Corte costituzionale

JUDGMENT NO. 77 OF 2007

Franco BILE, President

Romano VACCARELLA, Author of the Judgment

JUDGMENT NO. 77 YEAR 2007

In this case the Court considered a provision contained in the Law on the Establishment of the Regional Administrative Tribunals which stipulated that, where an application was rejected by the administrative courts due to lack of jurisdiction, the effects of the original application (e.g. for the purposes of the time-barring of claims) could not be maintained in any subsequent proceedings before another court (such as the ordinary civil courts). Although the Code of Civil Procedure made provision for the transfer of proceedings, the law did not stipulate that "the court to which proceedings are referred to be able to rule on the claim brought before it as if it had been brought before it at the time when it was submitted to the court with no jurisdiction". The Court held that, although the courts belonging to different branches of the judiciary were functionally independent from one another, "the Constitution …has since the outset … assigned to the court system as a whole the task of ensuring the protection through court proceedings of subjective rights and legitimate interests". Therefore, a procedural error cannot have such far-reaching detrimental consequences for the merits of a claim. The Court therefore held that "the principle that the declining of jurisdiction entails the requirement to commence proceedings *ex novo* without maintaining in the new proceedings the substantive and procedural effects of the application originally made" was to be expunged from the legal order, and therefore declared the provisions concerned unconstitutional.

THE CONSTITUTIONAL COURT

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

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 30 of law No. 1034 of 6 December 1971 (Law on the establishment of the regional administrative tribunals), commenced pursuant to the referral order of 21 November 2005 by the Regional Administrative Tribunal for Liguria in appeal proceedings by Totò Pizzeria s.r.l. *et al.* v.

Municipality of Genoa *et al.*, registered as No. 148 in the Register of Orders 2006 and published in the Official Journal of the Republic No. 21, first special series 2006.

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

Having heard in chambers on 24 January 2007 the Judge Rapporteur Romano Vaccarella.

The facts of the case

1.- By referral order of 21 November 2005, the Regional Administrative Tribunal for Liguria raised, with reference to Articles 24, 111 and 113 of the Constitution, the question of the constitutionality of Article 30 of law No. 1034 of 6 December 1971 (Law on the establishment of the regional administrative tribunals), insofar as it does not allow an administrative court which finds that it has no jurisdiction to order the continuation of proceedings, maintaining the substantive and procedural effects of the application.

1.1.- The question was raised during the course of proceedings brought by a company to obtain a declaration of liability and a corresponding court order against the Municipality of Genoa and the *Azienda Multiservizi e d'Igiene Urbana s.p.a.* (AMIU) [City hygiene and multiservice company] to restore certain areas to their original state and to pay compensation for damages caused by the placement of a series of "sliding refuse containers", intended for the collection and disposal of solid urban waste in the immediate vicinity of premises occupied by the plaintiff and used for the provision of food and drink.

The plaintiff company complains that, following the grant of permission by the municipality for the permanent occupation of the public land in front of the business premises, the public authority had partially reoccupied it and, "without notification of the initiation of the procedure", had commenced significant construction activities on the land covered by the grant and had located apparatus for the collection of solid urban waste only a few metres away from the entrance to the premises.

Following the unsuccessful communication of notices and warnings to the administration, the company initiated both an ejectment action as well as suing under the terms of Article 700 of the Code of Civil Procedure before the civil courts with a view to obtaining damages, the restoration of its enjoyment of the property and the

adoption of such measures as may be appropriate to eliminate the infringement of the right to health.

The ordinary court seized however declared that it had no jurisdiction to hear the case, since this had been transferred, insofar as it comprehensive issues of town planning and construction, to the exclusive jurisdiction of the administrative courts in accordance with Article 34 of legislative decree No. 80 of 31 March 1998, as amended by Article 7 of law No. 205 of 21 July 2000.

Following an appeal to the Regional Administrative Tribunal [TAR], the court found that the Constitutional Court's intervening judgment No. 204 of 2004 – which held that Article 33(1) and (2) and Article 34(1) of legislative decree No. 80 of 31 March of 1998 were in part unconstitutional – had precluded the jurisdiction of the administrative courts as averred by the defendants.

1.2.- The lower court finds, as regards the relevance of the question, that Article 30 of law No. 1034 of 6 December 1971 requires the administrative courts merely to declare that they have no jurisdiction, which may also be done *ex officio*, thereby preventing them from making any other order to ensure the possibility of resuming proceedings before the court with jurisdiction, with the resulting maintenance of the "substantive and procedural effects" of the application, whereas a transfer of proceedings ensures that proceedings already carried out are not undermined and prevents the parties from being deprived of rights "which have lapsed in the meantime", including in particular the right to bring an ejectment action, which may be brought within twelve months.

1.3.- As regards the non manifest groundlessness of the question, the pointless "judicial ping-pong" between courts belonging to different, but not separate, substantive jurisdictions, with the inevitable distorting effects flowing from the expenditure of procedural energies and financial resources as well as the blameless loss of the right to bring an ejectment action breaches, in the opinion of the referring court, the constitutional principle of the reasonable length of court proceedings and the right to the enforcement of the law, more specifically Articles 24, 111 and 113 of the Constitution.

The referring court also points out that the above could not be prevented either through a broad interpretation of Article 5 of the Code of Civil Procedure, due to the general principle of law which denies the practicability of *perpetuatio iurisdictionis* where the provision conferring jurisdiction is declared unconstitutional, or even by invoking the

institution of the pardonable error, which is in any case not capable of circumventing the procedural transfer mechanism, since the relevant recognition is in any event left to the assessment of the court.

2.- The President of the Council of Ministers intervened in proceedings, represented and advised by the *Avvocatura Generale dello Stato*, which requested the court to declare the question before it to be inadmissible or manifestly groundless, due to the lack of any description of the facts of the case in the proceedings before the lower court.

According to the state authorities, the fact that the referring court does undertake any discussion of the actual development of proceedings and in particular of any evidence heard (whether before the civil court or in subsequent proceedings before the administrative court) which should be maintained in subsequent proceedings before the ordinary courts, as well as in relation to the date on which the interruption of proceedings occurred, the first application was submitted and the subsequent appeal was brought before the TAR, constitutes an irremediable lack of information which is by contrast absolutely indispensable for the assessment of the relevance of the question raised in relation to the proceedings in progress.

Conclusions on points of law

1.- The Regional Administrative Tribunal for Liguria questions, with reference to Articles 24, 111 and 113 of the Constitution, the constitutionality of Article 30 of law No. 1034 of 6 December 1971 (Law on the establishment of the regional administrative tribunals), insofar as it does not allow an administrative court which finds that it has no jurisdiction to order the continuation of proceedings, maintaining the substantive and procedural effects of the application.

2.- The question is well founded for the reasons set out below.

3.- The referring court frames the problem from the constitutional viewpoints – on which the academic literature has for some time adopted a consistent standpoint – in terms of the extension to cases concerning a lack of jurisdiction of the principle of the maintenance of the effects of the application which, under the terms of the Code of Civil Procedure of 1942, was introduced exclusively for cases where the court was not competent *ratione materiae*; the most systematic reform projects for the law of civil

procedure have provided for such an extension in detailed provisions contained in the relevant draft parent legislation.

3.1.- By raising the question before the court, the referring court gives expression to the widespread discontent at the serious (and not infrequently irreparable) harm caused by legislation which is essentially based on the assumption that an act commencing proceedings addressed to a court with no jurisdiction is affected by a vice of form which renders it fundamentally incapable of producing both the substantive and procedural effects which the law confers on writs which breach the rules on the division of competence *ratione materiae*.

This discontent has first of all arisen from the fact that such rigorous legislation relates to a defect in the act commencing proceedings which flows from extremely detailed and complex regulations governing the division of jurisdiction: this means not only that the plaintiff's task is far from easy, but also that the court's task is equally disagreeable, any errors of which fall entirely on the party affected (consider the example of a court which mistakenly finds that is has no jurisdiction, resulting in a new filing of the application to the court indicated as having jurisdiction which, in turn, then rules that it has no jurisdiction: any application made to the first court could not "anchor itself" on the first application and benefit from its substantive and procedural effects).

This court is aware that the situation described above has taken on even more considerable proportions following one of its own recent judgments which declared unconstitutional certain provisions which, according to the criterion of "subject matter blocks", divided jurisdiction between the ordinary courts and the administrative courts: the absolutely prevailing opinion in case law that the principle of *perpetuatio iurisdictionis*, codified by Article 5 of the Code of Civil Procedure, did not apply in the event of a supervening declaration of unconstitutionality has certainly heightened the widespread feeling of the substantive unfairness of the legislation in force since, even where the application was addressed to the court with jurisdiction according to the law in force at the time when it was brought, the supervening lack of jurisdiction prevents or prejudices its protection in the courts.

On the other hand, the view of the Council of State, which is predominant, that it has the power to rule *ex officio* that there is no jurisdiction even where such a ruling has not been appealed – and the TAR has made a specific ruling on the matter – means that the

case must be brought *ex novo* before the ordinary courts even after the administrative courts have ruled on the question of jurisdiction (which has occurred in numerous cases affected by the judgment of this court mentioned above) .

3.2.- The academic literature is in turn virtually unanimous in calling for a legislative reform which provides – as occurs in cases in which a court lacks competence *ratione materiae* – for mechanisms capable of ensuring the maintenance of the effects which the law confers on the writ commencing court proceedings where the case has to be transferred to the court with jurisdiction.

A particular current in the academic literature also argues that a consequence of judgments issued by the Court of Cassation on the question of jurisdiction – under the terms of the combined provisions of Articles 50, 367 and 382 of the Code of Civil Procedure – is the transfer and the maintenance of the effects of the application. It has moreover recently inferred form this conclusion that – since the parties cannot be obliged to seize the Joint Sections of the Supreme Court in order for it to operate the mechanism of transfer – a similar result should follow, according to the law in force, where jurisdiction is declined by the trial court.

3.3.- Recently, in an attempt to resolve the long-standing and serious problem using hermeneutic techniques, the Court of Cassation (judgment No. 4109 of the Joint Sections of 22 February 2007) found – when remitting to the Council of State, due to violation of the rule of the expansive effects of appeal judgments [or *giudicato interno*[*]], a dispute concluded by the Council itself with a ruling that it had no jurisdiction – that the remittal in question amounted to a modification of its own "previous and well-established thinking, that a decision by the ordinary or specialised courts declaring that they have no jurisdiction does not enable proceedings to continue before the court with jurisdiction".

Recalling the fact that this traditional thinking was based on the fact that Article 50 of the Code of Civil Procedure provided for the resumption of proceedings only in cases concerning a lack of competence *ratione materiae*, and not also a lack of jurisdiction, and that Article 367 provided for the resumption of proceedings following a resolution

---

* Translator's note: the rule of "*giudicato interno*" refers to the principle that where one head of a trial court's judgment is appealed against, any modification of that head will also apply to other heads of the judgment which are directly dependent on the appealed head, irrespective of whether the latter heads were appealed or not.

of the issue of jurisdiction only before the ordinary courts, and having accepted the "fundamental principle of our classical writers that the objective of the trial must be to reach a decision on the merits", the Joint Sections "consider that, in accordance with a constitutionally informed reading of the legislation governing these matters, and which takes into consideration the arguments flowing from subsequent legislative amendments and the in part new perspectives recently opened up by the academic literature in this area, the conditions are satisfied for concluding that the principle of *translatio iudicii* [i.e. transfer] from the ordinary courts to the specialised courts, and vice-versa, in the event of a ruling on jurisdiction has been incorporated into the procedural order".

"A necessary prerequisite for this is the general consideration" that, whilst the legislation governing competence *ratione materiae* is lacking in relation to jurisdiction, "there is not however any express prohibition on transfer in the relations between the ordinary and specialised courts". Going then on to find that reversal of the lower court's judgment without remittal is possible pursuant to Article 382(3) of the Code of Civil Procedure in cases involving an absolute lack of jurisdiction, since in all other cases it must reverse the judgment and remit the case to the court with jurisdiction, the Court of Cassation notes, on the one hand, that the provision excluding the relevance on the merits of a ruling on jurisdiction (Article 386) is an indication of the "actionability" of the claim and, on the other hand, that the legislative extension of the regulations on jurisdiction to administrative and tax proceedings requires a broad interpretation of Article 367(2) Code of Civil Procedure, allowing for the resumption of proceedings also before the specialised courts.

It follows that the resumption of proceedings before the (ordinary or specialised) court with jurisdiction is always permitted following an ordinary appeal pursuant to Article 360(1) of the Code of Civil Procedure as well as following a ruling on jurisdiction. This resumption is possible – the court goes on to say "due to the requirements of systematic completeness" – "also in the event of a ruling by the trial court refusing jurisdiction".

Having rejected the argument that this result would require the intervention of the Constitutional Court (which, the Court of Cassation notes, is requested in the referral order before this court), the Joint Sections state that the court identified as having jurisdiction in the judgment rejecting jurisdiction may "in turn declare that it has no jurisdiction", but that in such cases, "out of respect for the principle that every court

rules on its own jurisdiction", an appeal to the Court of Cassation pursuant to Article 362(2) of the Code of Civil Procedure may resolve the "deadlock" of reciprocal *renvoi*; nevertheless – the court concludes – "the legal problem surrounding this dispute deserves to be considered in greater detail".

4.- The fact that the Court of Cassation has addressed at length the question at issue in the present constitutionality proceedings – to which it refers at various junctures – requires this court, due to the authoritative status of the Joint Sections, to consider closely the arguments set out above. This is because the Joint Sections – ruling on a procedural error, albeit in relation to jurisdiction – considered the matter when upholding the jurisdiction of the lower court, and dealt with the refusal of jurisdiction by the trial court only "due to the requirements of systematic completeness".

Nonetheless, this court cannot fail to give close consideration to the arguments presented by the Joint Sections in reaching the conclusion that, since the question at issue in these proceedings could be resolved according to the law in force, "it is not necessary to request the intervention of the Constitutional Court on this point". It is in fact clear that, should the arguments which led the Joint Sections to express this opinion be found to be acceptable, this court would have to declare the question before it inadmissible due to the lower court's failure even to attempt to undertake a constitutionally informed reading of the contested provision.

4.1.- Albeit in the awareness of the driving intention behind judgment No. 4109 of 2007, it is first of all necessary to rebut – as the Joint Sections assert as an "indispensable prerequisite" for their argument – the view that Italian law does not contain "an express prohibition on transfer in relations between the ordinary and specialised courts".

It is sufficient to point out in relation to this issue that the express provision for transfer with explicit and exclusive reference to "competence" – a novelty in the 1942 Code, called for (but only in relation to a lack of competence *ratione materiae*) since the so-called Chiovenda draft, and not by chance made possible through detailed provisions (Articles 42-50) which were totally lacking for "jurisdiction" – cannot mean anything other than the prohibition on applying the to jurisdiction the rule laid down expressly and exclusively for competence *ratione materiae*; against the backdrop of the plain simplicity of codified law, this would have rendered superfluous the "express

prohibition" on applying to jurisdiction the many provisions expressly dedicated (both in the headnote as well as in the text) to competence *ratione materiae* alone.

Secondly, as regards the argument which the Joint Sections infer from the provision for an appeal to the Court of Cassation contained in Article 362(2) of the Code of Civil Procedure, it must be pointed out that – in contrast to the provisions of Article 362(1) (recalling the deadline contained in Article 325(2)) for appeals against the judgments of the specialised courts "on grounds pertaining to jurisdiction" – "complaints" concerning negative jurisdictional conflicts may be made "at any time": insofar as is relevant for our present purposes, it is sufficient to note that the goal of "making transfers possible", thereby maintaining the effects of the application to the court with (as subsequently transpires) no jurisdiction, cannot be regarded as being dependent on an appeal which may be made "at any time" (and thus even years after the emergence of the conflict).

4.2.- Given the above comments on the two arguments on the basis of which the Joint Sections found the question pending before this court to be resolvable according to the law in force – a question which may not in consequence be declared inadmissible on the grounds that the referring court did not assess whether a constitutionally correct interpretation was viable – it should be pointed out that the lower court requests the intervention of this court not due to any complaint of an absence of procedural mechanisms enabling the transfer of proceedings to another court with jurisdiction, but rather the impossibility of maintaining the effects produced by an application made to a court with no jurisdiction following that court's rejection of jurisdiction.

This manner of viewing the question is correct, since it is clear that the existence in the Code of Civil Procedure of general provisions governing the institution of the resumption of proceedings (the current Article 125) does not by any means resolve the problem raised by the lower court: the possibility – expressly provided for by law or which may be inferred through a systematic "re-adjustment" of the provisions – of resuming proceedings does not *per se* imply that the claim brought in the resumed proceedings will maintain the effects produced by the original application.

The transferability of proceedings is a necessary but not sufficient instrument for the court to which proceedings are referred to be able to rule on the claim brought before it as if it had been brought before it at the time when it was submitted to the court with no jurisdiction.

5.- The principle of the "non-communicability" between courts belonging to different court systems – which may be understandable at other times in history as a throwback to the so-called "patrimonial" view of judicial power and as a consequence of the continuing frustration of the aspirations of the newly constituted unitary state (see e.g. law abolishing administrative disputes) to a unified court structure, resulting from the emergence of courts which appropriated jurisdiction for themselves – is without doubt at present incompatible with fundamental constitutional values.

Whilst it may indeed be true that the Constitution gave substance to the situation existing at the time regarding the different types of courts, it is also the case that it has since the outset – through Article 24 (reiterated in Article 111) – assigned to the court system as a whole the task of ensuring the protection through court proceedings of subjective rights and legitimate interests.

In the light of this fundamental *raison d'être* of the courts, both ordinary and specialised, such pluralism cannot result in loss of effectiveness, or even the undermining of protection through the courts: however this without doubt occurs where the manner in which their relations are regulated – which in addition are interwoven into a complex and detailed division of their competences – means that a mistaken identification of the court with jurisdiction (or an error by the court in relation to jurisdiction) may cause irreparable detriment to the very possibility of an examination of the merits of the claim to protection by the courts.

Insofar as it has the potential to infringe the right to protection through the courts and will in any case impinge upon the effectiveness of such protection, this legislation is incompatible with a fundamental principle of the legal system which, whilst recognising the existence of a range of courts, grants such recognition in order that these different competences may guarantee a more adequate administration of justice, and not in order that the very possibility that justice be dispensed with be jeopardised.

The version of the Code of Civil Procedure currently in force is consistently guided – in regular procedural questions – by the principle that procedural rules are not ends in themselves, but rather means for ensuring a higher quality of the decision on the merits. In particular, it is inspired by the rule that does not sacrifice the right of the parties to a response, whether positive or negative, concerning the "life good" at issue in their disagreement on their identification of the court with jurisdiction – with a view to

guaranteeing on the one hand the constitutional guarantee of a court with jurisdiction and on the other hand the suitability (in the opinion of Parliament) to pass the best judgments on the merits.

Articles 24 and 111 of the Constitution require that the same principle inform the regulation of relations between courts belonging to different court systems where a case is commenced before one court but, following a refusal of jurisdiction, must be ruled upon by another court.

6.- The respect for the limits of its own tasks within the legal order require this court to limit itself to declaring the contested provision unconstitutional insofar as it does not provide for the maintenance of the effects of an application, where jurisdiction has been declined, in proceedings before the court with jurisdiction, in accordance with the principle that the declining of jurisdiction entails the requirement to commence proceedings *ex novo* without maintaining in the new proceedings the substantive and procedural effects of the application originally made; this principle, which is not expressly formulated in one or more legislative provisions, but is rather presupposed within the entire system of relations between the ordinary and specialised courts, as well as between different specialised courts, must therefore be removed from the legal order.

7.- Any legislation which may be passed urgently in order to close a gap in the procedural order will be subject to limitations only insofar as it will have to implement the principle of the maintenance of the substantive and procedural effects produced by the application to a court without jurisdiction in proceedings duly resumed – after jurisdiction has been declined – before the court with jurisdiction.

In the light of the above, it is clear that – in contrast to that which appears to be argued in the referral order – the maintenance of the effects of the original application is a consequence not simply of a court's ruling that it lacks jurisdiction, but rather of the legal order itself as interpreted in the light of the Constitution; indeed, it must be emphasised that a ruling on jurisdiction, irrespective of the court which issues it, cannot have any bearing on the merits (which also include the effects of the application) referred to the court with jurisdiction.

This is confirmed by the fact that even the judgments of the supreme authority over matters of jurisdiction – the Court of Cassation – may, pursuant to Article 111(8) of the Constitution, require the Council of State and the Court of Accounts only to find that

they have jurisdiction to hear the dispute, though it may certainly not bind them in any sense as regards the (substantive or procedural) contents such decisions; a similar constitutional principle underpins Article 386 of the Code of Civil Procedure (applicable also to appeals lodged pursuant to Article 362(1) of the Code of Civil Procedure) when it provides that "decisions concerning jurisdiction shall be made on the basis of the object of the claim and, where jurisdiction is accepted, shall be without prejudice to questions concerning the relevance of the right and the actionability of the claim".

8.- Subject to these constitutional limits – and without prejudice to the requirement to stipulate that any court which rejects jurisdiction must indicate the court which in its opinion has jurisdiction – Parliament is free to pass legislation in such a manner as it may deem fit governing the procedures for resumption (formal requirements, time limits, procedures for service and/or deposit, any supplements to standard court fees, etc.) on the basis of a basic choice left to Parliament alone: i.e. deciding whether to retain the principle that every court rules on its own jurisdiction or to adopt the opposite principle followed in the Code of Civil Procedure (Article 44) in relation to competence *ratione materiae*.

9.- Needless to say, where possible the courts may of course implement the principle of the maintenance of the effects of the application in proceedings which have been resumed through hermeneutic interpretation (such as, in the case before this court, after jurisdiction has been declined).

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 30 of law No. 1034 of 6 December 1971 (Law on the establishment of the regional administrative tribunals) is unconstitutional insofar as it does not provide that the substantive and procedural effects of an application submitted to a court which lacks jurisdiction be maintained, after jurisdiction has been declined, in proceedings before the court with jurisdiction.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 5 March 2007.

Signed

Franco BILE, President

Romano VACCARELLA, Author of the Judgment

Maria Rosaria FRUSCELLA, Registrar

Deposited in the Court Registry on 12 March 2007.

The Registrar

Signed: FRUSCELLA