COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SPURIO, GALLO, ZILAGHE, LAGHI, VIERO, ORLANDINI AND RYLLO CASES

CASE OF GALLO v. ITALY

(28/1996/647/832)

JUDGMENT

STRASBOURG

2 September 1997

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SUMMARY[1]

Judgments delivered by a Chamber

Italy – length of proceedings in the administrative courts

I. SCOPE OF THE CASE (Gallo)

Complaint relating to Article 14 of Convention: outside scope of case as defined by Commission's decision on admissibility.

II. ARTICLE 6 § 1 OF THE CONVENTION ("reasonable time")

Basic distinction in law of many member States of the Council of Europe between civil servants and employees governed by private law – Court has accordingly held that disputes relating to recruitment, careers and termination of service of civil servants are as a general rule outside scope of Article 6 § 1.

Applicants sought: declaration that administrative authorities had acted unlawfully (Spurio), backdating of pecuniary advantages of a promotion (Orlandini), judicial review of administrative authorities' decision refusing reinstatement in former post (Ryllo), or judicial review of one or more decisions of administrative authorities assigning applicants to a particular rank (Laghi) or staff category (remaining cases) – they thus raised disputes related to their recruitment, careers or termination of service which did not concern a civil right within meaning of Article 6 § 1 – payment of difference in salary (Spurio, Viero and Orlandini) or pecuniary advantages of promotion (Orlandini only) directly dependent on prior finding that administrative authorities had acted unlawfully.

Conclusion: Article 6 § 1 not applicable (eight votes to one).

COURT'S CASE-LAW REFERRED TO (IN ONE OR MORE JUDGMENTS)

26.11.1992, Francesco Lombardo v. Italy; 24.8.1993, Massa v. Italy; 28.9.1995, Scollo v. Italy; 17.3.97, Neigel v. France

1. This summary by the registry does not bind the Court.

In the case of Gallo v. Italy[2],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[3], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr C. RUSSO,
Mr N. VALTICOS,
Mr R. PEKKANEN,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr G. MIFSUD BONNICI,
Mr P. KŪRIS,
Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 2 December 1996, 22 February and 28 June 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25575/94) against the Italian Republic lodged with the Commission under Article 25 by an Italian national, Mr Alcide Gallo, on 5 July 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 of the Convention.

Notes by the Registrar

2 . The case is numbered 28/1996/647/832. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

3 . Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 31). The lawyer was given leave by the President of the Chamber to use the Italian language (Rule 28 § 3).

3. On 30 March 1996 the President of the Court, Mr R. Ryssdal, decided, under Rule 21 § 7 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of Spurio, De Santa, Lapalorcia, Abenavoli, Zilaghe, Laghi, Viero, Orlandini, Ryllo, Soldani, Fusco, Di Luca and Saluzzi, Nicodemo, Pizzi, Scarfò, Argento and Trombetta v. Italy[4]. The Chamber to be constituted for that purpose included *ex officio* Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On the same day, in the presence of the Registrar, the President of the Court drew by lot the names of the other seven members, namely Mr N. Valticos, Mr R. Pekkanen, Mr A.B. Baka, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr P. Kūris and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Italian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 24 July 1996 and the Government's memorial on 25 July. On 25 June 1996 the Secretary to the Commission had informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 21 October 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 27 November 1996. The Court had held a preparatory meeting beforehand.

[4]. 26/1996/645/830; 27/1996/646/831; 29/1996/648/833; 30/1996/649/834; 31/1996/650/835; 32/1996/651/836; 33/1996/652/837; 34/1996/653/838; 35/1996/654/839; 36/1996/655/840; 37/1996/656/841; 38/1996/657/842-843; 39/1996/658/844; 40/1996/659/845; 41/1996/660/846; 42/1996/661/847 and 43/1996/662/848.

There appeared before the Court:

(a) *for the Government*
Mr G. RAIMONDI, *magistrato*, on secondment
to the Diplomatic Legal Service,
Ministry of Foreign Affairs, *co-Agent*,
Mr G. MANZO, *magistrato*, on secondment
to the Legislation Office, Ministry of Justice, *Adviser*;

(b) *for the Commission*
Mr A. PERENIČ, *Delegate*;

(c) *for the applicant*
Mr M. DE STEFANO, *avvocato*, of the Rome Bar, *Counsel.*

The Court heard addresses by the above-named representatives.

AS TO THE FACTS

7. Mr Alcide Gallo is a caretaker employed by the Student Welfare Centre ("the centre") in Trieste, where he lives.

8. On 28 August 1986 he instituted proceedings against the centre in the Friuli-Venezia Giulia Regional Administrative Court ("the RAC") seeking judicial review of a disciplinary penalty imposed on him by decision of the chairman of the centre's board of governors on 12 August 1986. The latter, having obtained the advice of the disciplinary board, had suspended the applicant for one month, on the ground that he had failed in his duty of diligence and perturbed "the continuity and regularity of the service" by taking sick-leave which was considered to be unjustified.

The applicant forfeited all but a fraction of his salary.

9. In a judgment of 9 April 1987, the text of which was deposited with the registry on 28 May 1987, the RAC gave judgment in the applicant's favour.

10. The centre appealed on 5 October 1987. In a judgment of 12 June 1992, the text of which was deposited with the registry on 8 January 1993, the *Consiglio di Stato* reversed the lower court's judgment and dismissed Mr Gallo's application.

PROCEEDINGS BEFORE THE COMMISSION

11. Mr Gallo applied to the Commission on 5 July 1993. He complained of infringements of his liberty of person (Article 5 of the Convention), the length of proceedings in the administrative courts (Article 6 § 1), the unfairness of those proceedings (Article 6) and an infringement of the principle of effective defence (Article 6 § 3 (c)).

12. On 6 July 1995 the Commission declared the application (no. 25575/94) admissible as regards the second complaint and inadmissible as regards the remainder. In its report of 28 November 1995 (Article 31) it expressed the opinion by twenty-five votes to four that there had been a breach of Article 6. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[5].

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

13. The Government asked the Court, as their primary submission, to rule that Article 6 § 1 of the Convention was not applicable to the case and, in the alternative, to hold that there had been no breach of it.

AS TO THE LAW

I. SCOPE OF THE CASE

14. The applicant's lawyer relied before the Court on Article 6 § 1 of the Convention and Article 14, which prohibits all forms of discrimination between persons.

The Court considers, however, that the second complaint falls outside the scope of the case as defined by the Commission's decision on admissibility (see, *mutatis mutandis*, the Scollo v. Italy judgment of 28 September 1995, Series A no. 315-C, p. 51, § 24).

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[5]. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* - 1997), but a copy of the Commission's report is available from the registry.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

15. Mr Gallo complained of the length of proceedings he had brought in the Friuli-Venezia Giulia Regional Administrative Court ("the RAC"), which had ended with a judgment of the *Consiglio di Stato*. He relied on Article 6 § 1 of the Convention, which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

The Court must first determine whether that provision is applicable to the present case.

16. The Government submitted that while the existence of civil rights in the context of employment in the civil service could not be excluded *a priori*, in principle disputes relating to such employment fell outside the scope of Article 6 of the Convention. That provision was applicable when the private-law features of any given case predominated.

In the present case, since the dispute concerned a disciplinary penalty, it came within the sphere of the powers by which the administrative authorities organised their activity, a sphere governed by public law. Accordingly, the application was inadmissible *ratione materiae*.

17. The applicant did not contest the fact that employment with the public authorities was the result of a unilateral decision on the authorities' part to take the person concerned into their employ, and that before that decision no civil right could exist. Once the employer-employee relationship had been formed, however, civil servants had the same rights as workers in the private sector.

Consequently, in the applicant's submission, Article 6 of the Convention did not apply to disputes concerning recruitment to the civil service but did apply to those concerning careers – such as the question of disciplinary penalties – and dismissal from the service. In particular, and in so far as it also constituted a pecuniary penalty, a disciplinary penalty could not be assessed one way when imposed by a public employer and another way when imposed by a private employer.

18. The Commission took the view that the – explicit or implicit – pecuniary aspect of what was at stake in the proceedings was decisive for the purpose of determining whether Article 6 was applicable when, as in the present case, the domestic proceedings had a bearing on the applicant's economic rights.

19. The Court observes that in the law of many member States of the Council of Europe there is a basic distinction between civil servants and employees governed by private law. This has led it to hold that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1" (see the Massa v. Italy judgment of 24 August 1993, Series A no. 265-B, p. 20, § 26,

and the Neigel v. France judgment of 17 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 410–11, § 43).

In the Massa case (judgment cited above) the applicant applied for a reversionary pension following the death of his wife, who had been a headmistress. In the case of Francesco Lombardo v. Italy (judgment of 26 November 1992, Series A no. 249-B) a *carabiniere* who had been invalided out of the service because of disability and who maintained that the disability was "due to his service" applied for an "enhanced ordinary pension". The applicants' complaints related neither to the "recruitment" nor to the "careers" of civil servants and only indirectly to "termination of service" as they consisted in claims for purely pecuniary rights arising in law after termination of service. In those circumstances and in view of the fact that the Italian State was not using "discretionary powers" in performing its obligation to pay the pensions in issue and could be compared to an employer who was a party to a contract of employment governed by private law, the Court held that the applicants' claims were civil ones within the meaning of Article 6 § 1 (see the above-mentioned Neigel judgment, pp. 410–11, § 43).

20. In the instant case, as evidenced by his application to the RAC, Mr Gallo sought only judicial review of the decision to suspend him for one month taken by the chairman of the Student Welfare Centre's board of governors (see paragraph 8 above). The dispute raised by him thus clearly related to his career and did not concern a "civil" right within the meaning of Article 6 § 1.

Accordingly, Article 6 § 1 is not applicable in the case.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that Article 6 § 1 of the Convention does not apply.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 2 September 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the dissenting opinion of Mr Pekkanen is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PEKKANEN

1. I regret that I cannot agree with the majority of the Court as regards the applicability of Article 6 of the Convention in the present case.

2. According to the case-law of the Court, Article 6 § 1 is applicable in disputes where the private-law features predominate over the public-law features (see, for example, the Feldbrugge v. the Netherlands judgment of 29 May 1986, Series A no. 99, p. 16, § 40). In the present case the public-law features are considered by the majority to predominate mainly because in the law of many European States a distinction is drawn between civil servants and employees governed by private law. This difference has led the Court to hold that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1" (see paragraph 19 of the present judgment).

This does not, however, mean that civil servants generally fall outside the scope of the Convention. Indeed, as the Court has stated in its Glasenapp v. Germany judgment of 28 August 1986 (Series A no. 104, p. 26, § 49), "as a general rule the guarantees in the Convention extend to civil servants". On the other hand, when access to the civil service lies at the heart of the issue submitted to the Court, the facts complained of are not covered by the Convention (ibid., p. 27, § 53).

A civil servant is, accordingly, protected by Article 6 § 1 only if the dispute concerns, not his or her recruitment, career or termination of service, but, for instance, a purely economic entitlement. In addition, it is a requisite for the applicability of Article 6 § 1 that the discretionary powers of the administrative authority in question should not be in issue (see paragraph 19 of the present judgment).

3. The term "civil servant" is used in the judgment without any definition. Accordingly, it must be deemed to cover all administrative officials in the service of the State or local authorities who are not employed under a private-law contract.

This conclusion entails two problems.

Firstly, the duties of the civil servant in question are not taken into account. The rule covers all civil servants from the lowest office cleaner with only menial duties to the highest officials who have, for instance, the power to exercise public authority. In my opinion there are adequate reasons to exclude from the protection of Article 6 § 1 only those civil servants who belong to the latter group. States have an understandable and acceptable interest in deciding on their recruitment, career and termination of service without being subject to judicial control.

Secondly, there are States where employees performing public services are covered partly by public-law and partly by private-law contracts, though their duties are the same. According to the present judgment, all those employees of the State who are governed by public law would be partly deprived of the safeguards in Article 6 while their colleagues employed under private law would enjoy the benefit of that protection. The civil servants in several European States would thus be unequally protected by the Convention, notwithstanding the similarity of their duties.

4. The Court ought to proceed on the basis of an autonomous interpretation of the notion of "civil service" for the purposes of Article 6 § 1, so that the same standards can be applied to individuals holding equivalent or similar posts, independently of the employment system in each member State. A distinction should be drawn between those civil servants exercising public authority and those who do not. Such a distinction has been recognised by the Court of Justice of the European Communities (see, for example and *mutatis mutandis*, case no. 473/93, Commission v. Luxembourg, judgment of 2 July 1996).

5. In the present case the duties of the civil servant in question did not involve the exercise of public authority. I therefore find Article 6 § 1 to be applicable.