



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

DE SANTA, LAPALORCIA, ABENAVOLI, NICODEMO CASES

CASE OF NICODEMO v. ITALY

(39/1996/658/844)

JUDGMENT

STRASBOURG

2 September 1997

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SUMMARY<sup>1</sup>

Judgments delivered by a Chamber

*Italy – length of proceedings in administrative courts*

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

**A. Applicability**

Applicants asserted either a purely economic right (De Santa, Lapalorcia and Abenavoli) or an essentially economic right (Nicodemo); administrative authorities’ discretionary powers not in issue – cases’ private-law features predominated over public-law features.

*Conclusion:* Article 6 § 1 applicable (seven votes to two: De Santa, Lapalorcia and Abenavoli; six votes to three: Nicodemo).

**B. Compliance**

1. Periods to be taken into consideration

Starting-point (in each case): institution of proceedings in Regional Administrative Court (“the RAC”).

End: date of deposit with registry of *Consiglio di Stato*’s judgment (De Santa); date on which RAC’s judgment became final (Lapalorcia); proceedings still pending (Abenavoli and Nicodemo).

Total: from approximately six years and two months (Lapalorcia) to nearly seventeen years (De Santa).

2. Applicable criteria

Reference to Court’s case-law.

Certain stages of proceedings considered in each case.

*Conclusion:* violation (seven votes to two: De Santa, Lapalorcia and Abenavoli; six votes to three: Nicodemo).

II. ARTICLE 50 OF THE CONVENTION

**A. Damage**

1. Pecuniary damage: not claimed (De Santa); claim dismissed, for lack of causal connection with violation found (Abenavoli and Nicodemo).

2. Non-pecuniary damage: claim allowed in part (De Santa, Abenavoli and Nicodemo).

3. Pecuniary and non-pecuniary damage: claim allowed in part (Lapalorcia).

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

**B. Costs and expenses**

Before Court: claim allowed in part (De Santa) – before Convention institutions: claim allowed in part (Lapalorcia and Abenavoli) – not claimed (Nicodemo).

*Conclusion:* respondent State to pay applicants specified sums (unanimously: De Santa, Lapalorcia and Abenavoli; eight votes to one: Nicodemo).

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; 15.11.1996, Ceteroni v. Italy

**In the case of Nicodemo v. Italy<sup>2</sup>,**

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 B<sup>3</sup>, 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 an application (no. 25839/94) against the Italian Republic lodged with the Commission under Article 25 by an Italian national, Mr Aldo Giuseppe Nicodemo, on 21 August 1993.

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.

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### *Notes by the Registrar*

2. The case is numbered 39/1996/658/844. 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.

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 applicant stated that he 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, Di Luca and Saluzzi, Pizzi, Scarfò, Argento and Trombetta v. Italy<sup>4</sup>. 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 applicant 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 applicant 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 Aldo Giuseppe Nicodemo lives in Praia a Mare (Cosenza). He is a lawyer by training.

8. On 14 July 1981 Calabria Regional Council (*Giunta Regionale*) took the applicant, who was already employed by the Council on a fixed-term

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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; 38/1996/657/842-843; 40/1996/659/845; 41/1996/660/846; 42/1996/661/847 and 43/1996/662/848.

contract, into its permanent employ. In the face of the Council's inertia, Mr Nicodemo instituted proceedings in the Calabria Regional Administrative Court ("the RAC") on 15 May 1984 seeking implementation of the decision, the difference in remuneration and damages for the delay.

9. On 21 May 1984 he asked the RAC to fix a date for the hearing. On 31 November 1988 and 5 March 1989 he applied for the case to be set down for an urgent hearing.

10. In an interlocutory judgment of 28 April 1989 the RAC ordered the Regional Council to file certain documents. This order was reiterated in a second interlocutory judgment given on 22 November 1991.

11. On 7 May 1993 the applicant again applied for the case to be set down for an urgent hearing. According to information submitted by the applicant, on 29 October 1996, the proceedings were then still pending.

## PROCEEDINGS BEFORE THE COMMISSION

12. Mr Nicodemo applied to the Commission on 21 August 1993. He complained of the length of the proceedings in the Calabria Regional Administrative Court and relied on Article 6 § 1 of the Convention.

13. On 6 July 1995 the Commission declared the application (no. 25839/94) 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 judgment<sup>5</sup>.

## 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.

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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

### I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

15. Mr Nicodemo complained of the length of the proceedings in the Calabria Regional Administrative Court (“the RAC”). He 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.

#### A. Applicability of Article 6 § 1

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 a decision of the Regional Council to take the applicant into its permanent employ, 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 does not accept the Government’s argument. Before the RAC the applicant sought, in addition to implementation of the Regional Council’s decision to recruit him, payment of the difference in salary and damages for the delay in implementing the decision (see paragraph 8 above). The right asserted by Mr Nicodemo was essentially economic and the administrative authorities’ discretionary powers were not in issue. Consequently, the private-law features predominated over the public-law features.

Accordingly, Article 6 § 1 is applicable.

## **B. Compliance with Article 6 § 1**

19. It remains to be determined whether a “reasonable time” was exceeded. The Commission and the applicant answered that question in the affirmative, the Government in the negative.

20. The Court observes that the period to be taken into consideration began on 15 May 1984, the date of the application to the RAC, and has not yet ended (see paragraphs 8 and 11 above).

21. The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court’s case-law, in particular the complexity of the case, the applicant’s conduct and that of the relevant authorities (see, among many other authorities, *mutatis mutandis*, the Ceteroni v. Italy judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1756, § 22).

22. The Government submitted that the delay complained of was not long enough to breach the Convention.

23. Like the Commission, the Court notes that despite Mr Nicodemo’s three applications (see paragraph 9 above), and although more than thirteen years have already elapsed since the case was submitted to it, the RAC has still not fixed a date for the first hearing. Such a lengthy period fails to satisfy the “reasonable time” requirement laid down in Article 6 § 1, which has been breached in the instant case.

## **II. APPLICATION OF ARTICLE 50 OF THE CONVENTION**

24. According to Article 50 of the Convention,

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

### **A. Damage**

25. Mr Nicodemo claimed 200,000,000 Italian lire (ITL) by way of just satisfaction.

26. The Government emphasised that any claim for alleged pecuniary damage had to be justified, costed and based exclusively on damage arising directly from the unreasonable prolongation of specific proceedings. They argued that such was not the position in the present case, as the applicant had confused what was at stake in the domestic proceedings with what was at stake in the Strasbourg proceedings.

27. The Delegate of the Commission submitted that the Court should award just satisfaction, but did not suggest a figure.

28. The Court agrees with the Government on the first point. For the rest, it considers that the applicant undoubtedly sustained non-pecuniary damage and awards him ITL 20,000,000.

### **B. Default interest**

29. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of adoption of the present judgment is 5% per annum.

### **FOR THESE REASONS, THE COURT**

1. *Holds* by six votes to three that Article 6 § 1 of the Convention is applicable in the case and has been breached;
2. *Holds* by eight votes to one
  - (a) that the respondent State is to pay the applicant, within three months, 20,000,000 (twenty million) Italian lire for non-pecuniary damage;
  - (b) that simple interest at an annual rate of 5% shall be payable on this amount from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* unanimously the remainder of the claim for just satisfaction.

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 following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Pekkanen;
- (b) dissenting opinion of Mr Bernhardt, joined by Mr Baka;
- (c) dissenting opinion of Mr Mifsud Bonnici.

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

**CONCURRING OPINION OF JUDGE PEKKANEN**

I have voted for the applicability of Article 6 § 1 of the Convention in the present case for the reasons set out in my dissenting opinion in the cases of Spurio, Gallo, Zilaghe, Laghi, Viero, Orlandini, Ryllo, Soldani, Fusco, Di Luca and Saluzzi, Pizzi, Scarfò, Argento and Trombetta v. Italy (see the Court's judgments of today's date).

DISSENTING OPINION OF JUDGE BERNHARDT,  
JOINED BY JUDGE BAKA

In eighteen cases against Italy which have been decided by the same Chamber at the same time, the Court has found Article 6 § 1 of the Convention applicable in four cases and non-applicable in the remaining fourteen cases.

All cases are concerned with claims brought by civil servants against public or administrative authorities, and they all had financial implications. The Court implicitly takes as its starting-point the general principle stated in its case-law that where a claimed entitlement, including a purely pecuniary one, discloses features of both public and private law, Article 6 § 1 will be applicable if the latter are predominant (see, for example, the *Feldbrugge v. the Netherlands* judgment of 29 May 1986, Series A no. 99, pp. 13–16, §§ 30–40, and the *Deumeland v. Germany* judgment of the same date, Series A no. 100, pp. 22–25, §§ 60–74, where the asserted pecuniary claims were for social-security benefits). The reason for the distinction drawn between the four cases in which Article 6 is found to be applicable and those in which it is not is held by the Court to reside in the essentially pecuniary and economic character of the asserted right. I am not convinced by this distinction, and I consider Article 6 of the Convention inapplicable in all eighteen cases, including the present one. To my mind, a proper and adequate delimitation can only be found if in principle all disputes concerning the conditions of employment in the civil service are deemed to fall outside the ambit of Article 6 of the Convention. Such a result is in my view compatible with the existing case-law of the Court.

In its recent judgment in the case of *Neigel v. France*, the Court observed 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”; and that this had led it in previous judgments 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” (17 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 410–11, § 43, and the authorities cited there). The dispute raised by the applicant in the *Neigel* case – over a refusal to reinstate her to a permanent post in the French civil service – related, so the Court found, to her “recruitment”, her “career” and the “termination of [her] service”. Accordingly, despite the fact that her entitlement to reinstatement was not conditioned by the exercise of discretionary power by the French State, the dispute did not concern a “civil” right within the meaning of Article 6 § 1. Her accompanying pecuniary claim for payment of salary did not attract the application of Article 6 § 1 because its successful outcome was directly dependent on a finding of unlawfulness as regards the refusal to reinstate her (*ibid.*, p. 411, § 44).

As I see it, the phrase “recruitment, careers and termination of service” is to be read as a whole, covering the employment relationship between a civil servant and the State from its inception to its termination. It would be artificial to hold, for example, that pecuniary claims dependent on “career” moves in the narrow sense, such as promotion, transfer and reinstatement, should be outside the scope of Article 6 § 1, whereas those dependent on other aspects of the rules governing remuneration under the employment relationship should not. I fail to perceive how in the latter category the features of private law are predominant if they are not in the former category. In my view, in both categories the features of public law are predominant precisely because of “the basic distinction between civil servants and employees governed by private law”.

It is true that claims for payment of civil-service pensions have been held by the Court to concern “civil” rights within the meaning of Article 6 § 1 (see the *Francesco Lombardo v. Italy* judgment of 26 November 1992, Series A no. 249-B, and the *Massa v. Italy* judgment of 24 August 1993, Series A no. 265-B). However, as pointed out in the *Neigel* judgment, the applicants in these cases were asserting “claims for purely pecuniary rights arising in law *after* termination of service” (emphasis added) and “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” (*loc. cit.*, pp. 410–11, § 43). In such circumstances, the features of private law, taken together and cumulatively, will confer on an entitlement to a civil-service pension the character of a “civil” right within the meaning of Article 6 § 1.

The undoubted pecuniary character of Mr Nicodemo’s claim for the difference in remuneration, with damages, and the absence of the exercise of discretionary powers by the Italian State are therefore insufficient on their own to warrant the conclusion that the right in issue was a “civil” one for the purposes of Article 6 § 1 of the Convention.

In summary, Article 6 § 1 of the Convention is, in my view, not applicable in this case.

## DISSENTING OPINION OF JUDGE MIFSUD BONNICI

I think that the case before the Italian administrative court concerns, in the first place, the question whether the applicant is entitled, according to Italian administrative law, to force the Calabria Regional Council to implement its decision to give him a permanent contract of employment instead of the fixed-term one which he enjoyed. If and when he is successful, he will be entitled to “the difference in remuneration and damages for the delay” (see paragraph 8 of the judgment).

It follows that the dispute in this case relates to the problem of a person’s recruitment to the civil service, and as such it is outside the scope of Article 6 § 1 of the Convention for the reasons set out in the other judgments in this group of cases. In addition, and perhaps more strongly so, I am also of the opinion that matters of this kind are not amenable to a fit and proper judicial assessment.