

Case C-41/23**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

26 January 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

26 January 2023

Applicants and appellants:

AV

BT

CV

DW

Defendant and respondent:

Ministero della Giustizia (Italy)

Subject matter of the main proceedings

Recognition for the applicants, who are *magistrati onorari* (lay judicial officers), (i) of the right to an employment relationship of indefinite duration with the public authorities, in particular with the Ministero della Giustizia (Italian Ministry of Justice), under the same financial and legal terms as *magistrati di ruolo* (tenured judicial officers), by means of permanent inclusion in the lists of the professional judiciary in accordance with their respective length of service; (ii) of the right to the payment of remuneration by way of a daily wage proportional to that payable to tenured judicial officers, from the date on which each applicant's employment relationship as a lay judicial officer was first established until the conversion of that relationship into a full-time and indefinite relationship; (iii) of the right to the same welfare and social security treatment as tenured judicial officers, with

reconstruction of the career and with all the economic and regulatory benefits based on length of service for the period prior to entry into the permanent position; (iv) in the alternative, of compensation for damages for abuse of statutory extensions of the employment relationship.

Subject matter and legal basis of the request

Interpretation of Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43);

Interpretation of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9);

Questions referred for a preliminary ruling

1) Should Article 7 of Directive 2003/88 and Clause 4 of the framework agreement on fixed-term work be interpreted as precluding national legislation which does not provide, in respect of *giudici onorari di Tribunale* (lay district court judges) and *vice procuratori onorari della Repubblica* (lay deputy public prosecutors), any entitlement to remuneration during the non-working holiday period, or to compulsory social security and insurance protection against workplace accidents and illnesses?

2) Should Clause 5 of the framework agreement on fixed-term work be interpreted as precluding national legislation under which the fixed-term employment relationship of *giudici onorari* (lay judges) – which can be classified as a service relationship and not as an employment relationship with a public authority, and which is based on an initial appointment and a single subsequent reappointment – may be extended several times by means of laws at State level, in the absence of effective and dissuasive penalties and without the possibility of transforming those relationships into employment contracts of indefinite duration with a public authority, in a factual situation which could have produced compensatory favourable legal effects for the individuals concerned, as their appointments have been extended in an essentially automatic manner for a further period of time?

Provisions of European Union law relied on

Article 7 of Directive 2003/88;

Clauses 4 and 5 of the framework agreement annexed to Directive 1999/70.

Provisions of national law relied on

Costituzione (the Italian Constitution), Articles 102 and 106;

Regio Decreto 30 gennaio 1941, n. 12, Ordinamento giudiziario (Royal Decree No 12 of 30 January 1941 on the judiciary);

Decreto del Presidente della Repubblica 9 maggio 1994, n. 487, recante norme sull'accesso agli impieghi nelle pubbliche amministrazioni e le modalità di svolgimento dei concorsi, dei concorsi unici e delle altre forme di assunzioni nei pubblici impieghi (Presidential Decree No 487 of 9 May 1994 laying down rules on access to employment in public authorities and the procedures for holding competitive examinations, single competitive examinations and other forms of recruitment in public employment);

Decreto legislativo 28 luglio 1989, n. 273, Norme di attuazione, di coordinamento e transitorie del decreto del Presidente della Repubblica 22 settembre 1988, n. 449, recante norme per l'adeguamento dell'ordinamento giudiziario al nuovo processo penale ed a quello a carico degli imputati minorenni (Legislative Decree No 273 of 28 July 1989 - Implementing, coordinating and transitional rules of Presidential Decree No 449 of 22 September 1988 on rules for the adaptation of the judicial system to new criminal proceedings and to criminal proceedings against juvenile defendants);

Decreto legislativo 30 marzo 2001, n. 165, Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche (Legislative Decree No 165 of 30 March 2001 on general rules on the organisation of employment in public authorities).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The four applicants have been holding positions as lay judicial officers (lay judges in the district courts or lay deputy prosecutors with the Public Prosecutor's Office) for several years. These appointments were first granted, for a fixed term, by resolution of the Consiglio superiore della magistratura (Supreme Council of the Judiciary, Italy) and by ministerial order of the Minister for Justice, and then repeatedly extended every three years. At the time the action was brought at first instance, the applicants' careers amounted, respectively, to 21 years and two months, 17 years and six months, 18 years, and 17 years and four months. All the applicants are still in service.
- 2 According to the applicants, the repeated extensions of their fixed-term employment relationship are contrary to several provisions of EU law, in particular Clauses 4 and 5 of the framework agreement annexed to Directive 1999/70 and Article 7 of Directive 2003/88.

- 3 On 23 March 2016, with the aim of obtaining recognition of their right to an employment relationship of indefinite duration with the public authorities, with all that that entails in terms of remuneration and welfare and social security entitlements, the applicants lodged an action before the Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court; ‘the TAR Lazio’). In the alternative, the applicants requested compensation for the damage resulting from the abuse of extensions of the employment relationship.
- 4 In a judgment of 1 September 2021, the TAR Lazio dismissed that action.
- 5 That judgment was appealed by the applicants before the Consiglio di Stato (Council of State, Italy), the referring court. Among their grounds of appeal, the applicants allege that the TAR Lazio committed an error of law in finding that questions of interpretation of EU law were irrelevant.
- 6 In the context of the main proceedings, AV and BT submitted to the file a complaint they had submitted to the European Commission in 2015, registered under number 7779/15/EMPL, in which they asked it to verify the compatibility with European law of the legal and economic situation of lay judicial officers. According to the reply those applicants received from the Commission, ‘the national legislation and practice concerning lay judicial officers raises a question of compatibility with Clauses 4 and 5 of the framework agreement annexed to Directive [1999/70] and with the right to paid annual leave laid down in Article 7 of Directive [2003/88]’.

The essential arguments of the parties in the main proceedings

- 7 The applicants claim that their financial and legal treatment should be equal to that of ordinary professional judicial officers. They also seek the stabilisation of their employment relationship, as they feel they have suffered the detrimental effects of the unlawful and repeated extension of their appointment orders.
- 8 According to the Ministry of Justice (the defendant), the legal and economic position of professional judicial officers cannot be automatically extended to their lay counterparts, since the former exclusively perform judicial functions, while the latter do so only concurrently with another profession. Moreover, the role of lay judge is unavoidably temporary in nature, is carried out in such a way as to ensure compatibility with the pursuit of various work or professional activities, and does not entail a public employment relationship.
- 9 This interpretation is also consistently followed by the case-law of the Suprema Corte di Cassazione (Supreme Court of Cassation, Italy).

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 The referring court first sets out the relevant Italian legislation.

- 11 Article 106 of the Italian Constitution, after enshrining the principle that ‘judicial officers shall be appointed by means of competitive examination’, provides that ‘the law governing the judicial system may admit the appointment, including by means of election, of lay judicial officers for the performance of all functions carried out by individual judges’.
- 12 In that regard, Royal Decree No 12 of 30 January 1941 on the judiciary, in the version applicable to the facts of the case, contained certain provisions regulating the appointment of lay judicial officers – who, unlike ordinary judicial officers, are not selected by means of a public competitive examination – and regulating the performance of their duties and their legal and financial treatment.
- 13 In particular, Article 42 ter of that royal decree provided that ‘lay district court judges shall be appointed by order of the Minister for Justice, in accordance with a resolution of the Supreme Council of the Judiciary’.
- 14 In addition, Article 42 quater of the same royal decree provided that ‘lawyers and interns admitted to providing legal representation may not practice the legal profession before courts in the district in which they sit as lay judge and may not represent or defend parties at subsequent stages of proceedings before those courts’.
- 15 Under Article 42 quinquies of the same royal decree, ‘lay district court judges shall be appointed for a term of three years. Upon expiry of that term, the office holder may be reappointed only once’.
- 16 Lastly, Article 42 septies of the Royal Decree provided that ‘... lay judges shall be entitled only to the allowances and other rights expressly conferred by law with specific reference to the lay service relationship’.
- 17 As regards, on the other hand, lay deputy public prosecutors, Article 71 of the aforementioned royal decree provided that those prosecutors ‘shall be appointed in the manner provided for the appointment of lay district court judges’.
- 18 The legislation in force also provides, in summary, as regards jurisdiction, that lay judicial officers may only be entrusted with civil or criminal cases of minor importance and, as regards remuneration, that this be in the form of a daily allowance, also based on the number of hearings held or hours worked.
- 19 The referring court then referred to the judgments of the Court of Justice of 16 July 2020, *UX*, C-658/18 (EU:C:2020:572), concerning the legal and economic status of Italian *giudici di pace* (magistrates), and of 7 April 2022, *PG*, C-236/20 (EU:C:2022:263), concerning the liability of the Italian State for its failure to grant paid leave to magistrates.
- 20 The referring court considers that those judgments are also applicable in the main proceedings, having regard to the common lay nature of the services performed by magistrates, lay district court judges and lay deputy public prosecutors.

- 21 It noted, however, that under domestic law, according to the settled case-law of both the Corte Costituzionale (Constitutional Court, Italy) and the Supreme Court of Cassation, the legal and economic position of professional judicial officers cannot be automatically extended to lay judicial officers, since the former exclusively exercise judicial functions, while the latter do so only concurrently with other activities.
- 22 Moreover, unlike professional judicial officers, the function of lay judicial officer is temporary in nature, is carried out in such a way as to ensure compatibility with the pursuit of different work or professional activities and does not entail a public employment relationship.
- 23 Indeed, in addition to the different recruitment methods and the non-exclusive and non-continuous nature of the judicial activity carried out, the difference in treatment is based on the temporary duration of the service relationship, the various limitations provided for by law as regards the type of disputes and the level of complexity of the cases dealt with and, lastly, the different remuneration regime (being one based on allowances rather than salary) that it entails.
- 24 Such difference in treatment is therefore not discriminatory, but justified by autonomous and objective considerations.
- 25 Indeed, domestic law distinguishes between an employment relationship and a service relationship: the former refers to the establishment of an employment relationship with the public administration (whether of indefinite duration, fixed-term or part-time), while the latter refers to the conferral of a function, on the basis of a provision of law or by an act of the public administration, without this necessarily entailing the establishment of an employment relationship.
- 26 So, while civil servants, including professional judicial officers, establish both those legal relationships with the public administration, lay judicial officers only establish a service relationship with it.
- 27 This is also reflected in the wording of Article 4 of the royal decree, emphasised by the referring court, according to which professional judicial officers ‘constitute’ the judicial order, whereas lay judges ‘belong’ to it.
- 28 The use of such different terminology is neither insignificant nor random, but expresses on a substantive level, even before the legal one, the reasons why these are different categories of individual with different legal and economic statuses which are not comparable.
- 29 Professional judges are necessarily attached to the ordinary courts, whereas lay judges can be attached to those courts only when professional judges are prevented from attending or are absent.
- 30 The fact that lay judges have duties similar to those of professional judges is only a consequence of the function performed, as judicial activity must always be

characterised by the same guarantees, regardless of the status of the judge exercising that activity.

- 31 It is therefore a question of a merely functional extension of duties that serve to ensure respect for the principles of impartiality and independence which characterise the exercise of any judicial function.
- 32 The Constitutional Court, in judgment No 267/2020 of 9 December 2020, referring to the function actually performed by *giudici onorari di pace* (lay magistrates), recognised their right to benefit from the reimbursement of any legal expenses incurred, on the grounds that this benefit ‘does not relate to the employment relationship [...] but to the service relationship’ and that ‘in view of the fact that the judging function is identical, and in view of its primary importance in the constitutional framework, it is unreasonable that the reimbursement of legal expenses should be a benefit recognised by law only for *giudici togati* (professional judges) and not also for magistrates, where for both there is, with equal significance, the need to ensure a serene and impartial activity, not conditioned by the financial risks connected with possible even if unfounded liability lawsuits’.
- 33 The referring court deduces from the foregoing that the different legal and economic treatment of lay judges compared with ordinary professional judges (i) responds to objective and transparent requirements and is justified by precise and concrete factors distinguishing between the conditions of service of the two categories of individual; (ii) meets a real need, considering the nature, quality and quantity, including in terms of hours, of the participation in the judicial function, the specific tasks for which the judges assume responsibility and the different level of qualifications required for the performance of those tasks; (iii) is suitable for achieving the legitimate social-policy objective of the Member State, in a proportionate manner and to the extent strictly necessary; (iv) is not intended to impose detrimental or discriminatory conditions of employment.
- 34 It therefore considers that, due to lack of relevance, the conditions are not met for referring to the Court for a preliminary ruling the first two of the applicants’ claims (the right to an employment relationship of indefinite duration and the right to payment of remuneration on the basis of a daily wage commensurate with that payable to a professional judicial officer).
- 35 It doubts, however, the compatibility with EU law of the national legislation on conditions of employment, in so far as it totally excluded lay judges from any entitlement to paid leave and from any form of welfare and social security protection (the first question referred for a preliminary ruling).
- 36 In that regard, it refers, on the one hand, to the case-law of the Court of Justice recalled above in paragraph 17, and, on the other, to the fact that the provisions at issue in the main proceedings were repealed by Legislative Decree No 116 of 13 July 2017, *Riforma organica della magistratura onoraria e altre disposizioni sui*

giudici di pace, nonché disciplina transitoria relativa ai magistrati onorari in servizio (Comprehensive reform of the system of lay judicial officers and other provisions on magistrates, as well as transitional rules on serving lay judicial officers), pursuant to legge 28 aprile 2016, n. 57 (Law No 57 of 28 April 2016).

- 37 That legislative decree has afforded lay judicial officers social security and welfare protection, providing for both the right to remuneration during the non-working holiday period and compulsory social security and insurance protection against workplace accidents and illnesses. In the referring court's view, this may have provided a valid remedy, applicable thenceforth, to what is in fact an unjustified, excessive and disproportionate critical element of the rules still applicable, *ratione temporis*, to the main proceedings.
- 38 Moreover, according to the same court, the provisions of Legislative Decree No 116 could be applied by analogy in the main proceedings.
- 39 Lastly, the referring court doubts the compatibility with EU law of the national rules relating to the number of successive renewals, in a situation in which (i) the employment relationship that lay judges establish with the judicial authority is a fixed-term relationship that can be classified as a service relationship, not as a public employment relationship, and which is based on an initial appointment and a single subsequent reappointment, and (ii) no deterrent preventive measures or effective sanctions are provided for against the public authorities and, indeed, the possibility of transforming the employment relationship into a public employment relationship of an indefinite duration is excluded (the second question referred).
- 40 In particular, this doubt also relates to the reasons put forward by the State legislator in support of the repeated reappointments, which are centred on the need to await a comprehensive reform of the lay judiciary and to ensure the continuity of the administration of justice pending that reform. The referring court questions whether those reasons can be characterised as objective and transparent, and as coming within the discretion of the social policy objectives of the Member States which may justify the use of the extension instrument.
- 41 Lastly, the referring court emphasises that the factual situation that may be created for lay judicial officers as a result of the application of the legislation currently in force may also have produced compensatory favourable effects as regards their legal position, inasmuch as their appointments were extended in time in an essentially automatic manner.