JUDGMENT NO. 143 YEAR 2013

In this case the Court heard a reference from a Supervisory Judge (the functions of which in part coincide with those of the Parole Board in the UK) questioning the constitutionality of a rule which limited the number and duration of meetings between prisoners incarcerated under the strict anti-mafia regime and their lawyers. Referring to supra-national law (the ECHR) requiring that prisoners must be allowed the right to confer with their defence representatives, the Court ruled the legislation unconstitutional, noting that they would only be permissible if "absolutely necessary" and that "the encroachment … on the right to a defence caused by the contested provision is not *prima facie* accompanied by a comparable increase in protection for the countervailing interest in safeguarding public order and the security of the general public".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 41-bis(2-quater)(b) of Law no. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom), as amended by Article 2(25)(f)(ii) of Law no. 94 of 15 July 2009 (Provisions on public security), initiated by the Supervisory Judge [*Magistrato di Sorveglianza*] of Viterbo pursuant to an application filed by G.D. by the referral order of 7 June 2012, registered as no. 241 in the Register of Referral Orders 2012 and published in the Official Journal of the Republic no. 43, first special series 2012.

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

Having heard the Judge Rapporteur Giuseppe Frigo in chambers on 24 April 2013.

[omitted]

Conclusions on points of law

1.– The Supervisory Judge of Viterbo questions the constitutionality of Article 41-bis(2-quater)(b) of Law no. 354 of 26 July 1975 (Provisions governing the law on

incarceration and the implementation of measures which deprive or limit freedom), as amended by Article 2(25)(f)(ii) of Law no. 94 of 15 July 2009 (Provisions on public security), insofar as it places limits on the right to discussions with defence representative for prisoners subject to a suspension of the ordinary rules governing their treatment, pursuant to Article 41-bis(2), in particular by providing that such prisoners may have "a telephone call or a discussion of the same duration as that granted for family members ... up to a maximum of three times each week" (equal respectively to ten minutes and one hour) with their defence lawyer.

In the opinion of the referring judge, the contested provision violates Article 3 of the Constitution by treating prisoners detained according to the special regime less favourably than other prisoners, which cannot be justified by the fact that they are more dangerous, and cannot have the effect of restricting their exercise of the right to a defence; moreover, it cannot be justified by the claim that their defence requirements are lower, as prisoners detained according to the special regime by contrast usually have greater defence requirements than "ordinary" prisoners due to the higher number and greater complexity of the criminal proceedings pending against them.

The contested provision is also claimed to violate Article 24 of the Constitution by imposing an evident restriction of the prisoner's right to a defence, which cannot be justified with reference to the need to prevent contacts with members of the criminal organisation with which they are affiliated, as that requirement is not relevant as regards relations with defence lawyers, who could not, by law, be subjected to the "suspicion of acting as an illegal channel for communication".

Finally, Article 111(3) of the Constitution is claimed to have been violated since the contested restrictions prevent the prisoners in question – who are often involved in several criminal proceedings at the same time – from being allowed the necessary time required to prepare their defence effectively.

2.– The question relating to Article 24 of the Constitution is well founded.

It is a settled position within the case law of this Court that the constitutional guarantee of the right to a defence includes professional representation (see judgments no. 80 of 1984 and no. 125 of 1979) and hence also the –instrumental – right to confer with a defence lawyer (see judgment no. 216 of 1996): this serves the purpose of defining and preparing defence strategies, and first and foremost gaining information

regarding one's own rights and the opportunities offered by the legal order to protect them and to avoid or mitigate the detrimental consequences to which prisoners are exposed (see judgment no. 212 of 1997). This position is essentially mirrored by that stated by the European Court of Human Rights, according to which the right of the accused to communicate in confidence with his or her defence lawyer constitutes one of the fundamental prerequisites of a fair trial within a democratic society, in the light of Article 6(3)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (see *inter alia*, European Court of Human Rights, judgments of 13 January 2009 in *Rybacki* v. Poland, or 9 October 2008 in *Moiseyev v. Russia*, of 27 November 2007 in *Asciutto v. Italy* and of 27 November 2007 in *Zagaria v. Italy*).

On the other hand, it is evident that the right in question has an entirely special effect for persons incarcerated in prison since, as they have only limited opportunity for direct inter-personal contact with the outside, such persons are in an inherently weaker position as regards the exercise of their rights to a defence. Within this perspective, the right of prisoners to confer with their defence lawyer has been expressly and specifically recognised under supranational law, including Recommendation R (2006)2 of the Council of Europe on the "European Prison Rules", adopted by the Committee of Ministers on 11 January 2006, which refers separately to the rights of both "prisoners" (rule 23) and "untried prisoners" (rule 98).

Under national law, the 1988 Code of Criminal Procedure – which modified the less favourable regime applicable under the previous version of the Code – enshrined the right of an accused person in pre-trial custody to confer with his or her defence lawyer from the start of enforcement of the measure; the exercise of this right may only be deferred by a judge, acting on a request by the public prosecutor, in cases involving "specific and exceptional interim requirements" and by very limited periods of time: no longer than seven days, subsequently reduced to five (Article 104 of the Code of Criminal Procedure).

However, the new Code of Criminal Procedure did not address the parallel right of prisoners who have been definitively convicted. Given the lack of a specific provision, even in the law on incarceration, it was therefore considered that discussions between a convicted person and his or her defence lawyer were governed by the general rules on discussions with persons other than spouses and cohabitants, and were thus conditional

upon discretionary authorisation by the prison governor, following a prior verification as to the existence of "reasonable grounds" (Article 18(1) of Law no. 354 of 1975 and Article 35(1) of Presidential Decree no. 29 April 1976, which was in force at the time, on the "Approval of the regulations implementing Law no. 354 of 26 July 1975 laying down provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom").

By judgment no. 212 of 1997, this Court held that such a regime was incompatible with the principle of the inviolability of the right to a defence, consequently declaring Article 18 of Law no. 354 of 1975 unconstitutional insofar as it did not allow convicted persons the right to confer with a defence lawyer after enforcement of the sentence had begun, not only in relation to court proceedings that have already been initiated, but also in relation to any judicial dispute liable to be launched. On that occasion, the Court held that "the right to confer with one's own defence lawyer cannot be restricted or rendered conditional upon the manner of detention, except in accordance with any limits provided for by law in order to protect other interests guaranteed under constitutional law (for example through limited temporary suspensions of the right provided for under Article 104(3) of the Code of Criminal Procedure […]), and evidently without prejudice to the provisions setting out arrangements for exercising the right, provided for having regard to other requirements related to the status as a prisoner: however, such arrangements cannot under any circumstances transform the right into a matter that is conditional upon a decision by the administrative authorities, and hence subject to a genuine discretionary authorisation".

As a result of the judgment referred to above, all prisoners, including those incarcerated under the terms of a definitive conviction, may thus confer with their defence lawyers without any requirement for authorisation and without being subject to "quantitative" limits (number and duration of discussions). The prison authorities are only granted the power, having regard to organisational and security requirements related to the status as a prisoner, to stipulate practical arrangements applicable to discussions (specification of times, locations, identification requirements for defence lawyers and the like), without any possibility for review as to whether the discussions are actually necessary and the reasons for them.

3.– However, the points made above that there may not be any restrictions on the number and duration of discussions applies to "ordinary" prisoners, and no longer at present to prisoners subject to the special regime suspending ordinary rules on the treatment of prisoners put in place by the Minister of Justice pursuant to Article 41-bis(2) of Law no. 354 of 1975.

This regime seeks primarily to contain the dangerousness of individual prisoners as projected outwards from the prison, in particular by preventing "links between prisoners who are members of criminal organisations and with members of such organisations who are not in prison": such links may be established "through contacts with the outside world", which are favoured by the law on incarceration itself as an instrument for reintegration into society (see judgment no. 376 of 1997; orders no. 417 of 2004 and no. 192 of 1998). The intention is above all to prevent incarcerated members of the organisation from exploiting the ordinary prison rules and thus to continue to be able to issue instructions to affiliates who are not in prison, thereby maintaining control over the criminal activities of the organisation also from prison.

In view of that objective, the restrictions imposed under the special detention regime – which were enacted for the first time by Law no. 279 of 23 December 2002 (Amendment of Articles 4-bis and 41-bis of Law no. 354 of 26 July 1975 on incarceration) – could not fail to affect, first and foremost, also the rules applicable to discussions, which offer the most direct and immediate opportunity for communication between prisoners and the outside. In this regard, Article 41-bis(2-quater)(b) of Law no. 354 of 1975, as amended by Law no. 279 of 2002, imposed restrictions on the frequency of discussions (the right of the prisoner to no less than one and no more than two face-to-face discussions per month, with the possibility for one additional telephone conversation only after the regime has been in place for more than six months), the status of visitors (prohibition on discussions with persons other than family members and cohabitants, except in exceptional circumstances) and the location of such visits (premises equipped in such a manner as to prevent the transfer of objects), as well as the possibility to monitor conversations (sound control and recording). However, the last sentence of letter (b) added – with the goal of safeguarding the right to a defence – that the provisions laid down in it "shall not apply to discussions with defence lawyers".

Consequently, the unconditional right to confidential discussions with defence lawyers remained in place also for prisoners subject to the special regime.

4.– The situation changed following the enactment of Law no. 94 of 2009, Article 2(25) of which introduced a broad range of amendments to Article 41-bis of Law no. 354 of 1975, the stated aim of which – as results unequivocally from the *travaux preparatoires* – was to render the special regime more stringent on the grounds that the previous measures were deemed to be insufficient to counter effectively the outcome feared.

This exacerbation of the regime applied also to the rules on discussions. In fact, following the changes the number of face-to-face discussions per month was reduced to one only, sound controls and video recording became mandatory (rather than discretionary) and telephone discussions could only be permitted if no face-to-face discussions had been held (and not in addition to these). But above all – as far as is relevant here – it amended the last sentence of paragraph 2-quater(b), introducing to the provision (which otherwise remained unchanged) that "the provisions of this letter shall not apply to discussions with defence lawyers" the phrase "with whom a telephone call or a discussion of the same length as those provided for in relation to family members may be held up to a maximum of three times each week": namely with a maximum duration of one hour for face-to-face discussions (Article 37(10) of Presidential Decree no. 230 of 30 June 2000 laying down "Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom"), and ten minutes for telephone conversations (the third sentence of Article 41-bis(2-quater)(b) of Law no. 354 of 1975, which mirrors – with regard to this issue – Article 39(6) of Presidential Decree no. 230 of 2000).

The meaning of the amended provision is clear, even taking account of the singular logical and syntactic formulation of the resulting rule. Leaving aside the fact that the rules requiring a glass screen, sound control and video recording (which apply to discussions with family members) do not apply to discussions with defence lawyers, "quantitative" legislative limits have been introduced for the first time on the right of the prisoners concerned to confer with their defence lawyers: these limits appear to be inspired by the suspicion that the lawyers may be willing to act as intermediaries for the

unlawful exchange of messages between prisoners and other members of the criminal organisation of origin.

5.– Due to the manner in which they are framed, the restrictions in question violate the right to a defence in a manner that is incompatible with the guarantee of inviolability enshrined under Article 24(2) of the Constitution.

It needs to be borne in mind that these restrictions are rigid, unequivocal and applicable over the long term, and thus differ considerably from those made possible as a general matter by Article 104(3) of the Code of Criminal Procedure in relation to accused persons in pre-trial custody.

Given the amendment to the second sentence of Article 41-bis(2-quater) (specifically, the replacement of the phrase "may entail" with the present indicative "shall provide"), the restriction of the right to discussions with a defence lawyer results – along with the other restrictions provided for by law – automatically and inescapably from the application of the special incarceration regime (see judgment no. 190 of 2010) and applies in parallel with that regime for its full duration, which is currently set at four years, subject to the possibility of further extensions of two-years each (paragraph 2-bis).

On the other hand, the limits in question invariably apply regardless not only of the nature and complexity of the judicial proceedings (or, more broadly, disputes) in which the prisoner is (or is liable to be) involved and the degree of urgency of the defensive action required, but also of their number, and thus of the number of legal representatives with whom the prisoner must consult. The interpretation of the contested provision to that effect, which was promptly adopted by the prison administration (circular of the Prison Administration Department of the Ministry of Justice no. 297600-2009 of 3 September 2009) in effect reflects both the wording (the provision refers to "defence lawyers" in the plural and does not make any reference to an increase in the limits if the prisoner is involved in more than one proceeding) as well as the rationale of the legislative amendment from 2009 highlighted above.

6.– Contrary to the assertions of the State Counsel, the legislative solution adopted cannot be justified by the need to strike a balance between the right to a defence and countervailing interests of equal constitutional standing relating specifically to the

protection of public order and the safety of the general public as regards organised crime.

This Court has acknowledged that the right to a defence may be balanced against other requirements of constitutional standing, with the result that its exercise may be granted within different bounds or restricted by legislation (see *inter alia* judgments no. 173 of 2009, no. 297 of 2008 and no. 341 of 2006 and, with specific reference to discussions with prisoners, judgment no. 212 of 1997): however, this is conditional upon the requirement that its efficacy may not be compromised, which represents the inderogable limit on operations of this type (see judgment no. 317 of 2009), and without prejudice also to the requirement to ascertain whether the restrictions actually imposed were reasonable (see judgment no. 407 of 1993).

These principles apply in particular to restrictions that impair the right to professional representation for persons incarcerated in prison, who – as noted above – are rendered more vulnerable, as regards the ability to exercise defence rights, by the restrictions on fundamental freedoms which inherently result, as a general matter, from the fact that they are incarcerated. It is also important in this regard to refer to the case law of the Strasbourg Court which – in accepting that the state may under exceptional circumstances limit confidential contacts between a prisoner and his or her lawyer – nonetheless notes that any restrictions must be absolutely necessary (see *inter alia*, European Court of Human Rights, judgments of 27 November 2007 in *Asciutto v. Italy* and of 27 November 2007 in *Zagaria v. Italy*) and must not in any case frustrate the efficacy of the legal assistance which the defence lawyer is authorised to give. In fact, such is the importance ascribed to the rights to a defence in a democratic society that the right to effective legal assistance must be guaranteed under all circumstances (European Court of Human Rights, Grand Chamber, judgment of 2 November 2010, *Sakhnovskiy v. Russia*).

In the present case, the rigid curtailment, which is protracted over time, of contact between the prisoner and his or her defence lawyers violates that essential core as there can be no absolute presumption that three one-hour face-to-face discussions per week or ten-minute telephone discussions enable defensive acts to be prepared adequately under any circumstances. Such situations involve *inter alia* persons who have been convicted or accused of particularly serious offences and who are often at the same time involved

– precisely due to the supposed links "with a criminal, terrorist or subversive association" on which subjection to the special regime is conditional (see Article 41-bis(2), first sentence) – in a range of other particularly complex prosecutions and enforcement proceedings. This is the case for the complainant in the proceedings before the referring judge who – according to that judge – has been imprisoned in accordance with three separate sentences and is being held in pre-trial custody under the terms of two further orders; in addition, further criminal proceedings are pending against him for which the time limits for pre-trial custody have expired, in addition to the supervisory procedure launched following the challenge to the ministerial decree ordering that he be subject to the special detention regime. The possibility that a total of three hours or thirty minutes each week of discussions – albeit taking account of the fact that correspondence by letter (an alternative which has evident functional limits) is also possible – may in actual fact not be sufficient to satisfy his defence requirements cannot therefore be regarded as remotely plausible or even purely conjectural.

It is significant in this regard that the Strasbourg Court held – taking account of the complexity of the individual court case in which the appellant was involved – that the right to a fair trial was violated by a restriction with significant similarities to that under examination (see judgment of 12 March 2003, *Öcalan v. Turkey*, concerning a case in which during his trial the accused was only permitted two discussions each week with his defence lawyers, each with a duration of one hour).

7.– As regards the second element – concerning the reasonableness of the restrictions – it is important to point out that discussions with defence lawyers by definition involve interlocutors who are "external" vis-a-vis the prisoner and occur with persons who are members of professional associations (such as lawyers), who are required to abide by a code of conduct with specific regard to their dealings with the justice system and who are subject to the disciplinary rules of their professional societies.

Whilst the possibility that such persons, who are associated with the prisoner under a contract for professional services, may agree to operate as an intermediary between the prisoner and other members of the criminal organisation cannot be excluded *ex ante* with certainty, it cannot however be presumed to be the case as a general rule of thumb, and subsequently transposed into legislation. This is because the situation here is

significantly different from that applicable to discussions with persons associated with the prisoner by family ties or friendship, or with unspecified third parties.

Moreover, it is decisive that, even if the scenario feared were to materialise, it does not appear that the restrictions under scrutiny would be capable of neutralising or significantly restricting its effects. In fact, given that – contrary to discussions with family members, cohabitants or other persons – discussions with defence lawyers are not monitored or recorded, the limits as to their frequency and duration provided for by law are by contrast liable to penalise the defence, but cannot prevent – even in part – the feared transfer of instructions and information between the prison and the outside or restrict in a genuinely significant manner the quantity and nature of the messages which it is feared may be exchanged through defence lawyers as part of criminal conspiracies.

Consequently, the legislation considered ends up conflicting with the principle that the balance struck cannot result in a lower level of protection for a fundamental right without the counterweight of a corresponding increase in protection for other interests of equal standing. In the case under examination conversely, the encroachment – which is beyond dispute – on the right to a defence caused by the contested provision is not *prima facie* accompanied by a comparable increase in protection for the countervailing interest in safeguarding public order and the safety of the general public.

8.– Accordingly, the last sentence of Article 41-bis(2-quater)(b) of Law no. 354 of 1975 must be declared unconstitutional with respect to the phrase "with whom a telephone call or a discussion of the same length as those provided for in relation to family members may be held up to a maximum of three times each week".

The objections relating to Articles 3 and 111(3) of the Constitution are moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 41-bis(2-quater)(b) of Law no. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive or limit freedom), as amended by Article 2(25)(f)(ii) of Law no. 94 of 15 July 2009 (Provisions on public security) is unconstitutional with respect to the phrase "with

whom a telephone call or a discussion of the same duration as those provided in relation to family members may be held up to a maximum of three times each week".

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 17 June 2013.