

CONFERENCE OF 7 JUNE 2010

« PREVENTING BACKLOG IN ADMINISTRATIVE JUSTICE »

Opening remarks

It should be noted that, in accordance with Article 44 of Law number 69 of 18 June 2009, the Italian Council of State has been requested by the Government to review the procedures and processes for appeals brought before the tribunals and the Council of State. Considering that, while the following responses are currently correct, some of them may change in the near future.

QUESTIONNAIRE¹

One should focus on three key areas in our deliberations on speeding up the administrative justice process: techniques for limiting the number of appeals (I), techniques to speed up proceedings (II) and any criteria for evaluating court activity and the application of these criteria (III).

I. Techniques for limiting the number of appeals

- 1) Must those wishing to refer a matter to the Supreme Administrative Court be represented by a lawyer? If so, are there any dispensations to this requirement? Are there any criteria regarding the lawyer's qualifications or seniority?**

A lawyer must file the request except in a very limited number of cases, where it can be filed directly by the individual (e.g.; related to the right to access documents).

To plead before the Council of State, lawyers must be qualified to plead appeals before the supreme jurisdictions. In order to be considered qualified the lawyer must have passed several career benchmarks.

Following law school the candidate must practice for two years as an apprentice and then is eligible to take the exam to become a lawyer (*avvocato*). The exam is a three-part written exam (which is comprised of two parts theoretical submissions based on Civil and Criminal Law and a third part which is practical; such as writing an appeal) and a five subject oral exam, which must contain at least one section on Procedural Civil Law, or Procedural Criminal Law.

After passing the exam the lawyer can then begin to practice law and after 12 years of effective practice the lawyer is qualified to represent cases before the Supreme Courts (such as the Council of State).

After six years of effective practice as a lawyer (following the exam mentioned above), the lawyer may choose to take another written exam to sooner qualify to represent cases before the Supreme Courts. This exam is very selective and on average only five lawyers per year are able to pass it (consider that in 2007 Italy had over 121,000 lawyers, which equalled about 1 lawyer for every 500 people, compared to France which had about 1400 people per lawyer).

- 2) Is the Supreme Administrative Court's jurisdiction limited to points of law ('administrative cassation') or can it also rule as an appeals court with cognizance of points of fact?**

¹ The present Questionnaire has been prepared by Prof. Dr. Rusen ERGEC, University of Luxembourg

The Italian Council of State, in its jurisdictional function (Sections 4, 5, 6, Plenary Assembly and Sicilian Council of Administrative Justice (CGARS)) also rules as an appeals court with cognizance of points of fact.

The oversight performed by the administrative judge is limited to a verification of legality after considering the points of fact. This means that the Court must ascertain whether the administration's decision, even if within its power, remained within the limits of the law, given the options the administration had at its disposal. If this is the case, the Court cannot examine the decision's substance (possibility of a different decision given the options authorized by law).

3) Is the right of appeal to the Supreme Administrative Court an absolute right or are there limitations? If there are, under what circumstances? Provide a short summary of how your Court interprets these limitations.

According to Article 103, first paragraph, of the Italian Constitution, the Council of State and the other organs of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid out by law, also of subjective rights.

An appeal against an administrative act (jurisdiction over legitimate rights) must be filed before the Administrative Tribunal (First Degree Court in administrative jurisdiction) within sixty days from the date the interested person had cognizance of the act. The time limit is the same for appeals filed before the Council of State (appeal's judge).

When an appeal is based on the violation of subjective rights the sixty-day time limit on initial applications before the Administrative Tribunals is not used as the statute of limitations (*prescrizione*) would apply instead.

According to Article 40, second paragraph of the King's Decree of 26 June 1924, number 1054, and Article 25 of Law number 1034 of 6 December 1971, after two years from the application of appeal, appeals that are not pursued with due diligence by the parties are considered abandoned.

4) Are there any penalties for abuse of appeals (e.g. fines for rash or persecutory appeals)? If so, are they applied at the request of the respondent or by the court as a matter of course? Does the procedure respect the principle of the right to be heard? Are reasons provided for the decision? Is the session heard by several judges or just one?

The right to be heard is a fundamental principle on which all judicial processes are based. In respect of the right to be heard there is no penalty for abuse of appeals but the principle is that whichever party loses the case has to pay the expenses (as awarded by the judge) for the successful party. Moreover, according to Article 96 of the Code of Civil Procedure (which applies also to administrative processes), in cases where gross negligence or bad faith is determined, the judge may award damages as well as expenses when requested.

The administrative judge almost always renders his/her decisions within a panel of judges: the judgment panel of the Courts of First Instance is made up of three judges. The Council of State panel is made up of five judges (except for the Plenary Assembly, made up of thirteen or fifteen judges).

The administrative Court renders decisions as a sole judge (by decree) only in exceptional cases: when the judge is delegated by the President of Section for cases of withdrawal, conciliation between parties, expiry or termination (the panel may be requested in any case); or when in cases of extreme emergency the President of Section, or a delegated judge of the Council of State, may render a decision on a request for an order instituting interim measures. This decision

stands until the panel makes its interim decision, which is rendered during the first effective hearing.

- 5) Do appeals have to go through an admission or authorisation procedure before being brought before the Supreme Administrative Court? If so, describe the procedure and the main conditions that would lead to an appeal being refused admission or authorisation ('leave of appeal').**

There is no real procedure for classifying the appeals which come before the Council of State in its jurisdictional functions. All the law stipulates is that certain decisions (in the case of expiry of a time limit, withdrawal, conciliation of the parties or termination of the proceedings) be rendered by a sole judge delegated by the President, but there is no procedure for examining disputes which might have such outcomes.

II. Techniques to speed up proceedings

- 1. Are there accelerated procedures for emergency situations (apart from proceedings for interim relief, which do not issue preliminary rulings on the merits of the case)? If so, describe the main conditions (whether these are adversary procedures, the reasoning behind the decision, whether the session is heard by one or more judges, whether the advisory body – if there is one – is involved, whether there is an investigation, whether there is a hearing, shorter deadlines for submitting documents or statements, etc.).**

In accordance with Article 23-bis of Law number 1034/1971 as amended by Law number 205 of 21 July 2000, for determined subjects (such as adjudication proceedings for contracts for public projects and services, land use and expropriation, acts taken by independent authorities, proceedings to privatise companies and public property, appointments made by the council of ministers, dissolution of local public institutions and their training establishments) an accelerated procedure is provided. It is also allowed in cases regarding access to documents and appeals related to the administration's failure to respond. All deadlines after the initial filing of the appeal are cut in half.

This accelerated program exists because these subjects are considered of particular importance or benefit to public interest. The composition of the judicial bodies and the process with which they decide the cases remain the same as for the non-accelerated procedures.

In cases of interim relief which do not issue preliminary rulings on the merits of the case, the judge is required to rule on the merits at the first hearing 30 days after the adoption of the interim relief, whether or not the judge suspends the enforceability of the impugned act, if the judge doubts the legitimacy of the impugned act.

- 2. Are there accelerated procedures for appeals that are clearly founded, unfounded or inadmissible? If so, refer to the questions listed under II, 1.**

Article 26 of Law 1034/1971 as amended by Law 205/2000, allows that for appeals that are clearly founded, unfounded or inadmissible, the Court can decide with a simplified decision. The motivation of that decision may refer to only the decisive point of fact or law or to a previous decision of an analogous case, which is a very useful tool in accelerating the process.

- 3. Are there accelerated procedures for cases that should be straightforward? If so, refer to the questions listed under II, 1.**

During the interim phase, if the Court deems that the adversarial principle has been respected and the case can be easily decided, it may inform the parties that it intends to render a

simplified decision which will end the dispute (accelerating the process considerably). This can be the best way to accelerate the proceedings, if properly utilised.

- 4. Other than for proceedings for interim relief that do not issue preliminary rulings on the merits of the case, are there sessions where appeals are heard by a single judge and if so, for what kinds of cases? Can this single judge refer the case to be heard in a session presided over by several judges?**

As stated above in I-4, the single judge may render a decision by decree only in exceptional cases. The single judge can decide not to adopt any decree. Which means the case will be heard in an ordinary session in accordance with the general process. The decree can be appealed within 60 days from its legal cognizance before the Court in its ordinary composition. The Court decides within 30 days and, if it states that the appeal is founded, the case is reopened and processed following the usual procedure.

- 5. Can the obligation to provide grounds be relaxed? (e.g., relaxation of the obligation to respond to all arguments or statements; grounds provided simply by referring to the relevant provisions, etc.)**

Decisions by the administrative judge are generally accompanied with detailed justification and take into account all the arguments invoked. As mentioned above, the Court may render a simplified decision in certain cases. Since 2000, judges may justify their simplified decisions by just referring to one precedent, to a clear reason for inadmissibility, or to an appeal's merit or absence thereof.

- 6. Is it possible to conduct procedures entirely in writing, with no need for a hearing?**

In general, proceedings before the Council of State in its jurisdictional functions are conducted entirely in writing. Parties have the right to apply for oral hearings, except in cases decided by a sole judge, but that right is rarely exercised (approximately 10-15% of cases). In cases regarding interim measures it is more common to request oral hearings (approximately 50% of cases).

- 7. Can any party not cooperating with the procedure be penalised?**

As mentioned in I-3 above, according to Article 40, second paragraph of the King's Decree of 26 June 1924, number 1054, and Article 25 of Law number 1034 of 6 December 1971, after two years from the application of appeal, appeals that are not pursued with due diligence by the complainant are considered abandoned.

- 8. Do judges raising legal arguments of the court's own motion always have to order deliberations to be begun again or do they have to authorise the parties to submit new conclusions?**

The Court is obliged to raise some questions *ex officio*. In particular, questions of public order such as; questions regarding jurisdiction (in which case it must be appealed before a different kind of judge), and the right to be heard. After raising a question *ex officio*, it is not necessary to order the deliberations to be restarted but generally the parties are advised during the hearing of the question *ex officio*, and they are asked to submit their opinions.

- 9. Does the procedure allow the deadlines for submitting statements and documents to be shortened?**

As described in II-1, II-2 and II-3 above, the Law provides for shortened deadlines in some cases. It is also allowed in cases regarding access to documents and appeals related to the

administration's failure to respond. The Court, however, does not have the power to shorten deadlines except in cases of excusable errors.

10. Does the procedure allow the appeal, the statements, written submissions and the documents to be submitted electronically?

A request may not be filed via the internet. An appeal may be followed through all its stages on the official website relating to Italian administrative law. A project to computerise all administrative procedures is in progress, awaiting the software development for electronic signatures.

11. Must statements, written submissions and documents be submitted in strict accordance with the deadlines, with the case being inadmissible if they are not submitted in time? If so, are there any exceptions to this rule?

If written submissions and documents are not submitted in accordance with the deadlines, the case is not considered inadmissible, but the submissions and documents will not be considered but the Court reserves the right to request further documents as necessary.

12. Is there a limit to the number of statements or written submissions that may be submitted? Can additional statements or written submissions and documents be submitted?

There is no limit to the number or length of statements or written submissions that may be submitted within the prescribed time limits. Barring exceptional cases, no additional submissions are permitted.

13. Is it compulsory to submit a summary statement closing the written submissions?

No.

14. Once the investigation has been closed, is it possible to submit new documents, written submissions or written observations at the last minute?

No.

15. Can new arguments be raised during the procedure?

Arguments can be expanded on or clarified, but new arguments cannot be raised unless it is demonstrated that they could not be raised before.

16. Can new arguments be raised on appeal?

No, new arguments cannot be raised unless it is demonstrated that they could not be raised before.

17. Are there appeal channels for accelerating the course of the procedure or applying a penalty for exceeding 'reasonable time', in accordance with the judgement in the case of *Kudla v. Poland*, delivered on 26 October 2000 by the European Court of Human Rights?

Law number 89 of 24 March 2001 (*legge Pinto*) introduced a provision, which allows parties to sue for damages when the processing of their case exceeds "reasonable time" limits, highlighting the State's liability for the unreasonable length of jurisdictional proceedings. Knowing that the delay of a case could lead to the State paying damages can have an accelerating influence over the delivery of a timely decision.

The Pinto Law provides for an accelerated system to request damages regarding exceeding “reasonable time” limits. The party suing for damages must bring an action directly before the Civil Courts of Appeal.

The criteria for determining “reasonable time”, according to the jurisprudence of the Italian Court of Cassation, are based on those established by the jurisprudence of the European Court of Human Rights.

Due to the high volume of cases brought before the Courts of Appeal, because of the *legge Pinto*, the backlog of the Courts of Appeal has been increasing, but the average time for processing ordinary appeals before all the other judicial bodies, has started decreasing.

- 18. What does the court understand by ‘reasonable time’ for a hearing within the meaning of Article 6 of the European Convention on Human Rights? If applicable, mention some cases where sanctions were applied because a hearing did not take place in reasonable time.**

Please see answer II-17 above.

III. Performance criteria

- 1. Are there quantitative and qualitative criteria for measuring the ‘performance’ of court activity? What is the judicial value of these criteria and what body issued them?**

In accordance with Article 13 of Law number 186, of 27 April 1982, as amended by Article 19 of Law number 205/2000, the Council of Presidency of Administrative Justice (the body which governs members of the Council of State and judges of the Regional Administrative Tribunals) determines the number of cases each administrative judge has to decide each month (approximately 12 cases per month). Even though the majority of administrative judges far exceed that monthly total there is still quite a backlog of cases to be reviewed, but the number is shrinking.

- 2. Are there statistical data on the average length of proceedings in the Supreme Administrative Court and the average length of a procedure from the court of first instance to the final decision by the Supreme Administrative Court?**

The statistical data on the average length differ depending on the subject of the appeal (i.e. whether it qualifies for accelerated proceedings). Some subjects which qualify for accelerated proceedings are adjudication proceedings for contracts for public projects and services, land use and expropriation, acts taken by independent authorities, proceedings to privatise companies and public property, appointments made by the council of ministers, dissolution of local public institutions and their training establishments, requests for access to documents, and appeals related to the administration’s failure to respond.

In general, accelerated proceedings last less than 1 year before the Council of State, and regular proceedings average two and a half years though that average is shrinking as well due to implemented time saving measures and technological advances.

Regarding the total time for the two degrees; accelerated proceedings last about two and a half years and ordinary proceedings last more than four years.

- 3. Are there significant differences in the length of procedures depending on the nature of the case?**

There is no difference in the length of procedures based on the nature of the case, it is only a question of whether or not the case qualifies for an accelerated proceeding as detailed in III-2 above.

4. During proceedings, are lower courts authorised to request the Supreme Administrative Court's opinion on a new point of law in the aim of guaranteeing judicial security and preventing an influx of disputes?

No, but in general when the Council of State is confronted by several similar cases, it will prioritize the hearings so that a precedent can be quickly established.

5. What is the ratio between the number of judges in the Supreme Administrative Court and the number of cases settled each year?

There are approximately fifty judges in the jurisdictional section of the Council of State, who process approximately sixteen thousand cases per year (ten thousand of which are decided on the merit and terminate proceedings and six thousand of which are orders for interim measures). Therefore, each judge on average processes 200 settled cases per year and writes 120 orders for interim measures.

6. What is the ratio between the number of judges and the number of assistants?

The position of assistant judge does not exist. It has been proposed in the past, but legislators did not introduce it into the laws. The ratio between judges and administrative personnel (secretaries, drivers, clerks etc) is approximately one judge for every two administrative personnel.

7. Are there specialised judges within the Supreme Administrative Court who only deal with a certain kind of cases? Does this specialisation have a basis in law or is it a result of internal work distribution?

No.