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

FIRST SECTION

DECISION

Application no. 58977/12
Filippa Roberta LO FERMO
against Italy

The European Court of Human Rights (First Section), sitting on 20 June 2023 as a Chamber composed of:

Marko Bošnjak, *President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Ivana Jelić,
Gilberto Felici,
Raffaele Sabato, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to the above application lodged on 28 August 2012,

Having deliberated, decides as follows:

## INTRODUCTION

1. The present application concerns an alleged violation of the right to a fair hearing due to a divergence in the case-law of the superior administrative court, namely within the chambers of the *Consiglio di Stato*. The applicant invoked Article 6 § 1 and Article 14 of the Convention (taken in conjunction with Article 6 § 1) and Article 1 of Protocol No. 12 to the Convention.

## THE FACTS

2. The applicant, Ms Filippa Roberta Lo Fermo, is an Italian national who was born in 1966 and lives in Piazza Armerina. She was represented before the Court by Ms G. Lo Fermo, a lawyer practising in Piazza Armerina.

## The circumstances of the case

3. The facts of the case, as submitted by the applicant, may be summarised as follows.

### *1. Background to the case*

4. In 2004 the applicant was a doctor working on an open-ended contract in a private healthcare facility accredited with the National Health Service (under Legislative Decree no. 502 of 30 December 1992 – see paragraph 24 below). She intended to apply for specialty training.

5. In accordance with Article 35 of Legislative Decree no. 368 of 17 August 1999, which laid down the rules concerning access and supernumerary admissions to specialty training in medicine and surgery (see paragraph 20 below), on 20 February 2004 the University of Catania launched a call for applications for specialty training in the Faculty of Medicine and Surgery. It specified that, under Article 35 § 4 of the Legislative Decree (see paragraph 21 below), candidates could apply for supernumerary places; in that event, they were required to expressly request access to those places in their application.

6. The applicant submitted her application for specialty training, specifying that she was applying for a supernumerary place. She was allowed to take the admission test, which she passed, and was subsequently included in the ranking list published by the university on 24 May 2004.

7. By order (*provvedimento*) no. 40/A of 4 August 2004, the Ministry of Education, Universities and Research ordered that doctors employed in a private healthcare facility accredited with the National Health Service be excluded from accessing supernumerary places. The order specified that the "tenured medical personnel" (*personale medico di ruolo*) referred to in Article 35 § 4 of Legislative Decree no. 368 of 1999 (see paragraph 21 below) exclusively denoted tenured doctors or doctors employed on an open-ended contract working in public healthcare facilities that were part of the National Health Service.

8. Subsequently, on the basis of order no. 40/A of 4 August 2004, and despite being included on the ranking list, the applicant was not granted a place for specialty training.

*2. Proceedings before the domestic courts*

9. On 22 September 2004 the applicant brought an action in the Sicily Regional Administrative Court, Catania Subdistrict Section (*Tribunale Amministrativo Regionale per la Sicilia, sezione distaccata di Catania*), complaining that order no. 40/A of 4 August 2004 had been adopted in breach of Article 35 § 4 of Legislative Decree no. 368 of 1999. She sought to have order no. 40/A set aside and asked to be admitted to one of the supernumerary places for specialty training.

**(a) Judgment of the Sicily Regional Administrative Court**

10. The Sicily Regional Administrative Court, Catania Subdistrict Section, gave judgment on 21 October 2004.

11. It observed that neither the law (Article 35 § 4 of Legislative Decree no. 398 of 1999) nor the call for applications supported the narrow interpretation relied upon by the Ministry of Education, Universities and Research. Moreover, according to the Regional Administrative Court, the restriction imposed by the Ministry was not consistent with the other provisions of Legislative Decree no. 368 of 1999, which did not make any distinction between doctors employed in private or public healthcare facilities. It then concluded that the scope of Article 35 § 4 of Legislative Decree no. 368 of 1999 should be interpreted as including not only tenured doctors but also doctors working in a private healthcare facility accredited with the National Health Service on an open-ended contract of employment.

12. On those grounds, the Sicily Regional Administrative Court set aside order no. 40/A of 4 August 2004 and ordered that the applicant be granted access to the supernumerary places for specialty training.

**(b) Proceedings before the Council of Administrative Justice for Sicily**

13. The Ministry of Education, Universities and Research appealed to the Council of Administrative Justice for Sicily (*Consiglio di Giustizia amministrativa per la Regione siciliana*), which, in view of Sicily's special constitutional regime, acts as a regionalised chamber of the *Consiglio di Stato* (see paragraph 25 below). The Ministry sought a stay of enforcement of the Regional Administrative Court's judgment and its subsequent quashing.

14. The applicant lodged a cross-appeal (*controricorso*).

15. On 7 February 2005 the Council of Administrative Justice for Sicily granted the stay of enforcement.

16. On 27 October 2011 the applicant submitted written observations. She referred to the case-law of the *Consiglio di Stato*, which, at the time, had adopted a broad interpretation of the scope of Article 35 § 4 of Legislative Decree no. 368 of 1999 on at least four previous occasions in the period between 2008 and 2011 (see paragraph 30 below). Given that the Council of Administrative Justice for Sicily had already taken the opposite approach in two previous judgments of 2007 and 2009, the applicant requested that,

before possibly reiterating this divergent line, the case be referred to the plenary session of the *Consiglio di Stato* under Article 99 of the Code of Administrative Procedure (see paragraph 27 below).

17. By judgment no. 269 of 6 March 2012, the Council of Administrative Justice for Sicily allowed the Ministry's appeal and quashed the Regional Administrative Court's judgment.

18. The Council of Administrative Justice for Sicily premised that that conclusion, which had already been reached in one of its previous judgments (no. 1103 of 2009), should be reiterated, and that the case-law of the *Consiglio di Stato* could not be endorsed. It found that the reference to the specific needs of the National Health Service in Article 35 § 4 of Legislative Decree no. 368 of 1999 (see paragraph 21 below) made clear the legislature's intention to favour "tenured" doctors (that is, only those doctors who were in the public sector, to which the concept of "tenure" literally referred) when granting access to specialty training. It noted that this intention was also in keeping with the need to ensure essential and uniform levels of healthcare throughout the nation and with the permanent nature of the employment of tenured doctors, a status that doctors in private healthcare facilities did not enjoy. It thus considered that the expression "tenured medical personnel" unequivocally referred to doctors permanently employed by public healthcare facilities in the National Health Service.

19. The Council of Administrative Justice for Sicily did not refer the case to the plenary session of the *Consiglio di Stato* and did not give any reason for not doing so.

# RELEVANT LEGAL FRAMEWORK AND PRACTICE

## A. Relevant domestic law and practice

### *1. Relevant legal framework*

#### (a) Legislative Decree no. 368 of 17 August 1999

20. Legislative Decree no. 368 of 17 August 1999 contains provisions for the transposition of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

21. Article 35 of the Legislative Decree read, at the material time and in so far as relevant, as follows:

> "1. Every three years, and by 30 April of the third year, the regions and autonomous provinces of Trento and Bolzano, taking into account the relevant health needs and on the basis of a thorough assessment of the employment situation, shall identify the need for medical specialists to be trained and inform the Ministry of Health and the [then] Ministry of Universities and Scientific and Technological Research thereof. By June of the third year, the Minister of Health, acting jointly with the Minister of Universities and Scientific and Technological Research and with the Minister of the Treasury, Budget and Economic Planning, having consulted the Permanent Conference for relations between the State, the regions and the autonomous provinces of Trento and

Bolzano (*Conferenza Permanente Stato, Regioni e Province Autonome*), shall determine the overall number of medical specialists to be trained annually, for each type of specialisation, taking into consideration the planning needs of the regions and autonomous provinces of Trento and Bolzano in relation to the activities of the National Health Service.

2. In connection with the decree referred to in paragraph 1, the Minister of Universities and Scientific and Technological Research, having obtained the opinion of the Minister of Health, shall determine the number of places to be allocated to each specialty training school that has been accredited under Article 43, taking into account the capacity and volume of healthcare provision of the facilities included in the school's training network.

...

4. The Minister of Universities and Scientific and Technological Research, upon a proposal by the Minister of Health, may authorise (*può autorizzare*), for specific needs of the National Health Service and within the limit of 10% more than the number determined in accordance with paragraph 1 and of the capacity of each school, the admission to specialty training of tenured medical personnel (*personale medico di ruolo*) belonging to specific categories working in healthcare facilities other than those included in the school's training network.

5. To gain access to ... the supernumerary places referred to in paragraph 4, candidates must have passed the admission tests as required by the school's regulations."

**(b) Legislative Decree no. 502 of 30 December 1992**

22. Legislative Decree no. 502 of 30 December 1992 contains provisions on matters of healthcare and the accreditation of healthcare facilities.

23. Article 8 *bis* of the Legislative Decree read, at the material time and in so far as relevant, as follows:

"1. The regions shall ensure the essential and uniform levels of healthcare referred to in Article 1 by making use of the facilities (*presidi*) directly managed by local health units (*unità sanitarie locali*), hospitals, universities and scientific institutes for research, hospitalisation and healthcare, as well as by entities accredited under Article 8 *quater*, in accordance with the contractual agreements referred to in Article 8 *quinquies*.

2. Citizens shall be free to choose their place of care and medical professionals within the framework of the accredited entities with which dedicated contractual agreements have been drawn up.

3. The provision of healthcare facilities and the performance of healthcare activities, the performance of healthcare activities on behalf of the National Health Service and the performance of healthcare activities at the expense of the National Health Service shall be subject respectively to the issuance of the authorisations referred to in Article 8 *ter*, the institutional accreditation referred to in Article 8 *quater*, and the stipulations of the contractual agreements referred to in Article 8 *quinquies* ..."

24. Article 8 *quater* of the Legislative Decree read, at the material time and in so far as relevant, as follows:

"1. Institutional accreditation shall be issued by the region to authorised public or private facilities and to professionals who apply for it, subject to their compliance with the additional qualification requirements, their functionality *vis-à-vis* the regional

planning guidelines and the positive assessment of the activity carried out and the results achieved.

..."

**(c) Other legislation**

25. Article 1 of Legislative Decree no. 373 of 24 December 2003 defines the Council of Administrative Justice for Sicily as follows:

"1. The Council of Administrative Justice for Sicily, hereinafter 'Council of Administrative Justice', shall perform consultative and judicial functions in the region of Sicily, in accordance with section 23 of the special statute.

2. The Council of Administrative Justice shall sit in Palermo and shall be composed of two chambers, which shall perform consultative and judicial functions respectively, and which shall act as regionalised chambers of the *Consiglio di Stato*."

26. By Legislative Decree no. 104 of 2 July 2010, the Code of Administrative Procedure (*Codice del Processo Amministrativo* – "the CPA") was adopted.

27. Article 99 of the CPA provided, at the material time and in so far as relevant, as follows:

"1. If the chamber to which the case is assigned finds that the point of law submitted to it for examination has given rise or could give rise to conflicting case-law, it may, at the parties' request or of its own motion, refer the case to the plenary session [of the *Consiglio di Stato*].

2. Before delivering the decision, the President of the *Consiglio di Stato* may, at the request of the parties or of its own motion, refer to the plenary session any appeal to resolve questions of law of particular significance or to solve a conflict in the case-law."

**(d) Administrative measures**

28. Decree no. 333 of 24 April 2013, issued by the Minister of Education, Universities and Research after the events to which the present case relates, determined the overall number of medical specialists to be trained in the academic year 2012/13. In so far as relevant, it read as follows:

"Having regard to Legislative Decree no. 368 of 17 August 1999 and, in particular, Article 35 § 2, which provides that the Ministry for Education, Universities and Research shall determine the number of places to be assigned to each specialty training school;

...

Having regard to judgment no. 1183 of 19 March 2008, according to which personnel employed in a private healthcare facility or doctors working upon accreditation within the framework of the National Health Service cannot be barred from supernumerary admissions to specialty training since, following accreditation, those who satisfy the pre-established specific requirements participate in operating the public healthcare service, in accordance with the choices and for the purposes laid down in the healthcare plan;

Having regard, therefore, to the fact that pursuant to Article 35 § 4 of Legislative Decree no. 368 of 1999, for specific needs of the National Health Service and within the limit of 10% more than the total demand for each specialty, supernumerary

admission to specialty training schools may be granted to medical personnel employed on an open-ended contract in public healthcare facilities or in private accredited facilities other than those included in the school's training network;

...

**Section 5**

(1) The specific category referred to in Article 35 § 4 of Legislative Decree no. 368 of 1999 shall expressly denote medical personnel employed on an open-ended contract in public healthcare facilities or in private accredited facilities other than those included in the training network of the specialised school.

..."

29. Ministerial decrees issued in subsequent years (*inter alia*, Ministerial Decrees nos. 612 of 8 August 2014, 315 of 26 May 2015 and 313 of 20 May 2016) contained similar provisions.

### *2. Relevant domestic practice*

#### (a) Case-law of the *Consiglio di Stato*

30. Since 2008 the *Consiglio di Stato* has adopted a broad interpretation of the scope of Article 35 § 4 of Legislative Decree no. 368 of 1999.

31. By judgment no. 1183 of 2008, it allowed an application by a doctor employed in a private accredited facility who, as in the case of the applicant, had been prevented from obtaining supernumerary admission to specialty training on account of the narrow interpretation of the scope of Article 35 § 4 of Legislative Decree no. 368 of 1999 adopted by the Ministry of Universities and Scientific and Technological Research. The *Consiglio di Stato* reasoned, among other things, that the expression "tenured medical personnel" referred to in Article 35 § 4 of Legislative Decree no. 368 of 1999 had to be understood as meaning "permanently employed personnel", hence setting a condition which applied both to personnel included in the staffing plan and personnel employed on an open-ended contract.

32. By judgments nos. 1425, 1426, 1427 and 1428 of 2008, delivered in identical sets of proceedings on the same day, the *Consiglio di Stato* reached the same conclusion on the basis of the same reasoning.

33. Those findings were then reiterated by judgments nos. 125 of 2010 and 2187 of 2011.

#### (b) Case-law of the Council of Administrative Justice for Sicily

34. The Council of Administrative Justice for Sicily first adopted a narrow interpretation of the scope of Article 35 § 4 of Legislative Decree no. 368 of 1999 in judgment no. 489 of 2007.

35. In that judgment it found that the expression "tenured medical personnel" in Article 35 § 4 of the Legislative Decree could only refer exclusively to doctors who were permanently employed in public healthcare facilities. In its view, the wording of the provision unequivocally led to that conclusion, together with the fact that private accredited facilities could not

be deemed equivalent to public healthcare facilities, as their connection with the National Health Service was tenuous.

36. By judgment no. 1103 of 2009, the Council of Administrative Justice for Sicily confirmed its line of case-law. The reasoning of that judgment was the same as that later endorsed by the Council of Administrative Justice for Sicily in the applicant's case (see paragraph 18 above).

## B. Council of Europe materials

37. The relevant parts of Opinion No. 20 (2017) of the Consultative Council of European Judges (CCJE) on the role of courts with respect to the uniform application of the law (CCJE(2017)4, dated 10 November 2017) read as follows (footnotes omitted):

> "IV. MEANS FOR ENSURING THE UNIFORM CASE LAW
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> ...
>
> **b. The role of supreme courts**
>
> 20. It is primarily a role of a supreme court to resolve contradictions in the case law. The supreme court must ensure uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system. There is an inherent link between considerations concerning the uniformity of the case law, on the one hand, and mechanisms for access to the supreme court, on the other.
>
> 21. The CCJE recognises that, on account of differences in legal traditions and organisation of judiciaries, access to supreme courts is framed differently across Europe. The same applies to the concepts as to whether supreme courts should predominantly serve the private function or the public function. The former consists of striving for just and correct resolution of every individual case for the benefit of the parties to this case. The latter is concerned with safeguarding and promoting the public interest in ensuring the uniformity of the case law and the development of law. ... [T]he supreme court's responsibility to ensure uniform case law is likely to require the establishment of adequate selection criteria for admitting cases to the supreme court. Those countries which permit unfettered right to appeal may consider introducing a requirement for seeking leave or other appropriate filtering mechanism. The criteria for granting leave should facilitate the supreme court in fulfilling its role in promoting the uniform interpretation of the law. In that context, the CCJE recalls what was said in Recommendation No. R (95) 514.
>
> 22. The introduction of such criteria for granting leave to appeal namely implies that a supreme court's resolution of the matter bears significance beyond the scope of the individual case. It will generally be expected to be followed in future cases and therefore offers a valuable guidance for lower courts and all future litigants and their lawyers. Only such selection criteria ensure that only cases of precedential value are adjudicated by a supreme court. At the same time, these are also the only criteria which may ensure that all such cases can reach a supreme court. Therefore, a supreme court can effectively perform the function of stating rules that should be effective in future cases in all areas of law ...
>
> 23. The CCJE takes the view that the responsibility of supreme courts to ensure and maintain the uniformity of the case law thus should not be understood as if the supreme court is required to intervene as often as possible. In addition to causing delays in the supreme court's handling of cases and diminishing the quality of its adjudication, such

an approach would inevitably cause contradictions within the case law of the supreme court itself, whereby it is also inevitable that if the number of cases decided by a supreme court is excessively high, its case law will frequently remain overlooked. Therefore, existence of conflicting judgments of lower courts cannot simply be cured by providing for an unrestricted access to the supreme court.

24. The existence of instruments for ensuring uniformity within the same court is particularly relevant for supreme courts. It is especially problematic if the supreme court itself becomes a source of uncertainty and of conflicting case law, instead of ensuring its uniformity. It is thus of paramount importance that within the supreme court, mechanisms exist which can remedy inconsistencies within this court ...

25. The CCJE is of the opinion that a divergent case law in appellate level of jurisdiction (either within the same appellate court or between different appellate courts) is best addressed by a possibility to file a further appeal on points of law to the supreme court.

...

V. DEPARTURE FROM THE CASE-LAW

**a. The need to prevent rigidity and obstacles for the development of law**

30. The CCJE is of the view that seeking to ensure equality, uniform interpretation and application of the law should not lead to rigidity and to obstacles for the development of law. Therefore, the requirement that 'like cases should be treated alike' must not be framed in absolute terms. The case law development is not, in itself, contrary to the proper administration of justice since a failure to develop and adapt the case law would risk hindering reform or improvement. Changes in society may trigger the need for a new interpretation of the law and thus overruling of a precedent. Moreover, decisions from supranational courts and treaty bodies (such as the Court of Justice of the EU or the ECtHR) often result in the need to adjust the domestic case law as well.

31. The need for improving a previous interpretation of the law might be the other reason for departing from the case law. This, however, should happen only when there are pressing needs to overrule. It is the view of the CCJE that considerations of legal certainty and predictability should support a presumption that a legal question, on which there already is a well-established case law, shall not be reopened. Thus, the more the case law regarding a certain issue is uniformly settled, the greater is the burden on a judge who departs from such case law to provide persuasive reasons.

**b. The requirement to provide explicit reasons for departure from established case law**

32. The CCJE has already adopted the position that while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated.

...

VII. OTHER RELEVANT ASPECTS

**a. Responsibilities of all three state powers**

44. The concept of the uniform application of the law is relevant to all organs of state: the legislature, the executive and the judiciary. In this respect too, the organs of state are interconnected and interdependent as they all have an obligation to foster coherent legal rules and coherent application of these rules. The law must as far as possible be clear, foreseeable and consistent and when amending laws, the legislature should have due regard to the case law that has developed in the areas where the change is attempted. The courts can better ensure uniform application of laws if laws are logically consistent, well drafted, clearly worded, avoiding unnecessary ambiguity and without internal contradictions.

45. The CCJE, while admitting that legislative reforms are inevitable in a highly regulated modern society, wishes to warn that frequent, sometimes incoherent and hasty, changes of laws affect the quality of legislation and legal certainty. A piecemeal nature of amending and the complexity of laws (as amended) compromise the principle of legal certainty.

46. Contradictions in the case law are sometimes a consequence of ambiguously drafted laws which prevent courts from being able to arrive at a uniform and generally acceptable interpretation. The CCJE considers it in such circumstances to be ultimately the responsibility of the legislature to change the law. This is not to suggest that casuistic and detailed regulation is a desired goal. Broad definitions and open norms are often indispensable as they allow courts much needed flexibility and may be useful when the need arises to fill gaps in law. As the ECtHR reiterates, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.

..."

# COMPLAINTS

38. Relying on Article 6 § 1 of the Convention, the applicant complained of the domestic court's failure to ensure legal certainty, due to a divergence in the interpretation of the relevant domestic provision by the administrative court of final instance.

39. She alleged that she had consequently suffered discrimination, as, being a resident of Sicily, her case had fallen within the jurisdiction of a regionalised chamber, namely the Council of Administrative Justice for Sicily, which had ruled differently from the central chambers of the *Consiglio di Stato*. She relied on Article 14 of the Convention and on Article 1 of Protocol No. 12 to the Convention.

# THE LAW

## A. Alleged violation of Article 6 § 1 of the Convention

40. The applicant complained that the conflicting case-law of the domestic courts had deprived her of a fair hearing, in breach of Article 6 of the Convention, which provides:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ..."

41. The applicant submitted that the Council of Administrative Justice for Sicily, relying on its own precedents, had dismissed her application to obtain supernumerary admission to specialty training, while several other similar cases brought before the *Consiglio di Stato* – which had adopted the opposite interpretation of the relevant domestic provision – had had a different outcome. The applicant also mentioned that the Council of Administrative Justice for Sicily had failed to refer the case to the plenary session of the *Consiglio di Stato*, despite her request to that end.

*1. General principles*

42. The relevant principles regarding alleged violations of Article 6 § 1 of the Convention on account of the divergent case-law of domestic courts are summarised in *Lupeni Greek Catholic Parish and Others v. Romania* ([GC], no. 76943/11, § 116, 29 November 2016; see also *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49-58, 20 October 2011).

43. The Court reiterates at the outset that, save in the event of evident arbitrariness, it is not its role to question the interpretation of the domestic law by the national courts. Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings, as the independence of those courts must be respected (see *Ādamsons v. Latvia*, no. 3669/03, § 118, 24 June 2008, and *Hayati Çelebi and Others v. Turkey*, no. 582/05, § 52, 9 February 2016).

44. The Court also reiterates that the principle of legal certainty is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see *Nejdet Şahin and Perihan Şahin*, cited above, § 56). The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Lupeni Greek Catholic Parish and Others*, cited above, § 116).

45. The requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency in case-law. Case-law development is not, in itself, contrary to the proper administration of justice, since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Lupeni Greek Catholic Parish and Others*, cited above, § 116; see also *Nejdet Şahin and Perihan Şahin*, cited above, § 58, and *Albu and Others v. Romania*, nos. 34796/09 and 63 others, § 38, 10 May 2012).

46. The Court has acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court.

That, in itself, cannot be considered contrary to the Convention (see *Nejdet Şahin and Perihan Şahin*, cited above, § 51).

47. At the same time, the Court has already emphasised on many occasions that the role of a supreme court is precisely to resolve such conflicts (see *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 9 others, § 59, ECHR 1999-VII, and *Ferreira Santos Pardal v. Portugal*, no. 30123/10, § 47, 30 July 2015). In consequence, if conflicting practice develops within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thereby undermining the principle of legal certainty and weakening public confidence in the judicial system (see *Lupeni Greek Catholic Parish and Others*, cited above, § 123, and the cases cited therein).

48. The criteria for the assessment of the circumstances in which divergent decisions by different domestic courts or by the same court, ruling at final instance, entail a violation of the fair-trial requirement enshrined in Article 6 § 1 of the Convention consist in establishing: firstly, whether (a) profound and (b) long-standing differences exist in the case-law of those courts; secondly, whether the domestic law provides for a mechanism for resolving such inconsistencies; and thirdly, whether that mechanism has been applied and, if appropriate, to what effect (see *Lupeni Greek Catholic Parish and Others*, cited above, § 116, in which the Court restated the principles set out in *Nejdet Şahin and Perihan Şahin*, cited above, §§ 49-58).

*2. Application of the above principles to the present case*

**(a) The existence of "profound and long-standing differences"**

49. Turning to the present case, the Court notes that the applicant submitted that all cases concerning supernumerary admissions to specialty training examined by the *Consiglio di Stato* on appeal had resulted in favourable outcomes for the applicants, whereas the same claims brought before the Council of Administrative Justice for Sicily had been dismissed.

50. The Court notes at the outset that the Council of Administrative Justice for Sicily acts as a regionalised chamber of the *Consiglio di Stato* (see paragraph 25 above). The present case thus involves an alleged inconsistency in the case-law of the same court of final instance (see *Lupeni Greek Catholic Parish and Others*, cited above, § 117; *Ferreira Santos Pardal*, cited above, § 45; and *Beian v. Romania (no. 1)*, no. 30658/05, § 38, ECHR 2007-V).

51. An analysis of the relevant domestic practice reveals the existence of a divergence in the case-law within the two chambers of the *Consiglio di Stato*. The Court notes that the divergence resided in the interpretation of the relevant substantive law, namely Article 35 § 4 of Legislative Decree no. 368 of 17 August 1999 (see paragraph 21 above); the chambers disagreed on whether its scope included doctors employed in private accredited facilities, and hence whether they were eligible for supernumerary admissions to specialty training.

52. The Court notes that that divergence arose in 2008, when the *Consiglio di Stato*, ruling on the merits for the first time, decided in favour of a broader interpretation of Article 35 § 4 of Legislative Decree no. 368 of 1999 (judgment no. 1183 of 2008 – see paragraph 31 above), contrary to the narrower one given by the Council of Administrative Justice for Sicily (judgment no. 489 of 2007 – see paragraph 34 above). The *Consiglio di Stato* reiterated its approach again in 2008 (judgments nos. 1425-29 of 2008, delivered on the same date in identical sets of proceedings – see paragraph 32 above), in 2010 (judgment no. 125 of 2010) and in 2011 (judgment no. 2187 of 2011 – see paragraph 33 above). At the same time, the Council of Administrative Justice for Sicily confirmed its opposite approach in 2009 (judgment no. 1103 of 2009) and lastly in 2012, when the applicant's case was decided (judgment no. 269 of 2012 – see paragraph 36 above).

53. The Court observes that the different chambers of the *Consiglio di Stato* delivered judgments that were diametrically opposed (see *Lupeni Greek Catholic Parish and Others*, cited above, § 126); each chamber merely continued to rely on its own precedents without providing any new argument or further developing the ones already set out (see *Borovská and Forrai v. Slovakia*, no. 48554/10, § 64, 25 November 2014). The Court consequently considers that these fluctuations in judicial interpretation cannot be regarded as evolving case-law, which is an inherent trait of any judicial system (see *Lupeni Greek Catholic Parish and Others*, cited above, § 126).

54. The Court also highlights that the divergence did not involve a secondary matter but the pivotal aspect of the case, namely the meaning of the substantive domestic provision determining whether the applicant's claim could be granted or not (compare *Lupeni Greek Catholic Parish and Others*, § 117, and *Hayati Çelebi and Others*, § 63, both cited above).

55. The Court therefore considers that the divergences in the interpretation of the scope of Article 35 § 4 of Legislative Decree no. 368 of 17 August 1999 could be viewed as profound.

56. The Court will now look into whether the divergences existing in the case-law were also "long standing". For this assessment the Court takes into consideration the specific circumstances of each case. Among them, the Court assesses the time frame during which the divergence in the case-law has lasted (see *Mariyka Popova and Asen Popov v. Bulgaria*, no. 11260/10, § 43, 11 April 2019), the number of opportunities that the domestic courts have been given to express their view on the relevant issue in that time frame (see *Svilengaćanin and Others v. Serbia*, nos. 50104/10 and 9 others, § 81, 12 January 2021) and the scale of the divergence (see *Albu and Others*, cited above, § 38, and *Tudor Tudor v. Romania*, no. 21911/03, § 31, 24 March 2009).

57. Accordingly, in *Mariyka Popova and Asen Popov* (cited above, § 43), the Court found that a "long-standing" divergence existed in the case-law of the Court of Cassation, observing that a significant number of contradictory decisions had been delivered between 2006 and 2010 on a matter attracting a potentially high number of applications (see also *Tudor Tudor*, cited above,

§ 31). On the contrary, in *Svilengaćanin and Others* (cited above, §§ 80-81) the Court found that there were no "long-standing differences" in the relevant case-law in a situation of alleged conflicting case-law concerning a procedural matter, albeit one of general importance, which had evolved between 2003 and 2005 and had been institutionally resolved by a legal opinion adopted by the Supreme Court. In *Sine Tsaggarakis A.E.E. v. Greece* (no. 17257/13, § 51, 23 May 2019), the Court considered the divergence complained of to be both "profound and long standing", noting that it had existed within the chambers of the Supreme Administrative Court of Greece for several years and, in addition, that it pertained to an issue of general interest, as it concerned numerous similar cases.

58. In the instant case, the Court notes that the divergence in case-law lasted between 2008 and 2012 (see paragraphs 30-36 and 52 above, and paragraph 63 below) and that within this four-year time span a limited number of judgments relating to each line of case-law were handed down. Furthermore, the scale of the divergence was limited, in so far as the claim brought before the *Consiglio di Stato* concerned a restricted category of possible applicants (namely doctors employed in private accredited facilities seeking supernumerary admission to specialty training) and not a potentially general issue (contrast *Mariyka Popova and Asen Popov*, § 43; *Sine Tsaggarakis A.E.E.*, § 51; and *Tudor Tudor*, § 31, all cited above).

59. The Court therefore considers that the divergences in the interpretation of the relevant legislation, albeit profound, could not be viewed as long standing.

**(b) The existence and use of a domestic-law mechanism to overcome inconsistencies in the case-law**

60. A finding that there were profound but not long-standing inconsistencies in the case-law of domestic courts would make it unnecessary for the Court to assess whether the domestic law provided for a mechanism for overcoming those inconsistencies and whether it had been applied and, if appropriate, to what effect (see *Lupeni Greek Catholic Parish and Others*, cited above, § 116, and *Emel Boyraz v. Turkey*, no. 61960/08, § 73, 2 December 2014). However, even assuming that the divergences in the case-law were profound and also long standing, in the specific circumstances of the present case the Court is of the view that they were in due time brought to an end (see paragraph 63 below).

61. In this connection, the Court notes that the dedicated mechanism provided for by domestic law to overcome inconsistencies in case-law (namely, a referral to the plenary session of the *Consiglio di Stato* under Article 99 of the CPA – see paragraph 27 above) was not applied in the instant case.

62. While it is not for the Court to speculate whether, had the divergence persisted, it would have been referred to the plenary session, in practice this

scenario did not arise since, after the judgment which decided the applicant's case, the divergence in the case-law *de facto* ceased.

63. The Court notes that this can be traced to a change in the relevant administrative framework: the Minister for Education, Universities and Research issued Ministerial Decree no. 333 of 24 April 2013, which, by explicitly acknowledging the *Consiglio di Stato*'s approach as set out in judgment no. 1183 of 2008, from that point on allowed doctors employed in private accredited facilities to apply for supernumerary admission to specialty training. The Minister issued further similar decrees in subsequent years (see paragraphs 28-29 above).

64. The Court takes note of this intervention by the executive power, aimed at clearly signalling its intention not to allow the effects of one of the two strands of case-law to continue over time (see, *mutatis mutandis*, *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, § 113, 3 November 2022).

65. The Court considers that a change of this kind in the framework governing administrative practice, similarly to the operation of a judicial mechanism, can be considered in certain circumstances as an appropriate means of overcoming inconsistencies in case-law (see *Dabanli v. Turkey* (dec.), 22789/19, §§ 54-57, 30 March 2021). In the present case, the Ministry for Education, Universities and Research – which had initially adopted a narrow interpretation of the relevant domestic provision – later, following the broader approach of the case-law of the *Consiglio di Stato*, put the divergence to an end.

66. Indeed, since it falls within the Contracting States' responsibility to organise their legal system in such a way as to avoid the adoption of discordant judgments (see *Lupeni Greek Catholic Parish and Others*, cited above, § 129), the Court has held that the legislature can depart from the courts' interpretation of the law and amend legislation in order to re-establish legal certainty by correcting an interpretation of the law given by the judiciary, subject, however, to compliance with the legal rules and principles which are binding even on the legislature, including respect for the rule of law and the notion of a fair trial (see *Vegotex International S.A.*, cited above, § 114, restating the principles already set out in *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 131, ECHR 2006-V, and *Lupeni Greek Catholic Parish and Others*, cited above, §§ 132-33).

67. Likewise, in the Court's view, an amendment of the relevant administrative framework by the executive power can contribute to re-establishing consistency in the application of the law; this is congruent with the fact that all organs of State are interconnected in fulfilling the obligation to foster coherent legal rules and coherent application of those rules (see the CCJE's Opinion No. 20 (2017), quoted in paragraph 37 above).

### *3. Conclusion*

68. Against this background and having regard to the specific circumstances of the present case, the Court cannot conclude that the

inconsistencies in the administrative courts' case-law entailed a breach of the principle of legal certainty.

69. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## B. Alleged violation of Article 14 taken in conjunction with article 6 § 1 of the Convention

70. The applicant alleged that, since, owing to her residence in Sicily, her claims had been heard by the Council of Administrative Justice for Sicily and not by the *Consiglio di Stato* (which had granted applications lodged by doctors employed in private healthcare facilities), she had suffered discrimination.

71. She relied on Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

72. The Court observes that domestic law governing the territorial jurisdiction of Italian administrative courts does not target any specific category of claimant; it establishes territorial jurisdiction in objective and general terms.

73. The Court further highlights that, in accordance with Article 1 of Legislative Decree no. 373 of 24 December 2003, the Council of Administrative Justice for Sicily constitutes a regionalised chamber of the *Consiglio di Stato* (see paragraph 25 above), which, according to the applicant's own submissions, does not present any specific feature that differentiates it from the central chambers.

74. The Court therefore finds that the mere fact that the applicant's claim fell within the jurisdiction of the Council of Administrative Justice for Sicily is not *per se* discriminatory within the meaning of Article 14 of the Convention.

75. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## C. Alleged violation of Article 1 of Protocol No. 12 to the Convention

76. The applicant, on the same grounds, relied on Article 1 of Protocol No. 12 to the Convention, which reads as follows:

> "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

77. The Court observes that Protocol No. 12 to the Convention has not been ratified by Italy.

78. Accordingly, this complaint is incompatible *ratione personae* with the provisions of the Convention and the Protocols thereto within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 13 July 2023.

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| Liv Tigerstedt<br>Deputy Registrar | Marko Bošnjak<br>President |