Corte costituzionale

# ORDER NO. 87 OF 2009

*Paolo MADDALENA, President*

*Sabino CASSESE, Author of the Judgment*

# JUDGMENT NO. 87 YEAR 2009

**In this case the Court considered a challenge to provisions which required judges on the Court of Accounts to be represented by another magistrate, and not by a professional barrister, in disciplinary proceedings. The referring Regional Administrative Tribunal questioned the constitutionality of these arrangements since a corresponding restriction did not apply to similar situations involving judges from the ordinary courts. The Court held that the same reasoning applicable to ordinary judges also applied in this case, since the relationship between the independence of the judiciary and the right to appoint a chosen representative is not affected by the status of the disciplinary proceedings as judicial or administrative, and therefore declared the contested provisions unconstitutional as challenged.**

THE CONSTITUTIONAL COURT

composed of: President: Paolo MADDALENA; Judges: Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 34(2) of law No. 186 of 27 April 1982 (Regulations governing the administrative courts and the secretarial and auxiliary staff of the Council of State and the Regional Administrative Tribunals) and Article 10(9) of law No. 117 of 13 April 1988 (Compensation for damages caused by the exercise of judicial functions and the civil responsibility of magistrates), commenced by the Regional Administrative Tribunal for Piedmont in the appeal filed by B. E. F. against the Court of Accounts and another by the referral order of 30 July 2008, registered as No. 344 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 46, first special series 2008.

*Considering* the intervention by the President of the Council of Ministers;

*having heard* the judge rapporteur Sabino Cassese in chambers on 25 February 2009.

*The facts of the case*

1.1. – The Regional Administrative Tribunal for Piedmont raised, with reference to Articles 3, 24 and 108 of the Constitution, the question of the constitutionality of Article 34(2) of law No. 186 of 27 April 1982 (Regulations governing the administrative courts and the secretarial and auxiliary staff of the Council of State and the Regional Administrative Tribunals) and Article 10(9) of law No. 117 of 13 April 1988 (Compensation for damages caused by the exercise of judicial functions and the civil responsibility of magistrates), insofar as they preclude the right of a judge on the Court of Accounts or an administrative judge who is subject to disciplinary action to appoint a professional barrister as their chosen representative.

1.2. – The referring court states that the appellant in the main proceedings, who is the regional public prosecutor with the Court of Accounts for Piedmont Region, challenged the orders by which the disciplinary sanction of a warning was imposed on him, following the outcome of a disciplinary investigation and a hearing behind closed doors during the course of which, applying the contested provisions, he was denied the right to choose a professional barrister as his chosen representative. The lower court notes that Article 10(9) of law No. 117 of 1988 refers, with regard to the provisions regulating disciplinary proceedings for judges on the Court of Accounts, to Article 34(2) of law No. 186 of 1982, which provides that an administrative judge "has the right to be represented by another magistrate", thereby precluding the right of an administrative judge, and – by virtue of the referral – a judge on the Court of Accounts, of the right to be represented in disciplinary proceedings against them by a professional barrister.

1.3. – As regards the relevance of the question of constitutionality, the referring court states that, during the course of disciplinary proceedings, the appellant in the main

proceedings requested that he be represented by a barrister and, during the course of the same disciplinary proceedings and then before the referring regional administrative tribunal, claimed that the provisions which precluded that right were unconstitutional. In the opinion of the referring court, if the question of constitutionality were to be ruled well founded, the appeal would have to be allowed.

1.4. – On the issue of the non manifest groundlessness of the question, the referring court considers first and foremost that the contested provisions violate the right to a defence guaranteed under Article 24 of the Constitution, and the principle of the independence of the special courts, imposed by Article 108 of the Constitution. The lower court draws heavily in this regard on this Court's findings in judgment No. 497 of 2000. In this judgment, according to the referring court, the Court recognised the existence of a "inseparable link" between the independence of the judiciary and the broadest manifestation of the guarantee of their right to a defence which the referring court, following a discussion of the national and supra-national legislative framework, considers moreover to be an expression of the "common European constitutional heritage". The referring court observes in particular, again restating the arguments developed in judgment No. 497 of 2000, that to limit a magistrate's right to a defence in disciplinary proceedings by restricting his right to choose the representative considered most appropriate by him, "ultimately entails partially restricting also the value of independence". This means, in the opinion of the referring court, that the restriction on the right to choose a representative which this Court has already declared unconstitutional with reference to disciplinary proceedings against ordinary magistrates, must also be declared unconstitutional where applied to judges on the Court of Accounts or administrative judges, since the Constitution intends to uphold the independence also of the latter. According to the referring court in fact, under Italian law "also the administrative judges and judges on the Court of Accounts are independent of all other branches of state power and that status and prerogative is recognised by the Constitution", and specifically by Article 108(2) which "requires Parliament to guarantee and assure, through legislation, the independence of the special courts".

Secondly, according to the referring court, the contested provisions violate the principle of equality laid down by Article 3 of the Constitution. On this point, the referring court observes that in accordance with judgment No. 497 of 2000, which is cited on various occasions, the right to be represented by a professional barrister within the ambit of disciplinary proceedings is currently granted to ordinary magistrates whereas, under the terms of the contested legislative provisions, it is still denied to administrative judges and judges on the Court of Accounts. According to the referring court, this difference in treatment is not justified by any objective reason. Nor can any other conclusion be reached, according to the referring court, on the basis of this Court's judgment No. 182 of 2008, which ruled groundless the question of the constitutionality of a provision which stipulated that officers of the State Police [*Polizia di Stato*] subject to disciplinary proceedings did not have the right to be represented by a professional barrister. The court points out in this regard that the institutional position and functions of police officers are different from those of an administrative judge or a judge on the Court of Accounts, since the requirement to guarantee the independence from the executive only subsists for the latter, and that disciplinary proceedings against public sector employees, such as police officers, are not carried out "according to judicial procedures", as on the other hand, according to the referring court, occurs for disciplinary proceedings against an administrative judge or a judge on the Court of Accounts.

2.1. – The President of the Council of Ministers entered an appearance, represented and advised by the *Avvocatura Generale dello Stato*, requesting that the question of constitutionality be ruled inadmissible or groundless.

2.1. – The state representative observes, in the first place, that the question of constitutionality is formulated "in terms so generic and hypothetical that it must be regarded as inadmissible".

2.2. – On the merits, the *Avvocatura Generale dello Stato* considers that the substantive differences between ordinary judges on the one hand and administrative judges and judges on the Court of Accounts on the other hand dictate that the arguments contained in judgment No. 497 of 2000 of the Constitutional Court "should not apply to the case under

examination" and preclude the existence of "an unjustified difference in treatment between the two categories of magistrate". According to the state representative, the Constitution regulates the two categories differently: for ordinary magistrates, it provides that the judiciary is an autonomous branch independent of all other state powers, asserts that they may not be removed and lays down fundamental principles for the composition and functioning of the Supreme Council of the Judiciary [*Consiglio superiore della magistratura*]; for administrative magistrates on the other hand, it "reserves for ordinary legislation the procedures for identifying the (certainly asserted) independence of the magistrates of the special courts [...] but makes no express provision regarding the constitution and functioning of the related self-regulatory organs and the exercise of disciplinary actions before the same". In particular, according to the *Avvocatura Generale dello Stato*, recalling the case law of the Court of Cassation on this point, the nature of disciplinary proceedings is different for the two categories of magistrate: such proceedings are of a judicial nature for ordinary magistrates, but of an administrative nature for administrative judges and judges on the Court of Accounts, the disciplinary sanctions of which may not be challenged by appeal to the Joint Divisions of the Court of Cassation. In the opinion of the state representative, these differences justify "different arrangements, without thereby causing an unreasonable violation of the principle of equality invoked".

Nor according to the *Avvocatura Generale dello Stato* has there been any violation of the right to a defence of administrative judges and judges on the Court of Accounts since "whilst, due to their special nature, disciplinary proceedings against ordinary magistrates may be challenged only by appeal to the Court of Cassation, in disciplinary proceedings against administrative judges and judges on the Court of Accounts – which have the nature of administrative proceedings – the respondent enjoys participation rights laid down under specific legislation and, where applicable, general procedural rules; and he moreover has the right (with a technical defence, i.e. with legal assistance) to two levels of merits procedures before the administrative courts before any appeal to the Court of Cassation". The state representative also refers to the case law of the Constitutional Court, according to which "the full substantive content [of the right to a defence] does not extend beyond the

confines of judicial proceedings, whilst in administrative proceedings it is sufficient to guarantee the right to make representations which guarantees an essential core of the values inherent in the inviolable rights of the person" (judgment No. 356 of 1995).

Finally, the *Avvocatura Generale dello Stato* argues that the violation averred of the principle of the independence of judges from the special courts laid down by Article 108 of the Constitution is groundless, since "the law regulates the celebration of disciplinary (administrative) proceedings with the recognition of broad guarantees".

*Conclusions on points of law*

1. – The Regional Administrative Tribunal for Piedmont has raised, with reference to Articles 3, 24 and 108 of the Constitution, the question of the constitutionality of Article 34(2) of law No. 186 of 27 April 1982 (Regulations governing the administrative courts and the secretarial and auxiliary staff of the Council of State and the Regional Administrative Tribunals) and Article 10(9) of law No. 117 of 13 April 1988 (Compensation for damages caused by the exercise of judicial functions and the civil responsibility of magistrates), insofar as they prohibit judges on the Court of Accounts or administrative judges subject to disciplinary proceedings from appointing a professional barrister as their chosen representative.

According to the referring court, the contested provisions violate Article 24 of the Constitution on the grounds that they restrict the right to a defence of administrative judges and judges on the Court of Accounts. Secondly, they are claimed to violate Article 108 of the Constitution on the grounds that they limit the independence of the special courts, which requires the broadest expression of the magistrate's right to a defence. Thirdly, they are claimed to violate Article 3 of the Constitution due to the difference in treatment between ordinary magistrates, who have the right to be represented by a professional barrister in disciplinary proceedings, and administrative judges and judges on the Court of Accounts who are denied this right.

2. – The objection that the question is inadmissible raised by the *Avvocatura Generale dello Stato* based on the generic nature of the challenge and its hypothetical nature must be rejected. The referral order by the referring administrative court correctly identifies the constitutional principles claimed to have been violated, and provides adequate argument in support of the challenges with reference to each of them. Moreover, the question is not formulated in hypothetical terms, because the referral order clarifies that the contested provisions apply in the main proceedings and are relevant for the court's decision.

3. – The question is well founded with reference to Article 108 of the Constitution.

The Constitution distinguishes between ordinary and special courts, but also lays down general provisions governing courts and procedure, taking care to define the guarantees necessary in order to ensure that their functions are carried out correctly. These guarantees include the independence of the judiciary, which concerns both the ordinary as well as the special courts. In fact, just as Article 104 provides that "judiciary is an autonomous branch independent of all other state powers", Article 108 provides that the law shall guarantee the independence of the judges on the special courts and the public prosecutors at those courts.

The guarantee of the independence of the judiciary is also relevant in matters concerning disciplinary responsibility, because the prospective of the imposition of a penalty may condition the magistrate when carrying out the functions vested in him under the legal order. It is therefore necessary that all measures necessary to avoid any undue conditioning be adopted. These measures include those directed at guaranteeing an effective defence. It is within this perspective that the Court has asserted that "there is a close relationship between the independence of a magistrate subject to disciplinary proceedings and the right to choose the representative considered by him to be most appropriate, which means that any limitation on this latter power ultimately involves also partially impinging upon the value of his independence": this led the Court to rule unconstitutional a provision which precluded the right of ordinary magistrates subject to disciplinary proceedings to be represented by a barrister (judgment No. 497 of 2000).

The correlation indicated is not affected by the judicial or administrative nature of the disciplinary proceedings, which depends on the features which Parliament has chosen to

attribute to the proceedings and to the bodies involved in them. Disciplinary proceedings concerning ordinary judges are of a judicial nature and are celebrated before the disciplinary board of the Supreme Council of the Judiciary, with all the resulting consequences concerning arrangements for appeals. Disciplinary proceedings against administrative judges have the nature of administrative proceedings and are celebrated before the *Consiglio di presidenza della giustizia amministrativa* [the self-regulating body for judges in the administrative courts] or the *Consiglio di presidenza della Corte dei Conti* [the self-regulating body for judges on the Court of Accounts].

This different configuration of the procedure is the result of a choice by Parliament, which may indeed make different arrangements for the structure of individual court systems, provided that the common constitutional principles are complied with. Irrespective of the status which the law confers on the proceedings and the disciplinary authority, the constitutional guarantee of independence means that such proceedings be of a special nature when they concern magistrates [in general], contrary to the situation for other categories of public sector employees (judgment No. 182 of 2008), the Constitution requires that magistrates be guaranteed the broadest expression of the right to a defence also in disciplinary proceedings.

The contested provisions, which allow a respondent magistrate to be represented only by another magistrate, unreasonably limit this right. The right to be represented by a magistrate, released from his "original corporative status", is still justifiable since the magistrate is "considered to have the technical expertise necessary in order to present such a defence" (judgment No. 497 of 2000). However, the prohibition on representation by a barrister, as the figure which the legal system recognises in the first instance as performing this function, is manifestly unreasonable.

In conclusion, the principle of independence requires that magistrates be recognised the right to choose a representative in disciplinary proceedings and that any provisions which limit this right are unconstitutional. This requirement – as noted above – is not affected by the objective circumstances, concerning the nature of the organ and of the disciplinary

proceedings, but rather depends on the subjective factor of the relevant person's status as s judge.

As a result, without prejudice to the legitimacy of the provision which permits administrative magistrates to be represented in disciplinary proceedings by another magistrate, the Court finds that the provision which prevents them from availing themselves of the services of a barrister in the same proceedings is unconstitutional.

4. – The challenges made with reference to Articles 3 and 24 of the Constitution are moot.

ON THOSE GROUNDS

## THE CONSTITUTIONAL COURT

*declares* that Article 34(2) of law No. 186 of 27 April 1982 (Regulations governing the administrative courts and the secretarial and auxiliary staff of the Council of State and the Regional Administrative Tribunals) and Article 10(9) of law No. 117 of 13 April 1988 (Compensation for damages caused by the exercise of judicial functions and the civil responsibility of magistrates) are unconstitutional insofar as they preclude the right of an administrative judge or a judge on the Court of Accounts who is subject to disciplinary action to be represented by a barrister.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 March 2009.

Signed:

Paolo MADDALENA, President

Sabino CASSESE, Author of the judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 27 March 2009.

The Director of the Registry

Signed: DI PAOLA