EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

24 September 2021

Case Document No. 7

***Associazione Professionale e Sindacale* (ANIEF) v. Italy**
Complaint No. 159/2018

GOVERNMENT RESPONSE TO THE THIRD INTERVENTION

Registered at the Secretariat on 30 July 2021

Ufficio dell'Agente del Governo davanti alla Corte europea dei diritti dell'uomo

AVVOCATURA GENERALE DELLO STATO

European Committee of Social Rights (ECSR)

Collective complaint n. 159/2018

ASSOCIAZIONE PROFESSIONALE E SINDACALE - ANIEF

vs ITALY

Replies of the Italian Government

Ct 25013/21

Proc. Lipari – Proc. Berti Suman

1. With the present notes, referring to all that has been explained in the submissions on the merits of September 8, 2018, the Italian Government aims to support the position of the interveners, stating the following.

2. The subject of the action brought by ANIEF is not a provision of the last decree of the update, triennial or annual, of the *"graduatorie ad esaurimento"* (hereinafter, GAE). The complaint is about the failure to provide for a rule recognizing the right of the complainants, as members of a specific category with distinctive characteristics, to be included *ex novo* in the above-mentioned lists, in derogation of the prohibition contained in the establishing regulation, art. 1, paragraph 605, letter c) of the law no. 296/06.

3. In fact, the "failure to provide for" an extension of the number of users requested by the appellants is exclusively attributable to the authorization regulations (Law no. 296/06 and subsequent amendments and Ministerial Decree no. 27/07) and any sub-primary regulatory sources expressly authorized by the legislator.

4. In their replies, ANIEF recalls the reference to the Plenary Session of Council of State (*Consiglio di Stato*) in Ordinance no. 6885/18. It should be noted that Ordinance no. 1/2018 (published on 13/12/2018) did not deem sufficient elements to depart from the principles of law enunciated by Plenary Session (*Adunanza Plenaria*) of the Council of State in sentence no. 11 of 2017, denying the interdict protection requested.

5. As pointed out by the interveners, the principles of the Plenary Session of the Council of State no. 11/2017 were reaffirmed by the Plenary Session of the Council of State no. 4 and 5 of 2019. Those decisions validated the unfoundedness of the interpretation based on the full and exclusive sufficiency of the absolute enabling value of the qualifying value, absolute, of the teacher's diploma, achieved within the a.s. 2001/2002 for the purpose of inclusion *pleno jure* in the GAE.

6. Correctly the interveners affirm that, according to the sentences of the Plenary Session of the Council of State no. 11/2017 and nos. 4 and 5 of 2019, magistral graduates before the school year 2001/2002 have no "*sufficient qualification for inclusion in the exhaustive lists of teaching and educational staff*". Therefore, the adversary claim is completely unfounded.

7. As also pointed out by the interveners, after the intervention of the Plenary Session of the Council of State, it is clear that the teacher's diploma obtained in 2001/2002 is not to be considered suitable for teaching and that therefore the claimants do not have any suitable qualification to be included in the GAE. Therefore, the legal prerequisite (validity of the qualification) allowing the applicants to be included in the ranking was lacking. As stated in the aforementioned sentences of the Council of State, in plenary session, the Administration is not authorized to recognize the inclusion of the claimants in the GAE.

8. This principle has been constantly reaffirmed by subsequent compliant administrative and ordinary jurisprudence, also recalled by the interveners. In particular, recently, these statements have been validated, in addition to the case law of the Council of State, also by the Court of Cassation (*Corte di Cassazione)*, with sentence no. 3830 of February 15, 2021 and the Advice *(Parere*) of the First Section of the Council of State (regarding extraordinary appeal to the President of the Republic[1]), no. 87, 88 and 89 of January 25, 2021. Lastly, these principles were reiterated by the sentence of Court of Cassation no. 12347 of May 10, 2021, which recalled the sentences of the Plenary Session of the Council of State no. 11/2017, no. 4/2019 and no. 5/2019, according to which "*the possession of only the teacher's diploma, although achieved within the school year 2001/2002 does not constitute*

[1] In the Italian legal system, the extraordinary appeal to the President of the Republic is a general legal remedy that allows to challenge an administrative act that has the character of finality, disciplined by the Decree of the President of the Republic 24 November 1971, n. 1199. It has an alternative nature to judicial appeals. The decision is issued in the form of a d.P.R. by the President of the Republic on the proposal of the Ministry and following the binding Advice ("parere") of the Council of State.

sufficient qualification for inclusion in the ranking of teachers and educational staff established by art. 1, paragraph 605, letter c) of Law no. 296/2006"[2].

9. It is useful to review the conclusions that are nowadays peacefully shared by the jurisprudence on this matter, referred to by the claimants (on this point, see the Advice (*Parere*) of the Council of State no. 2049 of December 17, 2020):

- in accordance with the provisions of the well-known pronouncements of the Plenary Session of the Council of State (no.11/2017 and subsequent nos. 4-5/2019), "*the possession of only the teaching diploma, although achieved by the school year 2001/2002, does not constitute sufficient qualification for inclusion in the rankings until exhaustion"*[3] since, *"contrary to what is claimed by the appellants, there is no provision that recognizes the teacher's diploma obtained within the school year 2001/2002 as a legitimate qualification for inclusion in the in the exhaustive lists*"[4];
- for this purpose, it is not possible to invoke the provisions of Presidential Decree no. 25 March 2014 (which has implemented the Advice of the Council of State, no. 3818/13), "*since it recognizes only the qualifying value of the title for the purpose of inclusion in the second tier of school rankings, and not also for the purpose of the school and not also for the purpose of inclusion in the GAE*" [5]. And this, since "*in that Advice has not been recognized the possibility of access to the teachers in question in the rankings until exhaustion for the preclusion of existing legislation in this regard, or for not having been represented in time the possibility of including them in the permanent lists, with the consequent lateness of the appeal in this regard. Similarly, the claimed qualification value ... cannot be derived*

[2] Unofficial translation of: "*il possesso del solo diploma magistrale, sebbene conseguito entro l'anno scolastico 2001/2002 non costituisce titolo sufficiente per l'inserimento nelle graduatorie ad esaurimento del personale docente ed educativo istituite dall'art. 1, comma 605, lett. c) della legge n. 296/2006*".

[3] Unofficial translation of*: "il possesso del solo diploma magistrale, sebbene conseguito entro l'anno scolastico 2001/2002, non costituisce titolo sufficiente per l'inserimento nelle graduatorie ad esaurimento"*

[4] Unofficial translation of*:"diversamente da quanto sostenuto dagli appellanti, manca una norma che riconosca il diploma magistrale conseguito entro l'anno scolastico 2001/2002 come titolo legittimante l'inserimento nelle graduatorie ad esaurimento".*

[5] Unofficial translation of*:"in quanto in esso si riconosce esclusivamente il valore abilitante del titolo ai fini dell'inserimento nella II fascia delle graduatorie di istituto e non anche ai fini dell'inserimento nelle GAE".*

either from the provision contained in art. 15, paragraph 7, of Presidential Decree no. 323 of July 23, 1998"[6]*;*

- in accordance with the regulations contained in the combined provisions of D.I. March 10, 1997 and article 15, paragraph 7, of the d.P.R. July 23, 1998, no. 323, the "*legal value retained permanently, therefore, is limited to the possibility of participating in qualification sessions or competitions.[...] The interpretation to be given to the expression (contained in the cited article 15, paragraph 7, d.P.R. no. 323 of 1998) "the titles achieved in the State examination at the end of the courses of study of the teacher training institute started in in the school year 1997/1998 retain permanently the current legal value and qualification for teaching in the elementary school" must be done, even in this case, taking into account the specification contained in the immediately following period (contained in the same paragraph 7 of art. 15), in the sense that the teaching diplomas achieved within the school year 2001/2002 retain their legal value of qualification and allow (without the need to also obtain a bachelor's degree) to participate in the qualification to teach pursuant to art. 9, paragraph 2, of Law no. 444/1968, as well as ordinary competitions for titles and exams for teaching posts in kindergartens and elementary schools. This implies that the legal value of the teaching diploma can be recognized only within the limits envisaged by the transitional regulations in question, that is, in an "instrumental" way, in the sense, as explained above, of allowing those who have obtained it by the 2001/2002 school year to participate in the qualification sessions and competitions, even if they do not have the diploma degree in the meantime established"*[7]*;*

[6] Unofficial translation of*: "nel detto parere non è stata riconosciuta la possibilità di accesso dei docenti in questione nelle graduatorie ad esaurimento per la preclusione normativa sussistente al riguardo, ovvero per non essere stata rappresentata in tempo utile la possibilità di inserimento degli stessi nelle graduatorie permanenti, con conseguente tardività dell'impugnativa sotto tale profilo. Ugualmente, l'invocato valore abilitante …non può ricavarsi nemmeno dalla previsione contenuta nell'art. 15, comma 7, del d.P.R. 23 luglio 1998, n. 323".*

[7] Unofficial translation of: *"il valore legale conservato in via permanente, quindi, si esaurisce nella possibilità di partecipare alle sessioni di abilitazioni o ai concorsi. [...] L'interpretazione da dare all'espressione (contenuta nel citato articolo 15, comma 7, d.P.R. n. 323 del 1998) "i titoli conseguiti nell'esame di Stato a conclusione dei corsi di studi dell'istituto magistrale iniziati nell'a.s.1997/1998 conservano in via permanente l'attuale valore legale e abilitante all'insegnamento nella scuola elementare" deve avvenire, anche in questo caso, tenendo conto della specificazione contenuta nel periodo immediatamente successivo (contenuto nello stesso comma 7 dell'art. 15), nel senso che i diplomi magistrali conseguiti entro l'anno scolastico 2001/2002 conservano il proprio valore legale di titolo di*

- ultimately, "*the qualification for teaching in nursery and elementary schools, ex articles 194 and 197 of Legislative Decree 297/94 and Presidential Decree 323/1998, has never constituted sufficient qualification for inclusion in the permanent rankings established by art. 401 of Legislative Decree 297/94, being instead provided for that purpose the procedures of a competitive nature (regional competitions for titles and examinations) with respect to which the diploma constituted a requisite for participation (pursuant to art. 402 of Legislative Decree 297/94). This applies also to procedures reserved for staff with a teacher's diploma and certain service requirements, established pursuant to art. 402 of Legislative Decree no. 297/94. This also applies to the procedures reserved for personnel with a teaching diploma and certain service requirements, instituted under art. 2, paragraph 4, Law 124/1999 (Ministerial Order 153/99) and under art. 2, c. 1, lett. C-bis d.l. 97/94 (Ministerial Orders 25 and 80 of 2005) which required, for the purposes of issuing the qualification, the passing of a selective competitive examination"*[8]. The above conclusions are supported by arguments of a systematic and teleological nature, not being able to be denied the regulatory data in which, *"since their original configuration, the permanent rankings (then transformed into rankings to exhaustion) were reserved for teachers who boasted a qualification further than the academic degree: the passing a competition for qualifications and examinations or passing a reserved session of examinations for those who had served for at least 360 days from the school year 1994-1995; also observing that*

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studio e consentono (senza necessità di conseguire anche il diploma di laurea) di partecipare all'abilitazione all'insegnamento ex art. 9, comma 2, della legge n. 444/1968, nonché ai concorsi ordinari per titoli ed esami a posti di insegnante nella scuola materna e nella scuola elementare…Ciò implica che il valore legale del diploma magistrale può essere riconosciuto solo nei limiti previsti dalla disciplina transitoria in esame, ossia in via "strumentale", nel senso, come si è chiarito, di consentire a coloro che lo hanno conseguito entro l'a.s. 2001/2002 di partecipare alle sessioni di abilitazioni e ai concorsi pur se privi del diploma di laurea nel frattempo istituito".

[8] Unofficial translation of: "*l'abilitazione all'insegnamento nella scuola materna ed elementare, ex artt. 194 e 197 del D.lgs. 297/94 e d.P.R. 323/1998, non ha mai costituito titolo sufficiente per l'inserimento nelle graduatorie permanenti istituite dall'art. 401 D.Lgs. 297/94, essendo invece previsto a tale fine il superamento di procedure di natura concorsuale (concorsi regionali per titoli ed esami) rispetto alle quali il diploma magistrale costituiva requisito di partecipazione (ai sensi dell'art. 402 D.lgs. 297/94). Ciò vale anche per le procedure riservate al personale in possesso di diploma magistrale e di determinati requisiti di servizio, istituite ai sensi dell'art. 2, comma 4, l. 124/1999 (O.M. 153/99) ed ai sensi dell'art. 2, c. 1, lett. c-bis d.l. 97/94 (O.M. 25 e 80 del 2005) che richiedevano, ai fini del rilascio del titolo, il superamento di una prova selettiva di tipo concorsuale*".

the regulatory interventions that have taken place over time, while broadening the range of subjects entitled to enrolment, have, however, always referred to categories of teachers with an additional qualification respect to the degree"[9];

- therefore, "*the reservation clause contained in art. 1, paragraph 605, law 296/2006 must be understood as referring only to those qualifications that, according to current legislation, constituted requirements for access to the rankings, being aimed at preserving the expectations of those who had, relying on the previous system, had already faced a course of studies to obtain the qualification necessary for inclusion in the GAE. It is no coincidence, in fact, that the reserve clause also referred to those who, at the date of entry into force of the law, were attending qualifying courses that, according to previous legislation, allowed access to the lists. Finally, from a teleological point of view, it is affirmed that the need for a qualifying qualification, in addition to the mere possession of a qualification further than the mere possession of the qualification is justified by the consideration that the inclusion in the ranking list is intended to allow for mere sliding the stable entry into the role and this entry, therefore, cannot disregard a serious recognition of experience or training followed after graduation*"[10];
- similarly, neither can the provisions of the subsequent article 1-quinquies of Decree Law No. 87 of 2018, which has not at all "*recognized enabling value ex se to the diploma magistral; as this rule on the contrary reaffirmed the need to*

[9] Unofficial translation of: *"fin dalla loro originaria configurazione, le graduatorie permanenti (poi trasformate in graduatorie ad esaurimento) sono state riservate a docenti che vantassero un titolo abilitante ulteriore rispetto al titolo di studio: il superamento di un concorso per titoli ed esami oppure il superamento di una sessione riservata di esami per coloro che avessero prestato servizio per almeno 360 giorni a decorrere dall'a.s. 1994-1995; osservandosi, pure, che gli interventi normativi succedutisi nel tempo, pur ampliando la platea di soggetti legittimati ad iscriversi, hanno, comunque, sempre fatto riferimento a categorie di docenti muniti di un titolo abilitante ulteriore rispetto al titolo di studio".*

[10] Unofficial translation of: *"la clausola di riserva contenuta nell'art. 1, comma 605, l. 296/2006 deve intendersi riferita solo a quei titoli abilitanti che, secondo la normativa vigente, costituivano requisiti di accesso alle graduatorie, essendo volta a preservare le aspettative di coloro i quali avessero, confidando nel sistema pregresso, già affrontato un percorso di studi per munirsi del titolo necessario all'inserimento in GAE. Non a caso, infatti, la clausola di riserva si riferiva anche a coloro che, alla data di entrata in vigore della legge, frequentavano i corsi abilitanti che secondo la normativa previgente consentivano l'accesso alle graduatorie. Sotto il profilo teleologico, infine, viene affermato che la necessità di un titolo abilitante ulteriore rispetto al mero possesso del titolo di studio trova giustificazione nella considerazione che l'inserimento in graduatoria è destinato a consentire per mero scorrimento lo stabile ingresso nel ruolo docente e tale ingresso, dunque, non può prescindere da una seria ricognizione dell'esperienza maturata o del percorso formativo seguito dopo il diploma".*

pass a competition to access the teaching posts, it is in line with the principle of law set out in judgment no. 11 of 2017, thus confirming its correctness"[11].

10. In essence, the complainants support the considerations made by the case law above cited. According to the Council of State, in a context that now provides as a requirement necessary possession of the degree (with the concrete activation of the degree courses in science of primary education), the teaching diploma, if achieved within the scholar year 2001/2002, remains title suitable to allow participation in the sessions of qualification for teaching or competitions for titles and titles and examination for teaching positions, but in itself does not allow immediate access to the roles. The legal value retained permanently, therefore, is exhausted in the possibility of participating in the sessions of or competitions

11. The legal value retained permanently, therefore, consists only in the chance of participating in the sessions of qualifications or in the competitions.

12. The GAE, even when they were GP (i.e. open to new insertions and not closed because destined to be exhausted), have never contemplated members with only the title today deducted. In fact, they are not able to allow teaching in a stable form or rather to ensure access to that specific channel of recruitment on the role, on a permanent basis, subject to passing the competitive examination (the "magistral competition"). In other words, the successful placement on the competition ranking list, in any event, made it possible to aspire to be called by sliding scale.

After the establishment of the recruitment under art. 402 of Legislative Decree no. 297/94, it was possible to enter the lists mentioned above, but only and exclusively because of the "competitive suitability", which *ipso facto* led to the possession of the teaching qualification.

[11] Unofficial translation of: *"riconosciuto valore abilitante ex se al diploma magistrale; avendo detta norma al contrario ribadito la necessità di superare un concorso per accedere ai posti di insegnamento, essa si inserisce nel solco del principio di diritto enunciato con la sentenza n. 11 del 2017, così confermandone la correttezza"*.

13. For the sake of completeness, it should be pointed out that the legal framework outlined above was consistent with the provisions of the "*Regulations containing norms on the modalities of integration and updating of the permanent ranking*" ("Regolamento recante norme sulle modalità di integrazione e aggiornamento delle graduatorie permanenti") pursuant to Ministerial Decree no. 123 of March 27, 2000.

14. That Decree, on the one hand, in article 2 regulated the *"First integration of the permanent classifications*" ("Prima integrazione delle graduatorie permanenti"), making express reference to "*those who had passed the tests of the reserved session of examinations"*[12].

On the other hand, the Decree confirmed that only those who had passed the competitions based on examinations and qualifications were entitled to subsequent insertions. In fact, article 4 of the aforementioned Regulation provides: "*The integrations of the permanent rankings subsequent to the first one are made periodically with the insertion of personnel who have passed the tests of the last competition for titles and exams for the same class. titles and examinations for the same class of competition or the same post*"[13].

15. Secondly, the complainants cannot invoke a condition of precariousness consolidated over the years for the purposes of the requested final stabilization of the effects of the insertion with reserve. The claimants have never been included in the GAE, nor have they complained about the lack of identification as subjects entitled to insertion (i.e. passage from the Permanent/GP lists) in the GAE at a time when it would have been timely. There was clearly no "manifestation of interest" in the attainment of the benefit then pursued from the years following the issuance of Ministerial Decree no. 235/14.

16. As also pointed out by the interveners, there is not, then, a disparity in treatment with teachers in the same condition, surreptitiously benefiting from the

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[12] Unofficial translation of: "*coloro che avessero superato le prove della sessione riservata di esami".*

[13] Unofficial translation of: "*Le integrazioni delle graduatorie permanenti successive alla prima sono effettuate periodicamente con l'inserimento del personale che ha superato le prove dell'ultimo concorso per titoli ed esami per la medesima classe di concorso o il medesimo posto".*

previous favourable jurisprudential guideline. First of all, the previous case law was not consolidated at all. The erroneous principles of law set out in a few previous sentences of the Council State were reversed in the aforementioned Plenary Session, based on objective reasons.

17. Furthermore, there is not, as a consequence, any precarious condition, given that the first work assignments have followed the inclusion in GAE by judicial order.

18. On this point, it must be recalled what was already provided for by article 2, paragraph 1, decree-law no. 357 of November 6, 1989, containing norms regarding the recruitment of school personnel (converted, with amendments, by law no. 417 of December 27, 1989): "*access to the to the teaching staff of nursery, primary and secondary schools, art schools and art institutes shall take place by means of examinations and by a competition for qualifications only; each type of competition is allocated annually. Each type of competition is allocated annually 50 per cent of the posts allocated to the competition procedures*"[14]; article 1, paragraph 10, established, in fact, that "*for admission to competitions on the basis of qualifications only, the following are required: a) passing the tests of a previous competition for qualifications and examinations or previous examinations also for qualification purposes only, in relation to the same class of competition or the same position; b) a teaching service in state institutes and schools of all levels, including Italian educational institutions abroad, for teaching corresponding to tenured positions, carried out on the basis of the qualification required for access to the roles, as well as teaching related to classes of competition. The service must have been provided for at least three hundred and sixty days, even if not continuous, in the previous three-year period, considering cumulative, on the one hand, the services in kindergarten and elementary school and, on the other hand, the services provided in schools and institutes of secondary education*"[15]. Both

[14] Unofficial translation of: "*l'accesso ai ruoli del personale docente della scuola materna, elementare e secondaria, dei licei artistici e degli istituti d'arte ha luogo mediante concorso per titoli ed esami e mediante concorso per soli titoli; a ciascun tipo di concorso è assegnato annualmente il 50 per cento dei posti destinati alle procedure concorsuali*".

[15] Unofficial translation of: "*per l'ammissione ai concorsi per soli titoli sono richiesti: a) il superamento delle prove di un precedente concorso per titoli ed esami o di precedenti esami anche ai soli fini abilitativi,*

regulations then merged into the legislative decree of April 16, 1994, n. 297, concerning "Consolidated text of the laws in force on education relating to schools of all levels" (*Testo unico delle disposizioni legislative vigenti in materia di istruzione relative alle scuole di ogni ordine e grado*), respectively in article 399 and article 401; article 400 regulated recruitment through competitions for titles and exams.

19. With Law no. 124 of May 3, 1999, regarding "Urgent provisions regarding school personnel" ("*Disposizioni urgenti in materia di personale scolastico"*), article 401 of Legislative Decree no. 297 of April 16, 1994 was amended by article 1, paragraph 6, establishing the replacement of the previous rankings of the "*Competition for titles*" with the newly established "*Permanent rankings*" (*Graduatorie permanenti)*.

20. Pursuant to the new Article 401, paragraph 1, "*The lists relating to competitions for qualifications only teaching staff of nursery, primary and secondary schools, including high schools of art and art institutes, are transformed into permanent lists, to be used for the recruitment in role of which Article 399, paragraph 1"*[16]. Updates and additions are regulated, therefore, by the subsequent paragraph 2, which expressly provides that: *"The permanent lists referred to in paragraph 1 are periodically integrated with the inclusion of teachers who have passed the tests of the last competition regional competition for titles and examinations, for the same class of competition and the same place, and teachers who have requested a transfer from the corresponding permanent list of another province. Simultaneously to the insertion of the new aspirants is carried out the*

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in relazione alla medesima classe di concorso od al medesimo posto; b) un servizio di insegnamento negli istituti e scuole statali di ogni ordine e grado, ivi comprese le istituzioni scolastiche italiane all'estero, per insegnamenti corrispondenti a posti di ruolo, svolti sulla base del titolo di studio richiesto per l'accesso ai ruoli, nonché per insegnamenti relativi a classi di concorso. Il servizio deve essere stato prestato per almeno trecentosessanta giorni, anche non continuativi, nel triennio precedente, considerandosi cumulabili, da una parte, i servizi prestati nella scuola materna e nella scuola elementare e, dall'altra, i servizi prestati nelle scuole e negli istituti di istruzione secondaria".:

[16] Unofficial translation of: "*Le graduatorie relative ai concorsi per soli titoli del personale docente della scuola materna, elementare e secondaria, ivi compresi i licei artistici e gli istituti d'arte, sono trasformate in graduatorie permanenti, da utilizzare per le assunzioni in ruolo di cui all'articolo 399, comma 1*".

updating of the positions of ranking of those who are already included in the permanent ranking"[17].

21. So, on the one hand, inclusion in the permanent lists was allowed for those who had passed competitions based on titles and exams. On the other hand, at the time of the first integration, it was possible for teachers - including teachers "qualified" under Articles 194 and 197 of Legislative Decree no. 297/1994 - who were emplyed for a certain period, to be included in the same lists. For that purpose, it was necessary after a selective procedure reserved for those teachers. The procedure, consisting of a course of 120 hours, as well as a written test and an oral test, was actually launched by Ministerial Order no. 153 of 15 June 1999.

22. Finally, once the operations of the first integration of the permanent lists were completed, the legislator (D.L. 255/2001, art. 2) recognized the right to be included in the above-mentioned lists only to those who had passed competitions based on titles and exams, as well as to holders of diplomas for secondary education.

23. On this point, reference is also made to the Advice no. 3813/2013 of the Council of State: "*On closer inspection, the groundlessness of the question raised in the sense of claiming the right of those who have obtained the qualification magistral within the year 2001 - 2002, can derive exclusively from the fact that the same subjects were not included in the permanent lists referred to in Article 1 of Decree Law No 97 of 7 April 2004, and were not in one of the transitional situations in order to obtain the qualification which the law itself takes into consideration for the the updating of the 'graduatorie ad esaurimento'. Therefore, if one considers unlawful their non-inclusion in the permanent lists which form the exhaustive lists, the appeal is out of time. If, on the other hand, the acquisition, in the meantime and after the entry into force of Law no. 296/2006, by persons in*

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[17] Unofficial translation of: "*Le graduatorie permanenti di cui al comma 1 sono periodicamente integrate con l'inserimento dei docenti che hanno superato le prove dell'ultimo concorso regionale per titoli ed esami, per la medesima classe di concorso e il medesimo posto, e dei docenti che hanno chiesto il trasferimento dalla corrispondente graduatoria permanente di altra provincia. Contemporaneamente all'inserimento dei nuovi aspiranti è effettuato l'aggiornamento delle posizioni di graduatoria di coloro che sono già compresi nella graduatoria permanente*"

possession of a magistral qualification of the other requirements suitable to allow them to be included in the 'graduatorie ad esaurimento' must allow the latter to be opened, the question is unfounded, given that the law does not allow for updating except in specifically determined cases"[18].

24. Therefore, as already enlightened by the Constitutional Court (judgment no. 44/2011), *"the decree with which the Minister of Education, Universities and Research and research provides for the integration and updating of these lists for the two-year school period 2011-2012 and 2012-2013, in compliance with the provisions of Article 1, paragraph 4, of the cited decree-law no. 97 of 2004, converted, with amendments, by law no. 143 of 2004, is based on the principle of the recognition of the right of each candidate to transfer from the province chosen at the time of the integration and updating for the two school years 2007-2008 and 2008-2009 to another province of his choice, with the recognition of the score and of the consequent position in the ranking*"[19].

25. The above-mentioned judgment had expressly noted that "*Article 1, paragraph 605(c) of Law 296/2006, in fact, with a view to containing public expenditure and absorbing the absorption of precarious teachers, provides for the transformation of the permanent lists into exhaustive lists and to this aim does not*

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[18] Unofficial translation of: "*A ben guardare l'infondatezza della questione sollevata, nel senso di rivendicare il diritto di quanti abbiano conseguito l'abilitazione magistrale entro l'anno 2001 – 2002, può derivare esclusivamente dal fatto che gli stessi soggetti non erano inseriti nelle graduatorie permanenti, di cui all'art. 1 d.l. 7 Aprile 2004 n. 97, e non si trovavano in una delle situazioni transitorie al fine del conseguimento del titolo abilitante, che la legge stessa prende in considerazione per l'aggiornamento delle graduatorie ad esaurimento. Pertanto, se si ritiene illegittima la loro mancata inserzione nelle graduatorie permanenti che vengono a formare le graduatorie ad esaurimento, il ricorso è tardivo; se, invece, si vuole che l'acquisizione, medio tempore e successiva all'entrata in vigore della legge n. 296/2006, da parte di soggetti in possesso di abilitazione magistrale degli altri requisiti idonei a consentirne l'inserimento nelle graduatorie ad esaurimento debba consentire l'apertura di queste ultime, la questione è infondata visto che la legge non consente l'aggiornamento se non in ipotesi specificamente determinate*".

[19] Unofficial translation of: "*il decreto con il quale il Ministro dell'istruzione, dell'università e della ricerca dispone l'integrazione e l'aggiornamento delle predette graduatorie per il biennio scolastico 2011-2012 e 2012-2013, in ottemperanza a quanto previsto dall'articolo 1, comma 4, del citato decreto legge n. 97 del 2004, convertito, con modificazioni, dalla legge n. 143 del 2004, è improntato al principio del riconoscimento del diritto di ciascun candidato al trasferimento dalla provincia prescelta in occasione dell'integrazione e dell'aggiornamento per il biennio scolastico 2007-2008 e 2008-2009 ad un'altra provincia di sua scelta, con il riconoscimento del punteggio e della conseguente posizione nella graduatoria*".

allow, as from 2007, the inclusion in them of new aspiring candidates before teachers who are already on the list are appointed"[20].

26. The Plenary Session of Council of State' aforementioned judgments clearly state that, pursuant to the legislation consisting of the combined provisions of the Decree of the President of the Republic of 10 March 1997 and the aforementioned art. 15, paragraph 7 of Presidential Decree no. 323 of 23 July 1998, "*the legal value retained permanently, therefore, is exhausted in the possibility of participating in qualifying sessions or competitions. [...] The interpretation to be given to the expression (contained in Article 15, paragraph 7, Presidential Decree No. 323 of 1998) "the qualifications obtained in the State examination at the end of the courses of study of the teacher training institute started in the school year 1997/1998 retain permanently their current legal value and qualification for teaching in primary schools" should take place, also in this case, taking into account the specification contained in the following sentence (contained in the same paragraph 7 of Article 15), in the sense that the magistral diplomas obtained by the school year 2001/2002 retain their legal value as a qualification and allow (without the need to also obtain a degree) to participate in the qualification for teaching pursuant to Art. 9, par. 2, of Law no. 444/1968, as well as ordinary competitions for titles and exams for teaching posts in nursery schools and primary schools ... This implies that the legal value of the diploma may be recognised only within the limits provided for by the transitional rules in question, that is to say, in an "instrumental" way, in the sense, as explained above, of allowing those who have obtained it by the 2001/2002 school year to take part in the qualification sessions and competitions, even if they do not have the diploma degree*"[21].

[20] Unofficial translation of: "*L'art. 1, comma 605, lett. c), della legge n. 296 del 2006, infatti, in un'ottica di contenimento della spesa pubblica e di assorbimento del precariato dei docenti, prevede la trasformazione delle graduatorie permanenti in altre ad esaurimento e a tale fine non permette, a partire dal 2007, l'inserimento in esse di nuovi aspiranti candidati prima dell'immissione in ruolo dei docenti che già vi fanno parte*".

[21] Unofficial translation of: "*il valore legale conservato in via permanente, quindi, si esaurisce nella possibilità di partecipare alle sessioni di abilitazioni o ai concorsi. […] L'interpretazione da dare all'espressione (contenuta nel citato articolo 15, comma 7, d.P.R. n. 323 del 1998) "i titoli conseguiti nell'esame di Stato a conclusione dei corsi di studi dell'istituto magistrale iniziati nell'a.s. 1997/1998 conservano in via permanente l'attuale valore legale e abilitante all'insegnamento nella scuola*

27. Therefore, "*the qualification for teaching in nursery and primary schools, pursuant to Articles 194 and 197 of Legislative Decree No 297/94 and Presidential Decree No 323/1998, has never constituted sufficient qualification for inclusion in the permanent lists established by Art. 401 of Legislative Decree no. 297/94, since it is necessary to pass competitive procedures (regional competitions for titles and exams) for which the teacher's diploma was a requirement for participation (under Article 402 of Legislative Decree no. 297/94). This also applies to the procedures reserved to staff with a teacher's diploma and certain service requirements, established under art. 2, par. 4, law no. 124/1999 (Ministerial Order 153/99) and under art. 2, par. 1, letter c-bis of legislative decree no. 97/94 (Ministerial Order 25/2005 and 80/2005) which required, for the issuance of the qualification, the passing of a selective competitive examination"*[22]. The above conclusions are supported by arguments of a systematic and teleological nature, since it is not possible to deny the legislation which states that*, "from their original permanent lists (later transformed into exhaustive lists) have been reserved for teachers who hold a qualification in addition to their academic qualification: passing a competition on the basis of qualifications and examinations or passing a reserved examination session for those who have served for at least 360 days from the school year 1994-1995; moreover, the regulatory interventions which have*

elementare" deve avvenire, anche in questo caso, tenendo conto della specificazione contenuta nel periodo immediatamente successivo (contenuto nello stesso comma 7 dell'art. 15), nel senso che i diplomi magistrali conseguiti entro l'anno scolastico 2001/2002 conservano il proprio valore legale di titolo di studio e consentono (senza necessità di conseguire anche il diploma di laurea) di partecipare all'abilitazione all'insegnamento ex art. 9, comma 2, della legge n. 444/1968, nonché ai concorsi ordinari per titoli ed esami a posti di insegnante nella scuola materna e nella scuola elementare…Ciò implica che il valore legale del diploma magistrale può essere riconosciuto solo nei limiti previsti dalla disciplina transitoria in esame, ossia in via "strumentale", nel senso, come si è chiarito, di consentire a coloro che lo hanno conseguito entro l'a.s. 2001/2002 di partecipare alle sessioni di abilitazioni e ai concorsi pur se privi del diploma di laurea nel frattempo istituito".

[22] Unofficial translation of: "*l'abilitazione all'insegnamento nella scuola materna ed elementare, ex artt. 194 e 197 del D.lgs. 297/94 e d.P.R. 323/1998, non ha mai costituito titolo sufficiente per l'inserimento nelle graduatorie permanenti istituite dall'art. 401 D.Lgs. 297/94, essendo invece previsto a tale fine il superamento di procedure di natura concorsuale (concorsi regionali per titoli ed esami) rispetto alle quali il diploma magistrale costituiva requisito di partecipazione (ai sensi dell'art. 402 D.lgs. 297/94). Ciò vale anche per le procedure riservate al personale in possesso di diploma magistrale e di determinati requisiti di servizio, istituite ai sensi dell'art. 2, comma 4, l. 124/1999 (O.M. 153/99) ed ai sensi dell'art. 2, c. 1, lett. cbis d.l. 97/94 (O.M. 25 e 80 del 2005) che richiedevano, ai fini del rilascio del titolo, il superamento di una prova selettiva di tipo concorsuale*".

followed over time, while widening the range of persons entitled to enrol, have, however, always referred to categories of teachers with a qualification in addition to the academic qualification"[23].

28. The above makes it possible to affirm, without fear of contradiction, that "*the reservation clause contained in Article 1, paragraph 605 of Law 296/2006 is to be understood as referring only to those qualifying titles which, according to the legislation in force, constituted requirements for access to the lists, being aimed at preserving the expectations of those who, relying on the previous system, had already embarked on a course of study in order to obtain the qualification necessary for inclusion in the GAE. It is not by chance, in fact, that the reservation clause referred also to those who, at the date of entry into force of the law, were attending qualifying courses that, according to the previous legislation, allowed the enabling courses which, under the previous legislation, allowed access to the lists. Finally, from a teleological point of view, it is stated that the need for a qualification in addition to the mere possession of a degree is justified by the consideration that inclusion in the ranking list is intended to allow, by mere sliding, the stable entry into the teaching role. This entry, therefore, cannot disregard a serious reconnaissance of the experience gained or of the training path followed after graduation*"[24].

[23] Unofficial translation of: "*fin dalla loro originaria configurazione, le graduatorie permanenti (poi trasformate in graduatorie ad esaurimento) sono state riservate a docenti che vantassero un titolo abilitante ulteriore rispetto al titolo di studio: il superamento di un concorso per titoli ed esami oppure il superamento di una sessione riservata di esami per coloro che avessero prestato servizio per almeno 360 giorni a decorrere dall'a.s. 1994-1995; osservandosi, pure, che gli interventi normativi succedutisi nel tempo, pur ampliando la platea di soggetti legittimati ad iscriversi, hanno, comunque, sempre fatto riferimento a categorie di docenti muniti di un titolo abilitante ulteriore rispetto al titolo di studio*".

[24] Unofficial translation of: "*la clausola di riserva contenuta nell'art. 1, comma 605 l. 296/2006 deve intendersi riferita solo a quei titoli abilitanti che, secondo la normativa vigente, costituivano requisiti di accesso alle graduatorie, essendo volta a preservare le aspettative di coloro i quali avessero, confidando nel sistema pregresso, già affrontato un percorso di studi per munirsi del titolo necessario all'inserimento in GAE. Non a caso, infatti, la clausola di riserva si riferiva anche a coloro che, alla data di entrata in vigore della legge, frequentavano i corsi abilitanti che secondo la normativa previgente consentivano l'accesso alle graduatorie. Sotto il profilo teleologico, infine, viene affermato che la necessità di un titolo abilitante ulteriore rispetto al mero possesso del titolo di studio trova giustificazione nella considerazione che l'inserimento in graduatoria è destinato a consentire per mero scorrimento lo stabile ingresso nel ruolo docente e tale ingresso, dunque, non può prescindere da una seria ricognizione dell'esperienza maturata o del percorso formativo seguito dopo il diploma*".

29. One last general remark. In several judgments, the Court of Justice of the European Union (CJEU) has recognised the legitimacy of national legislation so far as it differentiates the positions of workers recruited on the basis of success in an open competition rather than on the basis of the outcome of automatic regulatory mechanisms (sliding of the GAE) or "soft selections" (see Const. Court no. 187/16) also for the purposes of career reconstruction and the evaluation of fixed-term service (see CJEU, judgment 20 September 2018-C-466/17, Motter). Specifically, the CJEU, in the judgment 20 september 2018-C-466/17, validated the compatibility of the Italian legislation with clause 4 of the Framework Agreement on Fixed-term Work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP).

30. Otherwise, it would be supported a reading of the European legislation invoked clearly unequal to the detriment of the person more prepared, or rather 'qualified', because he/she has already been assessed as fit for the teaching profession in a competitive procedure. The CJEU has affirmed ed the desirability of preventing substantially discriminatory treatment to the detriment of workers who are already tenured, in formal compliance with clause 4 of the Framework Agreement on fixed-term work concluded on 18 March 1999, annexed to Directive 1999/62/EC (judgment 20 September 2018, C-466/2017, Motter, point 47).

31. The complaint's reference to the Social Charter, concerning the protection of the right to work (Article 1) and the right to professional training (Article 10), disregards the obligation (deriving from Article 1(4) of the European Convention on Human Rights) to 'ensure or encourage' for all citizens of the States party to the Social Charter the right to adequate professional guidance, training and retraining.

32. To this end, however, it should not be forgotten that the Charter is characterised by the particular "margin of appreciation" recognised in terms of the effectiveness of the process.

33. In this regard, it should not be forgotten that the Charter is characterised by a particular "margin of appreciation" in terms of the effectiveness of the principles it sets out and the obligations it imposes on the signatory states.

34. The vocation of the Charter is not to impose a uniform social policy on all the Member States, for the obvious reason that the different internal political solutions are also linked to the economic and social features of the States.

35. Rather, the aim is to set out rights in respect of which there is sufficient flexibility in assessing the levels of guarantee that the States can provide (bearing in mind each State's substrate of economic development).

36. This allows each legal system to evolve in terms of increasing the guarantees to be provided for the system of protection of rights under the Charter with reference to its own regulatory and socio-economic context, while at the same time facilitating the process of accession to the Charter.

37. With reference to certain important rights, the relevant European Committee for Social Rights recognises, therefore, a "margin of appreciation" for the States to determine when and how to implement them, given the concrete chances they have (see the following cases: European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, § 35: "*States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources*"; Mental Disability Advocacy Center (MDAC) v. Bulgaria, Complaint No. 41/2007, § 39).

38. States are required to verify the results obtained in adapting both practices and legislation by defining a series of obligations incumbent on them for the purpose of assessing the conformity of their domestic legislation with the Charter.

39. The criterion of reasonableness is used to assess the States' commitment to take the necessary measures, both at the legislative level and in administrative practice, to ensure effective protection of rights. Anyway, States have to take charge of particularly urgent situations, especially in relation to the most vulnerable social groups, in order to ensure the effectiveness of the rights recognised in the Charter.

45. On the one hand, however, the complainants call for the restoration of the "violated" right to work and training. On the other hand, they intend to do so without any verification of suitability for teaching by means of a comparative selection process. Therefore, there is no evidence of any real and patently obvious prejudice resulting from the choice of the contested legislation. Moreover, there is no logical-legal link and it is not shown that the contested rules give rise to discriminatory treatment in terms of access to employment of persons who may be included in that type of staff.

46. Having said that, the Government agrees with the considerations of the intervener and insists on the rejection of the complaint.

Rome, 30.7.2021

Drafted by

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