



Corte costituzionale



JUDGMENT NO. 20 OF 2009

GIOVANNI MARIA FLICK, President
LUIGI MAZZELLA, Author of the Judgment



JUDGMENT No. 20 YEAR 2009

In this case the Court considered a challenge to the arrangements governing the marking of professional examinations for lawyers which stipulated only the requirement that an alphanumeric grade be given, and that there was not need to give reasons. The referring court claimed that the contested provisions violated candidates' rights to effective protection through the courts. The Court ruled the question inadmissible, finding that the procedural principles raised were not relevant in this particular case, which concerned “the substantive aspect of the prerequisites for the validity of the decision to exclude the candidate”.

THE CONSTITUTIONAL COURT

composed of: President: Giovanni Maria FLICK; Judges: Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 22(9) of royal decree-law No. 1578 of 27 November 1933, (Organisation of the professions of barrister and solicitor) converted into law, with amendments, by law No. 36 of 22 November 1934, replaced by Article 1-*bis* of decree-law No. 112 of 21 May 2003, (Urgent amendments to arrangements governing qualification examinations for the legal profession), converted into law, with amendments, by law No. 180 of 18 July 2003 and Articles 17-*bis*, 22, 23 and 24(1) of royal-decree No. 37 of 22 January 1934 (Provisions to supplement and implement royal decree-law No. 1578 of 27 November 1933, on the organisation of the professions of barrister and solicitor) commenced pursuant to the

referral orders of 5 May (2 orders) and 3 June 2008 from the Regional Tribunal for Administrative Justice for Trento, respectively registered as Nos. 228, 229 and 261 in the Register of Orders 2008 and published in the *Official Journal of the Republic* Nos. 30 and 37, first special series 2008.

Considering the entries of appearance by the President of the Council of Ministers;
having heard the Judge Rapporteur Luigi Mazzella in chambers on 3 December 2008.

The facts of the case

1 – By three distinct orders, issued on 5 May and 3 June 2008, the Regional Tribunal for Administrative Justice for Trento raised, with reference to Articles 24(1) and (2), 111(1) and (2), 113(1) and 117(1) of the Constitution, the question of the constitutionality of Article 22(9) of royal decree-law No. 1578 of 27 November 1933 (Organisation of the professions of barrister and solicitor), converted into law, with amendments, by law No. 36 of 22 November 1934, replaced by Article 1-*bis* of decree-law No. 112 of 21 May 2003 (Urgent amendments to arrangements governing qualification examinations for the legal profession), converted into law, with amendments, by law No. 180 of 18 July 2003, as well as Articles 17-*bis*, 22, 23 and 24(1) of royal decree No. 37 of 23 January 1934 (Provisions to supplement and implement royal decree-law No. 1578 of 27 November 1933 on the organisation of the professions of barrister and solicitor) – the latter provisions being contested in the version currently in force, as resulting from the amendments and replacement provisions introduced by law No. 242 of 27 June 1988 (Amendments to the arrangements governing solicitors examinations) and by decree-law No. 112 of 21 May 2003 (Urgent amendments to arrangements governing qualification examinations for the legal profession), converted into law, with amendments, by law No. 180 of 18 July 2003 – insofar as they do not specify the obligation to justify and/or qualify the grade awarded in alphanumeric terms when assessing the written tests in examinations for qualification as a legal professional.

2 – The Regional Tribunal for Administrative Justice for Trento states in each of the referral orders that following proceedings challenging the unfavourable assessments of the papers submitted in the examination for qualification as a legal professional, session 2006/2007, it had rejected, in non definitive judgments, two of the three complaints made by the applicants based on the alleged violation by the examining boards of the alleged obligation to ensure the effective application of the evaluation criteria stipulated at national level, given that Articles 22 of royal decree-law No. 1578 of 27 November 1933 and 17-*bis*, 22, 23 and 24 of royal decree No. 37 of 23 January 1934 do not suggest the existence of such an obligation. Examining the third residual complaint, by which the applicants averred the failure to give reasons for the judgment expressed in view of the complete unsuitability of the so-called alphanumeric grade to express such justification, the referring court asserts that, in accordance with the consolidated case law of the Council of State, which accepts the view that an alphanumeric grade is sufficient, this complaint should be rejected.

3 – However, the referring court questions the constitutionality of the legislation concerned according to the settled interpretation within the case law of the Council of State. First, according to the referring court, the mere alphanumeric expression of a judgment does not satisfy the requirement to explain to the candidate the reasons why he failed to pass the written examinations, consisting only in the declaration of a relative value expressed in mathematical terms.

The referring court states that it is aware of this Court's recent rulings in orders No. 466 of 2000, No. 419 and No. 420 of 2005 and most recently No. 28 of 2006 regarding the inadmissibility of similar questions to that currently before the Court directed at the Court's approval for this interpretation, due to the inexistence in the case law of a genuine “living law”, or “law in action”. However, it considers that as things stand this case law may be set aside, since any different reading of Article 3 of law No. 241 of 7 August 1990 would be consistently rejected on appeal by the Council of State, the position of which should therefore now be classified as “living law”.

Confirmation for this may be found in the fact that, again according to the referring court, although Article 1-*bis* of decree-law No. 112 of 21 May 2003, converted into law, with amendments, by law No. 180 of 18 July 2003, introduced several criteria for

assessing the examinations under discussion, this principle does not appear to have been adopted within the case law of the Council of State, which has held that not even the prior determination of assessment criteria for examinations for public sector positions may be regarded as an element that is indispensable for the legitimacy of the procedure, consisting in activities falling within the discretionary powers of the Administration.

The question should be examined, in the opinion of the referring court, in the light of the principles contained in Articles 24(1) and (2), 111(1) and (2), and 113(1), in conjunction with those laid down by Article 117(1) of the Constitution.

As far as the principle of the efficacy of judicial protection is concerned, the referring court observes that, in opinion No. 120 of the General Assembly of 9 November 1995, the Council of State requested and obtained from Parliament the amendment to Article 21(1) of presidential decree No. 487 of 9 August 1994 (Regulation introducing rules concerning access to employment in the public administrations and the procedures for conducting public competitions for more than one public body and other the forms of public sector recruitment), which occurred by presidential decree No. 693 of 30 October 1996 (Regulation amending the regulation introducing rules concerning access to employment in the public administrations and the procedures for conducting public competitions for more than one public body and other the forms of public sector recruitment, approved by presidential decree No. 487 of 9 May 1994). In this way, the replacement of the expression “award of a score” with that previously applicable resulted in the removal from the legal order of the only provision capable of positively invalidating the theory of the alphanumeric grade.

According to the referring court, this reform was guided by the intention to secure the principles of impartiality, value for money and rapidity in the completion of recruitment procedures, as well as proper administration laid down by Article 97 of the Constitution.

However, it appears to the referring court that this reform, and the subsequent decisions in the case law of the Council of State, have overlooked the different but no less significant requirement of transparency in the judgments reached by the examining boards and that the different principle drawn from Articles 24(1) and (2) and 113(1) of

the Constitution, which proclaim with equal clarity the principle of effective protection through the courts, has been violated.

The assertion that the alphanumeric grade is a summary, but complete, expression of the judgment is claimed to be unsatisfactory, given that, on the basis of an alphanumeric grade the subsequent conducting of a fair inquiry is prevented, given the exclusion of any potential review of faults, if any, in the reasoning.

On the other hand, according to the referring court Article 22(9) of royal decree-law No. 1578 of 1933, as amended by decree-law No. 112 of 2003 and the conversion law for that decree, provides that “the board established with the Justice Ministry shall define the criteria for assessing the written papers” which must be communicated to the various sub-committees; these criteria must in any case always include the following: a) clarity, logical structure and methodological rigour of the argument; b) demonstration of the practical ability to solve specific legal problems; c) demonstration of familiarity with the theoretical bases for the legal institutions discussed; d) demonstration of the ability to appreciate any inter-disciplinary aspects; e) with regard to the court decision, demonstration that the candidate masters techniques of argumentation. This is stated to offer additional confirmation to the challenge made, given that the provision in question would lack any meaning in the absence of a requirement to give reasons for the judgments made regarding the papers submitted by the candidates.

The contested provisions, interpreted on the basis of the “living law” developed over the years by the Council of State, are moreover claimed to preclude any right to a defence since a negative assessment of an individual cannot be verified even in the narrow terms of the reasons given for it: this is stated to result in the violation of the principle of effective protection through the courts enshrined, according to the referring court, also in the principle of a “fair trial” contained in Article 111(1) and (2) of the Constitution.

The question appears to the referring court not to be manifestly groundless also in the light of Article 117(1) of the Constitution, since that Article requires the state to exercise its legislative powers in accordance with the limitations contained in Community law and international law. In fact, in accordance with the findings of this Court in judgments No. 348 and No. 349 of 2007, the violation of the rules of a fair trial

and of the principle of its effectiveness result in the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified by law No. 848 of 4 August 1955, as well as the Additional Protocol signed in Paris on 20 March 1952.

4 – The President of the Council of Ministers intervened in the proceedings, represented by the *Avvocatura Generale dello Stato*, with three distinct writs of intervention, claiming that the reference was inadmissible, due to the inexistence of the living law described by the referring court and arguing in any case, on the merits, that it was groundless.

As far as the first aspect is concerned, the state representative emphasises that in four judgments this Court has already highlighted the lack of any consolidated case law of the Council of State and the regional administrative tribunals which may be classified as “living law”, given the heterogeneous nature of the interpretative solutions offered in case law.

On the merits, the *Avvocatura Generale* recalls that, in providing for the general requirement to give reasons, Article 3 of law No. 241 of 7 August 1990 (New rules governing administrative procedures and the right of access to administrative documents), refers to the administrative activity directed at the taking of measures and not that resulting from a technical evaluation, such as that relating to the candidate's level of preparation.

It adds that in these circumstances the grade does not represent a kind of order for which it is necessary to give reasons, but itself expresses in summary form the evaluation made by the examining board when assessing the individual papers and comparing them with one another.

Nor, continues the *Avvocatura Generale*, can the situation be regarded as having been changed by the introduction of Article 11(5) of legislative decree No. 166 of 24 April 2006 (Rules governing solicitors' examinations, professional experience and training, as well as relating to solicitors' assistants implementing Article 7(1) of law No. 246 of 28 November 2005 concerning solicitors' examinations), according to which the decision that a candidate is unsuitable must be supported by reasons, whereas in the judgment of suitability [in this case] the grade acts as motivation. The difference

between the legislation is claimed to be justified by the fact that the solicitors' examination, in contrast to the qualification examination, is a procedure for recruitment to a limited number of positions, based on the necessary comparison between the candidates.

The *Avvocatura Generale* goes on to recall the recent decision of the Council of State on competitions for appointment as a trainee judge [*uditore giudiziario*], in which it held that the candidate has no legal right to know the level of inadequacy of his own examination, since “within the ambit of a fail, the rules do not confer different effects on different grades”.

As regards the argument according to which the numeric expression of the judgment does not make it possible for the candidate to understand where he went wrong, with a view to resitting the qualification examination, the *Avvocatura Generale* observes that the assessment of the board does not have didactic purposes, adding that this summary form of motivation guarantees respect for the constitutional principles of efficiency, value for money, effectiveness and rapidity on which administrative action must be based, since the activity of marking would be considerably slowed down if the board were required to express opinions supported by reasons instead of grades.

The suitability of a grade to encapsulate a summary judgment therefore means that the argument of the referring administrative tribunal averring the violation of the principle of effective protection through the courts and the guarantee of a fair trial lacks foundation, both concerning the complaint relating to Article 24 of the Constitution as well as that relating to Article 111 of the Constitution, as well finally as that concerning Article 117(1) of the Constitution.

Conclusions on points of law

1 – The Regional Tribunal for Administrative Justice for Trento questions, with reference to Articles 24(1) and (2), 111(1) and (2), 113(1) and 117(1) of the Constitution, the constitutionality of Article 22(9) of royal decree-law No. 1578 of 27 November 1933 (Organisation of the professions of barrister and solicitor), converted

into law, with amendments, by law No. 36 of 22 November 1934, replaced by Article 1-*bis* of decree-law No. 112 of 21 May 2003 (Urgent amendments to arrangements governing qualification examinations for the legal profession), converted into law, with amendments, by law No. 180 of 18 July 2003, as well as Articles 17-*bis*, 22, 23 and 24(1) of royal decree No. 37 of 23 January 1934 (Provisions to supplement and implement royal decree-law No. 1578 of 27 November 1933, on the organisation of the professions of barrister and solicitor), insofar as they do not specify the obligation to justify and/or qualify the grade awarded in alphanumeric terms when assessing the written tests in examinations for qualification as a legal professional.

The current system for evaluation, based on the award of an alphanumeric grade between 1 and 10, is challenged on the grounds that, according to a jurisprudential interpretation classified by the referring court as “living law”, it does not provide (even implicitly) for the requirement to give reasons for the grade awarded for the written papers.

The constitutional reference before the Court concerns, first, Articles 17-*bis*, 22, 23 and 24(1) of royal decree No. 37 of 22 January 1934, as amended by decree-law No. 112 of 21 May 2003 converted into law (...), which specify the procedure and contents of the examinations (written and oral) which aspiring barristers must sit stipulating, amongst other things, that after marking the written papers the sub-committee shall express a numeric grade between 1 and 10 for each written paper; secondly, it concerns the rule contained in Article 22 of royal decree-law No. 1578 of 1933, as amended by decree-law No. 112 of 2003, which requires the national examining board to define, for all appeal courts, uniform criteria for the evaluation of written papers.

In the constitutional proceedings before the Court, the above provisions are claimed to breach Articles 24 and 113 of the Constitution, due to violation of the principle of effective protection through the courts in both general and administrative matters, the principle of the “fair trial” laid down by Article 111 of the Constitution and finally, through Article 117(1) of the Constitution, with the same principles of effective protection through the courts and a fair trial enshrined in the Convention on the Protection of Human Rights and Fundamental Freedoms.

2 – Since the cases concern the same provisions, contested with reference to the same principles and on the basis of identical arguments, they must be joined for decision in a single judgment.

3 – The question is admissible.

In many of its decisions, this Court has rejected the argument that the absence under Italian law of any obligation for give reasons for the grades awarded when marking examinations and the suitability of the numerical grades to constitute valid grounds for the decision that the candidate is unsuitable amounts to a required and unequivocal interpretation of the applicable law (orders No. 466 of 2000, No. 233 of 2001, No. 419 of 2005 and most recently No. 28 of 2006).

Indeed, in the most recent development of the case law of the Council of State, this argument has now become consolidated, depriving the minority view, which is still adopted in some isolated judgments, of any concrete possibility of being definitively established within case law. This Court must therefore take note of the fact that the interpretative solution offered within the case law now constitutes genuine “living law”.

4 – On the merits, the question is groundless.

Articles 24 and 113 of the Constitution lay down the principle of the effectiveness of the right to a defence, the former in general terms and the latter with reference to protection against the actions of the public administration.

Both of these provisions are intended to ensure the adequacy of the procedural instruments made available by the legal system in order to protect rights during legal proceedings and operate exclusively on a procedural level (see, *inter alia*, judgments No. 182 of 2008, Nos. 180, 181, 282, 420 of 2007, No. 101 of 2003 and No. 419 of 2000).

In turn, the principle of a fair trial enshrined in Article 111 of the Constitution, is intended to ensure that the procedural instruments available place the plaintiff and the defendant in a position of parity and offer appropriate protection for the substantive rights in dispute in the proceedings, through the full implementation of the right to make representations, the principle of the reasonable length of proceedings, and that reasons be given for the decision. This principle too involves guarantees of an exclusively procedural nature.

The same principles of the effectiveness of the right to a defence and of a fair trial are also expressed in the “Convention on the Protection of Human Rights and Fundamental Freedoms” with exclusive reference to the procedural level.

Conversely, the alleged unconstitutionality of a rule which, according to the “living law”, does not impose on the board any specific procedure for justifying the decisions adopted by it in relation to written and oral examinations, concerns a stage in the administrative procedure which regulates the conduct of examinations for qualification as a legal professional. It therefore concerns the substantive aspect of the prerequisites for the validity of the decision to exclude the candidate, which concludes the said procedure. The procedural aspect of the instruments made available by the legal system in order to enforce rights during the proceedings is not affected by the provision, which does not preclude an appeal to the administrative courts.

The contested legislation is not therefore liable to interfere either with the right to a defence or with the right to make representations and does not fall within the ambit of application of the principles relied on by the referring court.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules that the question of the constitutionality of Article 22(9) or royal decree-law No. 1578 of 27 November 1933 (Organisation of the professions of barrister and solicitor), converted into law, with amendments, by law No. 36 of 22 November 1934, replaced by Article 1-*bis* of decree-law No. 112 of 21 May 2003 (Urgent amendments to arrangements governing qualification examinations for the legal profession), converted into law, with amendments, by law No. 180 of 18 July 2003, as well as Articles 17-*bis*, 22, 23 and 24(1) of royal decree No. 37 of 23 January 1934 (Provisions to supplement and implement royal decree-law No. 1578 of 27 November 1933, on the organisation of the professions of barrister and solicitor) raised, with reference to Articles 24(1) and (2), 111(1) and (2), 113(1) and 117(1) of the Constitution by the Regional Tribunal for

Administrative Justice for Trento with the referral orders mentioned in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 26 January 2009.

Signed:

Giovanni Maria FLICK, President

Luigi MAZZELLA, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 30 January 2009.

The Director of the Registry

Signed: DI PAOLA