Giovanni Paleologo (Presidente di sezione del Consiglio di Stato)

Steps of the Italian Administrative Law-suit

SUMMARY:

1. The competence of the Regional Administrative Tribunals, the appeal to the Council of State, three kinds of judgment: ordinary, cautionary and for the execution of a previus judgment.

2. Statutes and judge-made Law in the procedure in front of the Administrative Courts; parties, evidence, reasons of judgments

3. Some details on the procedure in the two degrees of administrative jurisdiction.

4. ...continuing on the same subject, effects of judgments in favour of the plaintiff.

5. Rules on judgments in the two degrees of jurisdiction.

1.

In Italy, the administrative Law-suit starts in an Administrative Regional Tribunal (= Tribunale regionale amministrativo; for short, TAR). It can be pursued, as a matter of right, by any party who did not completely win his case, by way of appeal to the judicial chambers of the Council of State.

At present, perhaps 15% of the judgments given by TARs are appealed.

Any citizen who claims to have a direct and personal interest in a certain activity of an administrative authority acting as such (that is to say, in pursuance of its statutory powers) can seek justice from the Administrative Courts.

This administrative activity may consist either in taking a certain decision, irrespective of the degree of discretion reserved by Statutes to the public body, or in not taking any decision at all.

On the other hand, only in a limited number of cases the Administrative Courts (as opposed to the Civil Courts) have power to decide on the claim of persons who submit that the public body has infringed an obligation of the same kind which can exist between individuals.

The functions already described are the principal, or ordinary, activity of the administrative Courts.

In addition, the Courts deal with ad interim, or cautionary, applications, pending an ordinary case. Mostly, applications of stay of execution: either of the administrative decision attacked, or of the judgment appealed.

Or these Courts deal with applications for the forced implementation, against a recalcitrant public body, of judgments given by the Administrative or Civil Courts.

In other words, the competence of the Courts can be either ordinary, or cautionary, or to execute a previous judgment.

2

1. The rules of procedure followed by the judicial chambers of the Council of State (from now on these chambers will be called, for brevity, Council of State) are contained in two Statutes and in an Order-in-Council.

They are quite similar for the two degrees of jurisdiction.

There are very few special procedural rules regarding specific subjects. Perhaps the most important instance in this field concerns Law-suits on the conduct and results of political elections. But it is to be considered that while communal, provincial, regional and supra-national elections are all in the province of the Administrative Courts, national political elections are only subject to validation by the parliamentary Chamber concerned (Chamber of deputies, or Senate of the Republic).

2. Written rules on administrative procedure are not very detailed; and have undergone little change since 1889, when a general Administrative Law-Court for the Kingdom of Italy (founded in 1861) was provided by the creation of the fourth Chamber of the Council of State.

It follows that principles established by judicial precedent are, also in matters of procedure, of the highest importance. These principles tend to evolve with great circumspection.

They concern also the identification of the parties which are to be called to Court; evidence; and the giving of reasons for any judgment.

In the first degree of litigation the plaintiff must call to Court the public authority concerned (defendant), and those parties if any who would be directly damaged by a judgment in his favour. But, in addition, the latter must be mentioned in the administrative decision attacked or, when there is no administrative decision, must be evidently identifiable by the plaintiff. These are the counter-interested parties.

In the appeal, the appealer must call to Court the parties of the first degree who would be damaged by a decision in his favour, and in any case the public authority concerned (which could, of course, be itself the appealer).

Evidence is given mostly through the submission of documents. It is almost never thought expedient to hear witnesses; and there are seldom inspections of sites and buildings: these last, done by some administrative authority (and not by the judge) in the presence of the parties, with the effect that what is accrued to the Law-suit is again a document, describing the results of the inspection.

Reasons of judgements are given in writing by one of the members of the Court, on behalf of the Court itself; and thus there is a time-lapse between hearing and judgment.

That is to say, the results of the case are known through the publication of the judgment; which is divided in a part detailing the parties and the matter in dispute, a part describing the progress of the Law-suit, a part on the reasons of the judgment, and a conclusion giving the judgment itself, with an order on costs.

3. Administrative procedure differs from civil procedure mostly in two aspects: a) a more limited range of possible evidence; and b) the fact that administrative Law-suits are normally decided after a single hearing, which is evidently very satisfactory.

On the other hand, administrative procedure differs from penal procedure chiefly on two accounts: in the former there is no participation of ordinary citizens in the administration of justice and as a rule no immediate giving of judgment in open Court by word of mouth.

It would seem inevitable that the three Law-suits must follow somewhat different principles.

4. In the two degrees of jurisdiction there are no differences of procedure other than those following from the fact that in the Council of State one attacks a judgment, and one must ordinarily show that the lower Court was at fault.

3

1. The administrative Law-suit is mostly written. It is started by an application directed to the Court (and notified beforehand to some at least of the adverse parties) stating which administrative decision or lack of decision; or lack of activity is attacked, and on which grounds.

In the appeal, the application states which judgment or part of judgment is attacked, and on which grounds.

These grounds cannot, as a rule, be changed during the Lawsuit, although any number of written papers (and, in the first degree, of documents) can be added till a certain date preceding the hearing.

New grounds can be added only when documents new to the plaintiff come to light.

The application starting the Law-suit is deposited with the clerks of the Law-court.

The author states his claim, and gives (as already said) the grounds for it.

Usually these grounds are more than one, each being sufficient, if upheld by the Court, to lead to a result in some way favourable to the plaintiff.

Notice of the application must be served afterwards to the parties to whom it not given beforehand.

In the hearing a judge usually gives a short report of the Lawsuit, and counsel may, if he so wishes, illustrate orally the case. After which the presiding judge states that «the case will be decided», and calls for the next case.

2. Applications and documents presented by the parties can always be consulted by any other party who has appeared in the Law-suit. They are not open to the public.

On the other hand, the hearing is public; and copies of the judgment, once given, can be obtained by anyone, and freely published and commented in Law-reviews, news-papers, etc.

Before the hearing there are no résumés, or acts of any judge; apart from injunctions to deposit some documents, or to notify the application to other interested parties.

The judges have no legal staff.

3. Judgment is given in the TARs by three judges, in the Council of State by five.

Any of the three judicial chambers of the Council of State can devolve to a special session cases concerning points of Law on which there are contrasting precedents. In this session, all three chambers are equally represented, under the chairmanship of the president of the Council of State. There are then thirteen iudges (4+4+4+1).

Law-suits, are allotted to chambers of TARs or of the Council of State by the respective presidents, according to a certain division of matters.

No experts are requested to sit as judges for special cases. But of course the point of a separate Administrative judiciary is that all its members must be expert in administrative matters, if not necessarily in the specific subject under discussion.

4. On deciding to hear a certain number of cases on a certain date, the president of the judicial office appoints each judge to study some of the Law-suits and to report on them.

The other judges are given copies of the relevant papers, but not of documents.

There is no help or intervention from any other person.

5. The public authority called in judgment must, as any other party, be represented by counsel, and in the Council of State by a senior one.

No party can be admitted to act in the Law-suit without such representation.

For their part, the various ministries employ a shared body of counsel, whose members are civil servants.

These can also represent a certain number of public agencies, and of regions. They also advise those public bodies, as well as the ministries, in all legal matters.

4

1. In the interval between the deposit of the plaintiff's application and the hearing, all parties can produce documents. The plaintiff can ask the presiding judge to order the defendant to deposit documents which are in his sole possession.

In the appeal normally one needs only the papers already existing in the lower Court.

2. There is no strict succession of stages from the calling of all interested parties, to the collection of evidence, to the decision of the case.

If in giving judgment the Court finds that some more documents are needed or some parties must still be called to appear it states so in the form of a (non definitive) judgment.

3. It is in the interest of the plaintiff to make sure that all parties have been notified of the Law-suit before the hearing.

If he fails to do so, he faces the consequent delay, caused by a non definitive judgment.

At the next hearing, the plaintiff who has not complied with the order to notify, given to him by the Court, looses his case.

As to the public authority appearing as defendant, or to the counter-interested party (for whom see citra 2, 2) already present in the Law-suit, the only thing they can do to speed up judgment is to convince the counter-interested party not yet called in the Law-suit to appear spontaneously in it. Or they can apply for a quick hearing, at the conclusion of which the Court will either dismiss the plaintiff's case (which the Courts feel entitled to do even in the absence of some opponents, when the plaintiff's application cannot manifestly succeed), or will order the plaintiff to notify his application to the remaining parties.

Passing to consider the evidence, it must be stated that it is, in general, the responsibility of the parties to deposit the documents they have.

On the other hand, the Court will ask the public body to deposit relevant documents in its sole possession. And if the latter does not comply, it is deemed to be in the wrong on the corresponding point.

Apart from the original application, which must be notified to the other parties, there is no communication of papers to them.

Any paper is deposited, in a certain number of copies, with the clerks of the Court, and all parties can, if they so wish, take a copy.

4. As a rule, the appealer must show that the lower Court was wrong to decide as it did, on the basis of the evidence it had or it should have requested.

Then, it is only when the lower Court has wrongly omitted to ask for a certain document that the appeal judge must in the presence of an appeal based on these grounds request new evidence.

On the day of the hearing the presiding judge could suggest to the parties the possibility of issuing an order to that effect.

If all parties agree, the order is given, and the Law-suit adjourned.

If not, the case is discussed, and reserved for decision. Then, the Court may feel that a non definitive judgment must be passed, ordering some parties to deposit documents; or may deem the case is, after all, ripe for a conclusion, and issue a definitive judgment.

5. In the Administrative Law-suit there is never an examination of the parties in Court, and practically never an examination of witnesses.

As a rule, the facts of the case are established through documents. Among these documents there can be a description either of places, or of buildings, or of other objects, made by some administrative authority on request of the Court, under the scrutiny of the interested parties. Or an answer by the defendant to questions put in writing either by the presiding judge with an order to answer, or by the Court with a non definitive judgment. And these documents must be deposited well before the (last) hearing.

During the hearing the Court can cheek with counsel which facts are considered certain by all parties.

6. Any judgment given against the plaintiff does not imply an execution (except for costs).

Both during the first and the second degree of litigation the plaintiff (that is to say, in appeal, the former plaintiff, now appealer) can ask for a cautionary measure: stay of execution of the administrative decision, or order given to the administrative authority to do something pending litigation.

Any judgment given by a TAR, quashing an administrative decision, has three effects: annulment of the decision; restitution of things to their original state; statement of some duties the administrative authority has from now on in front of the plaintiff .

Annulment and restitution take effect immediately after the judgment of the lower Court, no matter if still subject to appeal, or already appealed.

As to the statement of duties, if the judgment is subject to appeal, or appealed, the authority can choose whether to comply (for instance, making a new decision in accordance with the judgment), or suspend any activity.

Of course the former defendant, or the former counter-interested party (see citra 2, 2) can, as an appealer, ask for a stay of execution of the judgment appealed. And, if the stay is granted, no annulment or restitution is deemed to have occured.

5

1. Irrespective of the matter in question, when the Council of State quashes a judgment, it proceeds as a rule to decide the Law-suit. If some new documents are needed, there will be an order to this effect, and a new hearing.

It is only on special occasions that the Council of State quashes the judgment and sends back the case to be judged by the lower Court. That happens mostly when there has been a judgment in favour of the plaintiff without previous notification of the latter's application to an opposite party; when there has been a declaration of incompetence of the Administrative Court, whereas it was in fact competent, and should have decithe case; and when the judgment had not been signed by the judges.

2. The lower Courts cannot, as a rule, grant to the plaintiff more than is asked by him.

The Council of State judges extra petita only in some particular cases.

This happens mainly when the lower Court has rejected an application in its substance, without any examination of points of procedure and, on appeal by the previous plaintiff, the higher Court finds that the case should have been dismissed on the other counts. For instance, lack of competence on the part of the administrative judge, or lack of any previous notification of the application to the defendant, or to at least one of the counterinterested parties.

The higher Court feels that it does not need a counter-appeal by the former defendant (or by the former counter-interested party) against the passage of the lower Court's judgement which overlooked the point of procedure in question.

It must however be remarked that ultra petita is not reformatio in peius. In fact, it could be reformatio in melius; or in a way indifferent to the party concerned.

The only proper reformatio in peius can concern the former plaintiff who now appeals against a judgment passed against him on points of procedure. With the result that if the appealer is right in this submission such appeal will at times end up with a rejection of the original application in its substance, which could be more damaging to the party than the previous judgment.

Of course, the appealer is liable to be ordered to pay the costs of the new degree of litigation: but this could hardly count as a reformatio in peius. And as already seen there is the possibility of counter (or crossed) appeals.

The public body can always quash the administrative decision attacked in Court, or make pending the Law-suit the decision demanded; and that would deprive the litigation of any object.

The appealer can renounce his appeal. And the original plaintiff, against whom the appeal is now brought, can renounce the original application: that would lead to the automatic revival of the administrative decision, annulled by the lower Court with its judgment.

3. After the public hearing the Courts sit in private, and discuss each individual case; but the judges are free to continue discussion at a later date.

As a rule, the judge who has researched the case lists the various points which he thinks must be discussed.

Only on occasions is there a formal counting of votes. Then the presiding judge chooses the order of questions to be put to vote. The judge who researched the case votes first, and then the others, in ascending order of seniority. The presiding judge, if need be, votes last.

He keeps note of the results of any case, till the judgment is written. And the judges could, till then, re-discuss the case.

There can never be equality of votes, as the number of judges is always odd, and no abstention from the vote is permitted.

There can be no public expression of dissenting or concurring opinions.

4. See citra 2, at the end of §2.

The length of judgments changes only in relation to the difficulty and importance of the case; and to the personal style of the judge who has written the judgment for the Court.

The presiding judge, who reads and initials the project of judgment, may add or remove some passages, or discuss a re-drafting of the judgment with its author.

In any question of substance, the matter can be referred back to all the judges. In which case the judgment indicates, in its close, not only the date of the first decision (normally reached the day of the public hearing), but also that of the new deliberation and decision.

As a rule, points of law are much more discussed in judgments than points of fact.

The Council of State tends to follow strictly its own precedents (which are not technically binding for itself or for the lower Courts). So do the TARs, also in respect to their own precedents. In this case, of course, any discordance can lead to an appeal.

Public Administrations follow the jurisprudence and, the case being, extend it to individuals who have not gone to law and are no longer in time to do so.

5. The problem of a second language presents itself only in the Province of Bolzano, where German-speaking citizens are actually in a majority.

Counsel for these subjects can use German in front of the local TAR, although not in the appeal to the Council of State.

6. The clerk of Court sends by post to counsel notice of the issuing of judgements.

On the other hand, the winning parties can notify them to the loosing ones. After which there could be no defence of ignorance.

The period of time during which parties can appeal is abbreviated by notification of the judgment.

The Courts take no steps to give publicity to judgments; and the media pick up, naturally, judgments of greater financial importance, or of a special kind.

In the Law-suits concerning political elections, the concluding part of the judgment is announced by the presiding judge in open Court, immediately after deliberation, which takes place, in its turn, immediately after the hearing.

No other forms of publicity of judgments are provided by Statutes.