JUDGMENT NO. 123 YEAR 2017

In this case the Council of State questioned the lack of any provision under Italian law allowing for the cancellation of a final judgment in administrative matters following a ruling against the Italian State by the European Court of Human Rights. Referring to Strasbourg case law, the Court dismissed the questions, noting that the ECtHR does not require specific forms of action by states in order to comply with its judgments, and that *restitutio in integrum* need not necessarily be guaranteed by reopening a trial. The Court noted some level of reticence on the part of the EctHR to require the reversal of *res iudicata* in non-criminal matters, as this may also affect the legitimate expectations and reliance on legal certainty of other non-state actors who are not at fault for the breach. "It must therefore be concluded that, in areas other than the criminal law, it is not at present apparent from Convention case law that there is any general obligation to adopt the restorative measure of reopening the trial and that the decision to provide for this is left to the States Parties". The creation of rules in this area is a delicate matter that falls to the legislature and not the judiciary. The Court also noted that the task of national legislators would be facilitated if Convention proceedings were to be made accessible to a wider class of persons than at present.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 106 of Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009 authorising the government to reorganise the law on proceedings before the administrative courts) and Articles 395 and 396 of the Code of Civil Procedure initiated by the Council of State sitting in plenary session in the proceedings pending between S. S. and others and the University of Naples Federico II and others by the referral order of 4 March 2015, registered as no. 190 in the Register of Referral Orders 2015 and published in the Official Journal of the Republic no. 39, first special series 2015.

Considering the entries of appearance by F. F. and others, T. C. and others, the University of Naples Federico II and the National Institute for Social Security (*Istituto nazionale della previdenza sociale*, hereafter INPS);

having heard the judge rapporteur Giancarlo Coraggio at the public hearing of 7 March 2017;

having heard Counsel Riccardo Marone and Counsel Raffaella Veniero for F. F. and others, Counsel Riccardo Marone Giuseppe Maria Perullo for T. C. and others, Counsel Angelo Abignente for the University of Naples Federico II and Counsel Dario Marinuzzi for the INPS.

[omitted]

Conclusions on points of law

1.− The Council of State, sitting in plenary session, questions the constitutionality of Article 106 of Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009 authorising the government to reorganise the law on proceedings before the administrative courts) and Articles 395 and 396 of the Code of Civil Procedure with reference to Articles 24, 111 and 117(1) of the Constitution, the last-mentioned provision in relation to the interposed parameters contained in Article

46(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR or Convention), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, "insofar as they do not provide for any different grounds for revision of the judgment when this is necessary pursuant to Article 46(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in order to comply with a definitive judgment of the European Court of Human Rights".

2.− The referring court was apprised of proceedings concerning the cancellation of judgment no. 4 of 2007 by which the Council of State, sitting in plenary session, had ruled inadmissible a number of appeals filed by self-employed locum doctors seeking an order against the University of Naples Federico II to pay pension contributions, having concluded that the right to bring the action had lapsed pursuant to Article 45(17) of Legislative Decree no. 80 of 31 March 1998 (New provisions on the organisation of employment relations within the public administrations, on jurisdiction over employment disputes and on administrative jurisdiction, issued pursuant to Article 11(4) of Law no. 59 of 15 March 1997) and subsequently pursuant to Article 69(7) of Legislative Decree no. 165 of 30 March 2001 (General provisions on the regulation of employment in the public administrations), which provides that, with regard to litigation concerning "privatised" public sector employment, "disputes concerning issues pertaining to periods of the relationship falling prior to that date [30 June 1998] shall fall under the exclusive jurisdiction of the administrative courts only if they were filed before 15 September 2000, failing which they shall lapse".

The referring court states that the action seeking the cancellation of this ruling was brought following the issue of the judgments of the European Court of Human Rights (hereafter, ECtHR) of 4 February 2014 in *Mottola v. Italy* and *Staibano v. Italy* (hereafter, *Mottola* and *Staibano*), which held that, by judgment no. 4 of 2007 of the Council of State, the Italian State had violated the applicants' right of access to a court guaranteed under Article 6 ECHR as well as the right to protection of property guaranteed by Article 1 of the First Additional Protocol to the ECHR.

The referring court considers that, were the legal system not to provide for the cancellation of administrative judgments that have become final as a remedy for any breach ascertained by the ECtHR, this would constitute a violation of Article 117(1) of the Constitution, with reference to Article 46(1) ECHR, which requires the States Parties "to abide by the final judgment of the [European] Court [of Human Rights] in any case to which they are parties".

In the opinion of the referring court, the failure to provide for a specific ground for cancellation also violates Articles 24 and 111 of the Constitution because "the guarantees of the actionability of individual rights and the right to a fair trial provided for under our Constitution are not weaker than those set forth in the ECHR".

3.− Moving on to an examination of the objections, the second is inadmissible due to a failure to provide reasons as to why it is not manifestly unfounded (*inter alia*, Judgments no. 276 and no. 133 of 2016; Orders no. 93 of 2016, no. 261, no. 181 and no. 174 of 2012, no. 236 and no. 126 of 2011).

In fact, the referring court does not explain why the contested provisions breach Articles 24 and 111 of the Constitution, as alleged, but limits itself to asserting in generic terms and without any examination of the Constitution that the guarantee provided under those provisions is equivalent to that offered by the Convention system.

4.− As regards the first objection alleging a breach of Article 117(1) of the Constitution in relation to the interposed parameter laid down by Article 46(1) ECHR, for the purposes of the examination concerning both the relevance and the merits, it is appropriate to start from the findings of *Mottola* and *Staibano*.

4.1.− These rulings established in the first place that the applicants' right to a fair trial had been violated, as they had not specifically been allowed access to a court of law, given that the time limit provided for under Article 69(7) of Legislative Decree no. 165 of 2001 had initially been interpreted by the courts as a time limit for bringing an action before the administrative courts, without prejudice to the right of action before the ordinary courts, but had subsequently been found to be a substantive cut-off date.

According to the ECtHR, the change in the case law (and not the time limit laid down by the provision, which was "intended to achieve the proper administration of justice" and was "not excessively short *per se*") prevented the appellants from securing relief, in spite of the fact that they had "applied to the administrative courts in absolute good faith on the basis of a plausible interpretation of the provisions on the division of competences".

The judgments also held that a substantive violation had been committed: the appellants' right to protection of property guaranteed by Article 1 of the First Additional Protocol to the Convention had also been violated because the change in the approach of the courts prevented them from securing recognition for a claim – the right to claim payment of social security contributions – which "had a sufficient basis in national law as it had been confirmed by well consolidated case law".

Following its finding that procedural and substantive violations had been committed, the Strasbourg Court then went on to examine the claim for fair compensation, reserving judgment in the eventuality that the parties were unable to reach agreement ("reserves the final decision and will schedule the further proceedings, taking account of the possibility that the Government and the appellants may reach an agreement").

5.− As regards the issue of relevance, according to the INPS, this requirement has not been met because the question raised is strictly related to that pertaining to Article 69(7), which has been submitted for examination on various occasions to this Court, which has always held the related questions of constitutionality to be unfounded: therefore, the prerequisites for the cancellation of judgment no. 4 of 2007 of the Council of State, sitting in plenary session, are claimed not to have been met within the proceedings before the referring court.

According to the University of Naples Federico II on the other hand, the question lacks relevance because, in reopening the trial, the appellants seek the recognition of a right – specifically the right to payment of social security contributions – which has already become time-barred pursuant to Article 3 of Law no. 335 of 8 August 1995 (Reform of the compulsory and complementary pension system).

5.1.− As is known, the assessment as to the relevance of a question "falls to the referring court, which means that the Court's involvement must be limited to ascertaining the existence of sufficient reasons, which must not be manifestly mistaken or contradictory, without reaching so far as to carry out a self-standing examination of the aspects that led the referring court to particular conclusions. In other words, within constitutional review proceedings, for the purposes of the assessment of relevance, the key issue is the assessment which must be made by the referring court in relation to the possibility that the proceedings pending may, or may not, be resolved independently of the answer to the question referred, and the Court may interfere with that assessment

only if it appears *prima facie* to be absolutely devoid of any foundation (*inter alia*, Judgments no. 91 of 2013, no. 41 of 2011 and no. 270 of 2010)" (Judgment no. 71 of 2015; for similar findings in subsequent cases, see *inter alia* Judgment no. 228 of 2016).
The referral order in these proceedings does not present this error, as it asserts that it is necessary to apply the contested provisions in order to decide, within the cancellation proceedings, on the admissibility of the request for cancellation.
It is in fact evident that the decision concerning the question of constitutionality impinges upon the initial assessment which the referring court is required to make as to whether or not this case falls under any of the grounds for cancellation provided for by law (*inter alia*, Judgments no. 20 of 2016, no. 294 of 2011, no. 151 of 2009; Order no. 147 of 2015).
By contrast, both the question concerning the constitutionality of Article 69(7) and that concerning the time-barring of the rights actioned in the proceedings relate to the subsequent and contingent stage concerning the merits of cancellation, and thus do not do not cast doubt on the relevance of the question as they do not impinge upon the preliminary assessment of the admissibility of the action, which falls to the referring court.
5.2.− The fact that *Mottola* and *Staibano* did not assert any obligation to reopen the trial as a due form of *restitutio in integrum* are also of no consequence for the issue of relevance. This in fact does not exclude the possibility that ordinary proceedings must provide a remedy to the appellant's claim seeking to enforce the right to a specific procedural remedy, which purportedly results *per se* from the established violation of Article 46 ECHR.
Indeed, to establish whether or not such a right subsists raises a problem concerning the interpretation of the interposed Convention provision, a problem which in this case pertains to the merits of the question of constitutionality (see the recent Judgments no. 43 of 2017, no. 276 and no. 193 of 2016).
6.– On the merits, the question is unfounded.
7.− The examination of the objection raised by the referring court must be carried out separately for the appellants in the cancellation proceedings who were successful before the Strasbourg Court and for those who did not activate the Convention procedure, but whose material facts are identical.
8.− This Court has already found against the latter appellants as the obligation to reopen the trial laid down by Article 46 ECHR, "in the meaning stipulated by the Strasbourg Court, does not apply to cases – different from that to which this judgment relates – in which the judgment has become final for the purposes of internal law" (Judgment no. 210 of 2013).
There is in fact "a fundamental difference between persons who have appealed to the ECtHR after exhausting internal remedies, and those who by contrast have not exercised that right, with the result that the proceedings relating to them, which have now been resolved by a final judgment, are no longer eligible for relief under the Convention" (Judgment no. 210 of 2013).
9.– On the other hand, with regard to the individuals who successfully appealed to the Strasbourg Court, in Judgment no. 113 of 2011, this Court recognised the existence of the Convention obligation to reopen a criminal trial wherever this is necessary in order to comply with a judgment of the ECtHR, and consequently introduced a specific ground for the review of a judgment that has become final into Article 630 of the Code of Criminal Procedure.

It is necessary to ascertain in this case whether this conclusion also applies to proceedings other than criminal trials, and in particular for administrative cases.

10.− As was noted by this Court in the decision referred to above, the ECtHR has held since the judgment of the Grand Chamber of 13 July 2000 in *Scozzari and Giunta v. Italy*, according to a combined expansive reading of Articles 41 and 46 ECHR, that the obligation to comply with its judgments implies that the unsuccessful defendant state must, as the case may be cumulatively: 1) pay just satisfaction, where ordered by the Court pursuant to Article 41 ECHR; 2) where appropriate, take the individual measures necessary in order to eliminate the consequences of the violation established; 3) introduce general measures in order to ensure the cessation of the violation resulting from a legislative act or administrative or case law practice and to avoid future violations (principle reiterated most recently in the judgments of the ECtHR of 14 February 2017, *S.K. v. Russia*, paragraph 132; 15 December 2016, *Ignatov v. Ukraine*, paragraph 49; 20 September 2016, *Karelin v. Russia*, paragraph 92; Grand Chamber, 17 July 2014, *Centre for legal resources on behalf of Valentin Campeanu v. Romania*, paragraph 158).

The individual measures should be those enabling *restitutio in integrum*, and their aim should be to put the applicant, as far as possible, "in the position he would have been in had the requirements of the Convention not been disregarded" (Grand Chamber, 17 September 2009, *Scoppola v. Italy*, paragraph 151; followed *inter alia* by Grand Chamber, 12 March 2014, *Kuric and others v. Slovenia*, paragraph 79; Grand Chamber, 30 June 2009, *Verein Tierfabriken Schweiz (VgT) v. Switzerland*, paragraph 85).

Moreover, the ECtHR has been settled in asserting that, as a matter of principle, it does not fall to it to state suitable measures to give tangible expression to *restitutio in integrum* or the general measures necessary in order to put an end to a breach of the ECHR, as the States are free to choose the manner in which that obligation is complied with, provided that this is compatible with the conclusions contained in its judgments (*inter alia*, Grand Chamber, 5 February 2015, *Bochan v. Ukraine*, paragraph 57; Grand Chamber, 17 July 2014, *Centre for legal resources on behalf of Valentin Campeanu v. Romania*, paragraph 158; Grand Chamber, 12 March 2014, *Kuric and others v. Slovenia*, paragraph 80), and has only considered it appropriate to indicate the type of measure to be adopted in a few exceptional cases (amongst the most recent judgments, 30 October 2014, *Davydov v. Russia*, paragraph 27; 9 January 2013, *Oleksandr Volkov v. Ukraine*, paragraph 195).

In addition, in cases involving a violation of the provisions on a fair trial (Article 6 ECHR), it has also asserted that the reopening of the trial or the review of the case are in principle the most appropriate ways of providing *restitutio in integrum* (*inter alia*, 20 September 2016, *Karelin v. Russia*, paragraph 97; Grand Chamber, 5 February 2015, *Bochan v. Ukraine*, paragraph 58).

10.1.− The form of these measures was also addressed in Recommendation R(2000)2 of 19 January 2000 which, although it is not binding, is particular important in establishing the scope of the Convention case law, both because it was issued by the body − the Committee of Ministers − which is officially charged with overseeing the enforcement of ECtHR judgments, and also because it affects the practical implementation that is relevant for the interpretation of the ECHR pursuant to Article 31(3) of the Vienna Convention on the Law of Treaties, and finally because it is often referred to by the Court in its decisions, and has thus been incorporated into the body of reasons for its

decisions, and therefore ultimately plays a part in substantiating the meaning of the principles enshrined in the Convention.
The Recommendation states that the obligation to comply may "in certain circumstances" entail the adoption of measures other than just satisfaction; that "in exceptional circumstances" the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*; and that finally this appears to be appropriate where the "injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction".
11.− It is thus apparent from the case law of the ECtHR and the Recommendation that the obligation to comply with the Court's judgments is variable in content, that the individual measures of redress other than compensation are only contingent and must only be adopted where they are "necessary" in order to implement judgments and that the review of the case or the reopening of the trial are however to be regarded as the most appropriate measures in cases involving the violation of Convention rules on the right to a fair trial.
12.− The specific case law of the ECtHR on civil and administrative trials essentially reflects these principles.
In particular, also the judgments given in these areas stress the importance of reopening the trial or reviewing the case in order to guarantee the efficacy of the Convention system in situations involving procedural violations.
It must however be noted that the assertion that the trial must be reopened as a measure capable of guaranteeing *restitutio in integrum* is only contained in judgments given against states the internal legal systems of which already provide for the review of judgments that have become final in the event that the Convention has been violated (see inter alia 22 November 2016, *Artemenko v. Russia*, paragraph 34; 26 April 2016, *Kardoš v. Croatia*, paragraph 67; 26 July 2011, *T.Ç. and H.Ç v. Turkey*, paragraphs 94 and 95; 20 December 2007, *Iosif and others v. Romania*, paragraph 99; 20 December 2007, *Paykar Yev Haghtanak LTD v. Armenia*, paragraph 58; 10 August 2006, *Yanakiev v. Bulgaria*, paragraph 90; 11 July 2006, *Gurov v. Moldavia*, paragraph 43).
12.1.− The approach adopted by the ECtHR in areas other than criminal law is summarised in very clear terms by the Grand Chamber judgment of 5 February 2015 in *Bochan v. Ukraine*.
After setting out the data relating to a comparative study of the legislation in the States Parties (paragraphs 26 and 27), the Court noted that there is not a uniform approach to the possibility of reopening civil trials following a judgment by the ECtHR containing a finding that the Convention has been violated (paragraph 57).
Moreover, whilst encouraging the States Parties to adopt measures necessary in order to guarantee the reopening of trials, the judgment held that "it is for the Contracting States to decide how best to implement the Court's judgments without unduly upsetting the principles of *res iudicata* or legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected" (paragraph 57).
13.− This passage from the reasons is of particular significance for the resolution of the current question of constitutionality because, in delineating the obligation to comply resulting from Article 46(1) ECHR, it considers the principal difference between criminal and civil trials to lie in the protection available to non-state parties to the internal proceedings; this difference is also relevant for administrative proceedings,

which also frequently involve non-state administrations, private respondents who have been vested with public functions and other private parties with an interest.
The more cautious stance adopted by the ECtHR in relation to non-criminal trials may be explained by the need to protect these parties, along with the respect for legal certainty in relation to them guaranteed by *res iudicata* (in addition to the fact that civil and administrative proceedings do not have any potential implications for individual freedom).
14.− This is reflected by the position of various States Parties that have expressed similar caution in this regard, as was noted – as mentioned above – in *Bochan* and as is apparent from the Explanatory Memorandum to Recommendation R(2000)2, the Review of the implementation of Recommendation of 12 May of 2006 and finally the Overview of the Committee of Experts dated 12 February 2016.
15.− It must therefore be concluded that, in areas other than the criminal law, it is not at present apparent from Convention case law that there is any general obligation to adopt the restorative measure of reopening the trial and that the decision to provide for this is left to the States Parties, which are moreover encouraged to make provision to this effect, albeit with due consideration to the various countervailing interests in play.
16.− This invitation has been accepted by around half of the Member States of the Council of Europe, as is apparent from the aforementioned Overview which, as at 12 February 2016, states that twenty-three States have introduced instruments allowing for the reopening of civil trials following ECtHR judgments that have found the Convention to have been violated.
These include Germany, where the *Zweites Gesetz zur Modernisierung der Justiz − 2. Justizmodernisierungsgesetz* of 22 December 2006 supplemented the grounds for the extraordinary cancellation of civil judgments listed in Article 580 of the *Zivilprozessordnung* by situations in which the ECtHR has ruled that the Convention or its protocols have been violated by a national judgment and where the national judgment was based on that violation. Administrative rulings may also be called into question since, as in Italian law, there is a provision that refers to the provisions of the procedural code with regard to the cancellation of judgments.
Also in Spain, following various attempts within the case law to construe broadly the provisions on appeals already available in the legal system, the amended *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* introduced into Article 5-bis with effect from 1 October 2015 a ground for *recurso de revisión* against any judgment that is at odds with a final ruling of the ECtHR where, due to its nature and seriousness, the violation has enduring effects that cannot be brought to an end in any way other than a review of the judgment.
Finally, by the enactment of *Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*, the French legislator made provision within the *Code de l'organisation judiciaire* for the right to seek the cancellation of civil judgments that affect the status of individuals in the event of a ruling against the State by the ECtHR where, due to its nature and seriousness, the violation of the Convention has given rise to a loss that cannot be made good by just satisfaction.
17.− Also under Italian law the reopening of non-criminal trials, resulting in the reversal of a final judgment, require that a delicate balance be struck, in the light of Article 24 of the Constitution, between the right of action of interested parties and third parties' right to a defence, and that balancing of interests falls primarily to the legislator.

Within this perspective, whilst it may be the case that the state's interest in a system of rules that avoids the payment of compensation – which may in some cases be considerable – for violations that may be made good through other means must not be understated, it must not be overlooked that the invitation by the ECtHR could be more easily embraced in the event that third parties were more effectively involved within proceedings before the ECtHR.

It is in fact well known that such proceedings necessarily involve the applicant and the state that committed the violation, whereas interventions by persons other than those who were parties to the internal proceedings − upon whom moreover notice of the appeal need not be served − is a matter pursuant to Article 36(2) ECHR for the discretionary assessment of the President of the Court, who "may... invite" "any person concerned who is not the applicant to submit written comments or take part in hearings".

There is therefore no doubt that a systematic opening up of Convention proceedings to third parties – as a result of a change in the law on Convention level, or an interpretation of the law to that effect by the ECtHR − would facilitate the task of the national legislator.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) rules that the question concerning the constitutionality of Article 106 of Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009 authorising the government to reorganise the law on proceedings before the administrative courts) and Articles 395 and 396 of the Code of Civil Procedure, raised with reference to Articles 24 and 111 of the Constitution by the Council of State sitting in plenary session by the order mentioned in the headnote, is inadmissible;

2) rules that the question concerning the constitutionality of Article 106 of Legislative Decree no. 104 of 2010 and Articles 395 and 396 of the Code of Civil Procedure, raised with reference to Article 117(1) of the Constitution by the Council of State sitting in plenary session by the order mentioned in the headnote, is unfounded.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 March 2017.