



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

COURT (CHAMBER)

CASE OF FRANCESCO LOMBARDO v. ITALY

(Application no. 11519/85)

JUDGMENT

STRASBOURG

26 November 1992

In the case of Francesco Lombardo v. Italy*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr F. GÖLCÜKLÜ,

Mr B. WALSH,

Mr C. RUSSO,

Mr R. PEKKANEN,

Mr A.N. LOIZOU,

Mr F. BIGI,

Sir John FREELAND,

Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 June and 29 October 1992,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 September 1991, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11519/85) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by Mr Francesco Lombardo, an Italian national, on 3 October 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

* The case is numbered 76/1991/328/401. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he did not wish to take part in the proceedings.

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 September 1991, in the presence of the Registrar, Mr J. Cremona, the Vice-President of the Court, drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr B. Walsh, Mr N. Valticos, Mr R. Pekkanen, Mr A.N. Loizou, Mr F. Bigi and Mr L. Wildhaber (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Sir John Freeland, substitute judge, subsequently replaced Mr Valticos, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Italian Government ("the Government") and the Delegate of the Commission on the organisation of the procedure (Rule 37 para. 1 and Rule 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 12 March 1992. In a letter received on 16 April the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. Also on 16 April the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 1992. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr G. RAIMONDI, magistrato,

seconded to the Diplomatic Legal Service of the Ministry
of Foreign Affairs, *Co-Agent;*

- for the Commission

Mr J.A. FROWEIN,

Delegate.

The Court heard statements and addresses by them.

The Government's replies to the Court's questions were received on 20 July.

AS TO THE FACTS

7. Mr Francesco Lombardo resides in Rome. The facts established by the Commission pursuant to Article 31 para. 1 (art. 32-1) of the Convention are as follows (see paragraphs 15-30 of its report):

"A. The circumstances of the case

15. The applicant served in the Carabinieri from 15 August 1946 to 14 March 1974, on which date he was invalidated out of the service because he had become disabled as a result of two illnesses - an ulcer and neoplasia.

16. Since 29 January 1975 the applicant has been in receipt of an ordinary retirement pension.

17. On 10 June 1974 he applied for an 'enhanced ordinary pension' on the ground that the illnesses which had caused his disablement were 'due to his service'. On 19 October 1976 the applicant was examined at the Messina military hospital by the Ministry of Defence medico-legal board. On 26 November 1976 the board concluded that the neoplasia which had caused the applicant's disablement was not 'due to his service'.

18. On 21 May 1977, in its decision on the applicant's request, the Ministry of Defence granted him payment at the enhanced rate for two years, on the ground that the ulcer he suffered from was 'due to his service', but rejected that part of his application concerning the neoplasia.

19. In a registered letter dated 20 December 1977 the applicant appealed to the Court of Audit against this decision. The appeal was received by the Court of Audit on 22 December 1977 and reached the competent division of that court on 3 January 1978, being registered under file no. 0110931.

20. On 7 September 1978 the applicant asked for his appeal to be given priority, by derogation from the chronological order principle usually applied. Following this request, on 13 September 1978, the registry of the Court of Audit asked the Ministry of Defence for the applicant's administrative file; on 23 September 1978 it again asked for this file to be forwarded.

21. In a note of 20 October 1978 the Ministry of Defence announced that it was shortly to adopt an administrative measure concerning the applicant [- an adjustment of his pension -] and that the file would be transmitted thereafter.

22. The file was received by the registry of the Court of Audit on 4 December 1980. On 13 January 1981 the applicant's appeal and his file were transmitted to the principal public prosecutor, who [granting Mr Lombardo's application of 23 February 1982] on 8 January 1983 decided to give the case priority.

23. On 17 September 1985 the principal public prosecutor requested the opinion of the Ministry of Defence medico-legal board. He received this opinion on 7 April 1986. It confirmed that the applicant's neoplasia was not 'due to his service'.

24. On the basis of this opinion, on 6 June 1987, the principal public prosecutor submitted his pleadings, calling for the appeal to be dismissed.

25. On 28 October 1987 the applicant again asked for his case to be given priority.

26. On 30 November 1987 the president of the division of the Court of Audit dealing with the case arranged for a hearing to be held before that division on 27 April

1988. However, the hearing did not take place because, following a judgment of the Constitutional Court (no. 270 of 25 February 1988), the Judicial Division of the Palermo Court of Audit gained jurisdiction to hear the case, which was transferred to it on 25 May 1988.

27. This division heard the case at a hearing held on 15 February 1989, at the end of which it upheld the applicant's appeal. The text of the judgment was deposited with the registry on 7 July 1989. ...

B. The relevant domestic law

28. In pursuance of the provisions of Presidential Decree no. 1092 of 29 December 1973, state public servants are entitled to an 'enhanced ordinary pension' when their employment in the public service is terminated as a result of a disability or injury attributable to the requirements of the service.

29. Public servants make direct contributions to the pension fund through monthly payments calculated as a fixed percentage of their wages and deducted therefrom.

30. The nature of the disability or injury is taken into account for the purpose of deciding which scale is to be applied in calculating the amount of pension. For professional members of the armed forces these scales range from 30% to 100% of the figure used as the basis for the calculation of pension, i.e. the full amount of the latest remuneration received, plus certain allowances where appropriate. Consequently, the amount of the pension granted is not directly linked to the total contributions paid into the pension fund by the person concerned."

8. On 26 November 1991 the applicant informed the Court that Italy had now paid him part of the amount in issue.

PROCEEDINGS BEFORE THE COMMISSION

9. Mr Lombardo applied to the Commission on 3 October 1984. Relying on Article 6 para. 1 (art. 6-1) of the Convention, he complained of the length of the civil proceedings brought by him.

10. The Commission declared the application (no. 11519/85) admissible on 5 March 1990. In its report of 10 July 1991 (made under Article 31) (art. 31) it expressed the opinion by thirteen votes to six that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 249-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

GOVERNMENT'S FINAL SUBMISSIONS TO THE COURT

11. At the hearing the Government asked the Court to hold that there had not been a violation of the Convention in the present case.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

12. The Government claimed in their memorial that Mr Lombardo had not exhausted domestic remedies, as he had applied to the Commission without waiting for the Court of Audit to give judgment.

At the hearing on 22 June 1992, however, their Co-Agent withdrew the said objection, and the Court may not examine it of its own motion (see, *inter alia*, the *Moreira de Azevedo v. Portugal* judgment of 23 October 1990, Series A no. 189, p. 15, para. 60).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

13. Mr Francesco Lombardo complained of the length of the proceedings in the Court of Audit. He alleged that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention, which provides that:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

A. Applicability of Article 6 para. 1 (art. 6-1)

14. The Commission considered that this provision was applicable in the present case, whereas the Government took the opposite view.

15. In the *Feldbrugge v. the Netherlands* and *Deumeland v. Germany* judgments of 29 May 1986 (Series A no. 99, p. 13, para. 29, and no. 100, p. 23, para. 63) the Court found that there existed great diversity in the legislation and case-law of the member States of the Council of Europe as regards the juridical nature of the entitlement to insurance benefits under social security schemes. It accordingly concluded that there was no common standard pointing to a uniform European notion in this regard.

16. The Government argued that the case comprised features of public law only. Firstly, the right claimed was not of a personal and pecuniary nature, as the service relationship between the State and Mr Francesco Lombardo had been of a public law nature. Nor was it connected with a

contract of employment, as the appointment of a public servant originated in a unilateral act on the part of the authorities which was subject to special legislation. Moreover, the sickness insurance scheme which the applicant was covered by had no affinities with a private insurance scheme, since the Italian State had assumed the responsibility of regulating its framework and overseeing its operation.

Finally, payment of the "enhanced ordinary pension" was similar to payment of an indemnification borne entirely by the State; it was not linked with the payment of individual contributions and was not a function of the level of salary or length of service.

17. The Court is not convinced by this argument. Even though disputes relating to the recruitment, employment and retirement of public servants are as a general rule outside the scope of Article 6 para. 1 (art. 6-1) (on access to the civil service, see the *Glaserapp and Kosiek v. Germany* judgments of 28 August 1986, Series A no. 104, p. 26, para. 49, and no. 105, p. 20, para. 35), State intervention by means of a statute or delegated legislation has not prevented the Court, in several cases, from finding the right in issue to have a civil character (see the *Feldbrugge* judgment cited above, pp. 13-14, para. 32).

Notwithstanding the public law aspects pointed out by the Government, what is concerned here is essentially an obligation on the State to pay a pension to a public servant in accordance with the legislation in force. In performing this obligation the State is not using discretionary powers and may be compared, in this respect, with an employer who is a party to a contract of employment governed by private law. Consequently, the right of a carabinieri to receive an "enhanced ordinary pension" if he fulfils the necessary conditions of injury and disability is to be regarded as a "civil right" within the meaning of Article 6 para. 1 (art. 6-1), which is therefore applicable in the present case.

B. Compliance with Article 6 para. 1 (art. 6-1)

18. It remains to determine whether or not a "reasonable time" was exceeded.

The Commission considered that it had been, but the Government did not.

19. The period to be taken into consideration began on 22 December 1977, when the applicant's appeal was received by the Court of Audit. It ended on 7 July 1989 when that court's judgment was filed. It thus lasted for approximately eleven and a half years.

20. The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.

21. The Government pleaded the complex nature of the case and the excessive workload of the Court of Audit.

22. On the first point, the Court acknowledges that the question to be decided, namely whether the applicant's disability was due to his service, was of a certain difficulty in view of the state of medical knowledge on cancer; the medico-legal board of the Ministry of Defence was moreover consulted on two occasions (see paragraph 7 above, at nos. 17 and 23). However, this circumstance does not in itself justify the length of the proceedings.

The Court agrees with the Commission in finding that there were several periods of delay: the registry of the Court of Audit received Mr Francesco Lombardo's administrative file two years after requesting it (see paragraph 7 above, at nos. 20-22); the principal public prosecutor waited approximately seven years and nine months before commissioning an expert report - the only investigative measure taken - and once he was in possession of the report he waited fourteen months before filing his submissions (see paragraph 7 above, at nos. 23-24).

23. The excessive workload cannot be taken into consideration. Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that paragraph (art. 6-1) (see, among many other authorities, the *Tusa v. Italy* judgment of 27 February 1992, Series A no. 231-D, p. 41, para. 17).

24. In these circumstances the delays which have been noted were so substantial that the overall length of the proceedings must be regarded as excessive.

There has therefore been a violation of Article 6 para. 1 (art. 6-1).

III. APPLICATION OF ARTICLE 50 (art. 50)

25. The applicant did not claim any just satisfaction under Article 50 (art. 50) and this is not a matter for the Court to examine of its own motion.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that Article 6 para. 1 (art. 6-1) is applicable in the present case and has been violated;
2. Holds that it is not necessary to apply Article 50 (art. 50) in this instance.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1992.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar