charge, the aggravating circumstance in fact lay precisely in the fact that the offence had been committed through an abuse of the powers vested in members of the SISMI.

Moreover, to assert that the intelligence service had nothing to do with the events at issue in the criminal proceedings appears at the same time to be intimately contradicted by the facts invoked in the charge, which contains an express reference not only to the personal capacities of the individual defendants and the role specifically played in relation to the CIA network in Italy but also to the use of a SISMI structure for the relative operation in addition to the logistical infrastructure available to the CIA network.

Moreover, it is appropriate to stress a further issue on which the judgment of the Court of Cassation does not appear to have focused. With regard to the so-called functional immunity of members of the intelligence services, Article 204(1-bis) of the Code of Criminal Procedure (which was introduced by Article 40 of Law no. 124 of 2007 after the offence was committed but long before the Judgment by the trial court) provides that facts, information or documents relating to actions carried out by members of the intelligence and security services in breach of the provisions on the special grounds for justification applicable to the activities of personnel from the intelligence

and security services cannot be classified as secret. The provision specifies that "conduct by which, after the specific procedure provided for by law has been carried out, proves to fall outside the scope of the special grounds for justification shall be regarded as a breach of the aforementioned legislation".

However, in laying down the "procedures authorising the conduct prescribed by the law as an offence", 18(6) of Law no. 124 of 2007 itself expressly provides that "in situations in which the conduct prescribed by law as an offence was carried out without or beyond the scope of the authorisations provided for under this Article, the President of the Council of Ministers shall take the necessary measures and inform the judicial authorities without delay".

Thus, were the argument of the Court of Cassation to be considered correct, the prohibition on the classification as official secrets of "unlawful" activities carried out by officials from the intelligence services without authorisation or beyond the limits set out in the authorisation – along with the related obligation for the President of the Council of Ministers to give notice, as noted above – should thus have required conduct diametrically opposed to that pursued in this matter by the applicant: instead, the reiterated classification of the official secret, and its confirmation, and the related initiation of various jurisdictional disputes, are in themselves testament to the implausible nature of the argument that seeks to reduce the facts to an initiative carried out "in a personal capacity" by the various defendants, and in any case excluding, also in logical terms, the possibility that the scope of the secret could be "interpreted" in the manner indicated by the Court of Cassation.

On the other hand, the "objective" scope of the official secret is already unequivocally traced out, with reference to the present case, by Judgment no. 106 of 2009. That Judgment recalls amongst other things (paragraph 12.3. of the Conclusions on points of law) that classification as an official secret had not at any time covered "the offence of the kidnapping in itself, which could be investigated by the competent courts according to standard procedures, but rather on the one hand the relations between the Italian and foreign secret services, and on the other hand the organisation and operational procedures of the SISMI, with particular reference to the directions and orders which had been issued by its Director to the members of the agency, even if those relations, directions or orders were in some way related to the offence itself; […]

this resulted in a "bar" on the powers of the courts flowing from the invocation and the confirmation of the official secret, which occurred in accordance with recognised procedures".

Thus, within that perspective, it would be extremely difficult to argue that classification as an official secret – the effective extent of which evidently can only be determined by the very same authority that classified and confirmed the official secret, and which is vested with the relative power – does not extend to all facts, information and documents relating to any operational directives, internal affairs of an organisational and operational nature and relations with foreign intelligence services, even if these relate to renditions and the abduction of Abu Omar. This is obviously conditional upon the requirement that the acts carried out by the officials are aimed at protecting the security of the state.

7.– In the light of the above findings, it must therefore be ruled that the Court of Cassation was not entitled to annul the acquittals of the defendants Pollari, Ciorra, Di Troia, Di Gregori and Mancini and to annul the orders of 22 and 26 October 2010 by which the Milan Court of Appeal had ruled inadmissible the statements made by the defendants during the course of the preliminary investigations. Consequently, it must also be ruled that the Milan Court of Appeal was not entitled to hold within the remitted proceedings – in accordance with the dicta of the Court of Cassation contained in its annulment judgment – that the defendants had incurred criminal responsibility in relation to the abduction of Abu Omar; and that it was not entitled – taking account of the classification as an official secret – to convict on the basis of the use within the proceedings of the reports relating to the questioning of the defendants during the course of the investigations (the return of which to the Public Prosecutor General at the same Court had been ordered on 22 and 26 October 2010, but subsequently annulled by the Court of Cassation without consulting the President of the Council of Ministers with a view to confirming the classification as an official secret, which had been raised in their defence by the defendants Pollari, Mancini, Ciorra, Di Troia and Di Gregori at the hearing of 4 February 2013: during that hearing the Public Prosecutor General had been invited to submit his conclusions, using evidence classified as an official secret).

In view of this declaration of non-entitlement, the corresponding judicial acts that encroached upon the powers of the applicant President of the Council of Ministers in

relation to classification as official secrets must be annulled in this regard. The omission referred to above on the part of the Milan Court of Appeal in failing to consult the President of the Council of Ministers with a view to confirming the official secret raised by certain defendants in their defence must also be deemed to infringe these prerogatives.

8.– On the other hand, the objection that the Milan Court of Appeal, as the court to which the proceedings had been remitted, violated the principle of "loyal cooperation" between branches of state by failing to stay the criminal proceedings pending a decision by the Constitutional Court on the jurisdictional dispute previously raised in relation to the annulment judgment by the Court of Cassation, of the filing of which the Court of Appeal had been informed the day before that on which it issued the contested judgment, does not appear to be well founded.

First, the principle of loyal cooperation does not in itself require as a general matter that the exercise of the disputed powers must be frozen. Secondly, the staying of proceedings by the judicial authority apprised of the proceedings is not contemplated in relation to such "disputes"; this means that – had it been ordered – it would have amounted to a measure *praeter legem*, if not even *contra legem*, having regard to the mandatory regime governing the grounds for the suspension of trials which automatically trigger, amongst other things, the rules of substantive law on the time barring of offences.

9.– In view of the infringement of the powers of the President of the Council of Ministers, the acts constituting the infringement must be annulled with regard to the aspects to which each declaration of "non-entitlement" relates.

It shall then be for the judicial authorities to assess the procedural consequences resulting from the annulment.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares

1) that the Court of Cassation was not entitled to annul – by Judgment no. 46340/12 of 19 September 2012 – the acquittal of the defendants Pollari Nicolò, Ciorra Giuseppe, Di Troia Raffaele, Di Gregori Luciano and Mancini Marco, and the Orders issued on 22

and 26 October 2010 by which the Milan Court of Appeal ruled inadmissible the statements made by the defendants during the course of the preliminary investigations on the grounds that the classification of the case relating to the abduction of Abu Omar as an official secret concerned only relations between the Italian intelligence services and the CIA, and the internal affairs of the Italian intelligence services which resulted in operations authorised by the intelligence services, and not also the objective fact that the abduction in question occurred;

2) that the Milan Court of Appeal was not entitled, as the court to which the proceedings had been remitted, to allow – by the order of 28 January 2013 – the submission by the Office of the Public Prosecutor General at that court of the reports relating to questioning carried out during the course of investigations by Mancini, Ciorra, Di Troia and Di Gregori – the return of which documents to the Public Prosecutor General had been ordered by the Court of Appeal on 22 and 26 October 2010, but subsequently annulled by the Court of Cassation by the Judgment referred to above;

3) that the Milan Court of Appeal was not entitled – with reference to the order issued on 4 February 2013 – to refrain from consulting the President of the Council of Ministers with a view to confirming the classification as an official secret raised in their defence by the defendants Pollari, Mancini, Ciorra, Di Troia and Di Gregori during the hearing of 4 February 2013, inviting the Public Prosecutor General to present his conclusions and to make his written submissions to the court on the basis of evidence classified as an official secret;

4) that the Milan Court of Appeal was not entitled – in relation to Judgment no. 985 of 12 February 2013 – to conclude that the defendants Pollari Nicolò, Di Troia Raffaele, Ciorra Giuseppe, Mancini Marco and Di Gregori Luciano were responsible under criminal law for the offence consisting in the abduction of Abu Omar on the grounds that the classification of the relative matter as an official secret by the President of the Council of Ministers applied solely to the relations between the Italian intelligence services and the CIA, and the internal affairs of the Italian intelligence services which resulted in operations authorised by the intelligence services, and not also those otherwise pertaining to objective fact that the abduction in question occurred;

5) that the Milan Court of Appeal was not entitled to issue the judgment referred to above based on the usage of the reports relating to the questioning of the defendants during the course of the preliminary investigations – the return of which to the Public Prosecutor General had been ordered by the Court of Appeal on 22 and 26 October 2010 – without consulting the President of the Council of Ministers with a view to confirming the classification as an official secret raised in their defence by the aforementioned defendants during the hearing of 4 February 2013, as the Public Prosecutor General had been invited to present his conclusions, thereby enabling him to make his written submissions to the court on the basis of evidence classified as an official secret;

6) that the Milan Court of Appeal was entitled to decide not to stay the criminal proceedings against the defendants Pollari, Mancini, Ciorra, Di Troia and Di Gregori pending the judgment on the jurisdictional dispute between branches of state;

annuls the Judgments referred to above of the Court of Cassation and of the Milan Court of Appeal in the relevant parts, as well as the aforementioned Orders, also in the relevant parts.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 10 February 2014.