



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

**SOLDANI, FUSCO, DI LUCA AND SALUZZI, PIZZI,
SCARFÒ, ARGENTO, TROMBETTA CASES**

CASE OF DI LUCA AND SALUZZI v. ITALY

(38/1996/657/842-843)

JUDGMENT

STRASBOURG

2 September 1997

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SUMMARY¹

Judgments delivered by a Chamber

Italy – length of proceedings in the administrative courts

I. SCOPE OF THE CASE (Fusco)

Complaint relating to “fair hearing” requirement in Article 6 § 1 of Convention: outside scope of case as defined by Commission's decision on admissibility.

II. ARTICLE 6 § 1 OF THE CONVENTION (“reasonable time”)

Basic distinction in law of many member States of the Council of Europe between civil servants and employees governed by private law – Court has accordingly held that disputes relating to recruitment, careers and termination of service of civil servants are as a general rule outside scope of Article 6 § 1.

Applicants sought recognition of existence of permanent contract of employment (Fusco) or judicial review of one or more decisions of administrative authorities assigning them to a particular staff category (remaining cases) – they thus raised disputes related to their recruitment and careers which did not concern a “civil” right within meaning of Article 6 § 1 – payment of difference in salary directly dependent on prior finding that administrative authorities had acted unlawfully (Trombetta).

Conclusion: Article 6 § 1 not applicable (eight votes to one).

COURT’S CASE-LAW REFERRED TO (IN ONE OR MORE JUDGMENTS)

26.11.1992, Francesco Lombardo v. Italy; 24.8.1993, Massa v. Italy; 28.9.1995, Scollo v. Italy; 21.2.1996, Hussain v. the United Kingdom; 17.3.1997, Neigel v. France

1. This summary by the registry does not bind the Court.

In the case of Di Luca and Saluzzi v. Italy²,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court B³, as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr C. RUSSO,

Mr N. VALTICOS,

Mr R. PEKKANEN,

Mr A.B. BAKA,

Mr M.A. LOPES ROCHA,

Mr G. MIFSUD BONNICI,

Mr P. KÜRIS,

Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 2 December 1996, 22 February and 28 June 1997,

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 11 March 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in two applications (nos. 25837/94 and 25838/94) against the Italian Republic lodged with the Commission under Article 25 by two Italian nationals, Mr Giustino Di Luca and Mr Osvaldo Saluzzi, on 3 February 1994.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 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 § 1 of the Convention.

Notes by the Registrar

² The case is numbered 38/1996/657/842-843. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

³ Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicants stated that they wished to take part in the proceedings.

3. On 30 March 1996 the President of the Court, Mr R. Ryssdal, decided, under Rule 21 § 7 and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider the instant case and the cases of *Spurio, De Santa, Gallo, Lapalorcia, Abenavoli, Zilaghe, Laghi, Viero, Orlandini, Ryllo, Soldani, Fusco, Nicodemo, Pizzi, Scarfò, Argento and Trombetta v. Italy*⁴. The Chamber to be constituted for that purpose included *ex officio* Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On the same day, in the presence of the Registrar, the President of the Court drew by lot the names of the other seven members, namely Mr N. Valticos, Mr R. Pekkanen, Mr A.B. Baka, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici, Mr P. Kūris and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Italian Government (“the Government”), the applicants and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 25 July 1996. On 25 June 1996 the Secretary to the Commission had informed the Registrar that the Delegate did not intend to submit written observations. The applicants did not submit any observations.

5. On 21 October 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. On 27 November 1996 the Chamber decided to dispense with a hearing in the case, having satisfied itself that the conditions for this derogation from its usual procedure had been met (Rules 27 and 40).

AS TO THE FACTS

7. Mr Giustino Di Luca and Mr Osvaldo Saluzzi are surveyors living in Bari.

8. On 21 December 1989 they instituted proceedings against the Ministry of Finance in the Apulia Regional Administrative Court (“the

⁴. 26/1996/645/830; 27/1996/646/831; 28/1996/647/832; 29/1996/648/833; 30/1996/649/834; 31/1996/650/835; 32/1996/651/836; 33/1996/652/837; 34/1996/653/838; 35/1996/654/839; 36/1996/655/840; 37/1996/656/841; 39/1996/658/844; 40/1996/659/845; 41/1996/660/846; 42/1996/661/847 and 43/1996/662/848.

RAC”), seeking judicial review of a decision of the Ministry assigning them, at the time when they were recruited to permanent posts, to a category of staff and salary scale lower than those to which they considered themselves to be entitled on the basis of the duties they had performed as temporary staff.

9. On 8 January 1990 they applied to the President of the RAC for a date to be fixed for the hearing. On 8 February 1993 they filed an application for the case to be set down for an urgent hearing.

10. On a date which is not specified in the file the RAC set down the case for hearing on 7 February 1996.

11. According to the information supplied by the applicants, the RAC required the Ministry of Finance, in an interlocutory judgment of 24 September 1996, to produce certain documents which have still not been filed. On 12 February 1997 the applicants asked for a date to be fixed for the hearing.

PROCEEDINGS BEFORE THE COMMISSION

12. Mr Di Luca and Mr Saluzzi applied to the Commission on 3 February 1994. They complained of the length of the proceedings in the Apulia Regional Administrative Court and relied on Article 6 § 1 of the Convention.

13. On 6 July 1995, after joining the cases, the Commission declared the applications (nos. 25837/94 and 25838/94) admissible. In its report of 28 November 1995 Article 31 it expressed the opinion by twenty-four votes to five that there had been a breach of Article 6. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment⁵.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

14. The Government asked the Court, as their primary submission, to rule that Article 6 § 1 of the Convention was not applicable to the case and, in the alternative, to hold that there had been no breach of it.

⁵. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* - 1997), but a copy of the Commission's report is available from the registry.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

15. Mr Di Luca and Mr Saluzzi complained of the length of the proceedings they had brought in the Apulia Regional Administrative Court. They relied on Article 6 § 1 of the Convention, which provides:

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

The Court must first determine whether that provision is applicable to the present case.

16. The Government submitted that while the existence of civil rights in the context of employment in the civil service could not be excluded *a priori*, in principle disputes relating to such employment fell outside the scope of Article 6 of the Convention. That provision was applicable when the private-law features of any given case predominated.

In the present case, since the dispute concerned assignment to a particular staff category, it came within the sphere of the powers by which the administrative authorities organised their activity, a sphere governed by public law. Accordingly, the application was inadmissible *ratione materiae*.

17. The Commission took the view that the – explicit or implicit – pecuniary aspect of what was at stake in the proceedings was decisive for the purpose of determining whether Article 6 was applicable when, as in the present case, the domestic proceedings had a bearing on the applicant's economic rights.

18. The Court observes that in the law of many member States of the Council of Europe there is a basic distinction between civil servants and employees governed by private law. This has led it to hold that “disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1” (see the *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B, p. 20, § 26, and the *Neigel v. France* judgment of 17 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 410–11, § 43).

In the *Massa* case (judgment cited above) the applicant applied for a reversionary pension following the death of his wife, who had been a headmistress. In the case of *Francesco Lombardo v. Italy* (judgment of 26 November 1992, Series A no. 249-B) a *carabiniere* who had been invalided out of the service because of disability and who maintained that the disability was “due to his service” applied for an “enhanced ordinary

pension”. The applicants' complaints related neither to the “recruitment” nor to the “careers” of civil servants and only indirectly to “termination of service” as they consisted in claims for purely pecuniary rights arising in law after termination of service. In those circumstances and in view of the fact that the Italian State was not using “discretionary powers” in performing its obligation to pay the pensions in issue and could be compared to an employer who was a party to a contract of employment governed by private law, the Court held that the applicants' claims were civil ones within the meaning of Article 6 § 1 (see the above-mentioned Neigel judgment, pp. 410–11, § 43).

19. In the instant case Mr Di Luca and Mr Saluzzi were essentially seeking judicial review of the decision of the Ministry of Finance assigning them, at the time when they were recruited to permanent posts, to a category of staff lower than the one to which they considered themselves to be entitled (see paragraph 8 above). The dispute raised by them thus clearly related to their recruitment and their career and did not concern a “civil” right within the meaning of Article 6 § 1.

Accordingly, Article 6 § 1 is not applicable in the case.

FOR THESE REASONS, THE COURT

Holds by eight votes to one that Article 6 § 1 of the Convention does not apply.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 2 September 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the dissenting opinion of Mr Pekkanen is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE PEKKANEN

1. I regret that I cannot agree with the majority of the Court as regards the applicability of Article 6 of the Convention in the present case.

2. According to the case-law of the Court, Article 6 § 1 is applicable in disputes where the private-law features predominate over the public-law features (see, for example, the *Feldbrugge v. the Netherlands* judgment of 29 May 1986, Series A no. 99, p. 16, § 40). In the present case the public-law features are considered by the majority to predominate mainly because in the law of many European States a distinction is drawn between civil servants and employees governed by private law. This difference has led the Court to hold that “disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6 § 1” (see paragraph 18 of the present judgment).

This does not, however, mean that civil servants generally fall outside the scope of the Convention. Indeed, as the Court has stated in its *Glaser v. Germany* judgment of 28 August 1986 (Series A no. 104, p. 26, § 49), “as a general rule the guarantees in the Convention extend to civil servants”. On the other hand, when access to the civil service lies at the heart of the issue submitted to the Court, the facts complained of are not covered by the Convention (*ibid.*, p. 27, § 53).

A civil servant is, accordingly, protected by Article 6 § 1 only if the dispute concerns, not his or her recruitment, career or termination of service, but, for instance, a purely economic entitlement. In addition, it is a requisite for the applicability of Article 6 § 1 that the discretionary powers of the administrative authority in question should not be in issue (see paragraph 18 of the present judgment).

3. The term “civil servant” is used in the judgment without any definition. Accordingly, it must be deemed to cover all administrative officials in the service of the State or local authorities who are not employed under a private-law contract.

This conclusion entails two problems.

Firstly, the duties of the civil servant in question are not taken into account. The rule covers all civil servants from the lowest office cleaner with only menial duties to the highest officials who have, for instance, the power to exercise public authority. In my opinion there are adequate reasons to exclude from the protection of Article 6 § 1 only those civil servants who belong to the latter group. States have an understandable and acceptable interest in deciding on their recruitment, career and termination of service without being subject to judicial control.

Secondly, there are States where employees performing public services are covered partly by public-law and partly by private-law contracts, though their duties are the same. According to the present judgment, all those employees of the State who are governed by public law would be partly deprived of the safeguards in Article 6 while their colleagues employed under private law would enjoy the benefit of that protection. The civil servants in several European States would thus be unequally protected by the Convention, notwithstanding the similarity of their duties.

4. The Court ought to proceed on the basis of an autonomous interpretation of the notion of “civil service” for the purposes of Article 6 § 1, so that the same standards can be applied to individuals holding equivalent or similar posts, independently of the employment system in each member State. A distinction should be drawn between those civil servants exercising public authority and those who do not. Such a distinction has been recognised by the Court of Justice of the European Communities (see, for example and *mutatis mutandis*, case no. 473/93, Commission v. Luxembourg, judgment of 2 July 1996).

5. In the present case the duties of the civil servant in question did not involve the exercise of public authority. I therefore find Article 6 § 1 to be applicable.