



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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 66432/01
by Gino MICONI
against Italy

The European Court of Human Rights (First Section), sitting on
6 May 2004 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mr G. BONELLO,

Mr E. LEVITS,

Mrs S. BOTOCHAROVA,

Mr A. KOVLER,

Mr V. ZAGREBELSKY,

Mrs E. STEINER, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 27 November 2000,

Having regard to the observations submitted by the respondent
Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Italian national, born in San Severino (Macerata) and living in Macerata. He is a lawyer by profession. The respondent Government are represented by their Agent, Mr I.M. Braguglia, and by their co-Agent, Mr F. Crisafulli.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

By judgment no. 314 of 6 December 1985, the Constitutional Court ruled that the State should, in respect of entitlement to a pension of any nature, guarantee the statutory minimum amount.

Since that judgment was not immediately enforced through legislative measures, in 1990 the applicant took proceedings against the Istituto Nazionale della Previdenza Sociale (INPS) in the Italian magistrates' courts on behalf of numerous pensioners. In those proceedings, the applicant requested that his fees, costs and expenses be awarded directly to him (*distrazione delle spese*, Article 93 of the Code of Civil Procedure).

At first instance, in 1992, the magistrates' courts found in the plaintiff's favour and awarded the fees, costs and expenses directly to the applicant.

By judgments nos. 495 of 31 December 1993 and 240 of 10 June 1994, the Constitutional Court held that the State should reimburse part of the taxes unjustifiably paid by certain categories of pensioners on their old-age pensions.

At second instance, in 1995, the appellate court upheld the magistrates' courts' judgments and awarded fees and legal costs directly to the applicant.

In 1995, the INPS appealed against those judgments to the Court of Cassation.

On 28 March 1996 the President of the Republic passed a legislative decree ("*decreto legge*") (no. 166) enforcing the judgments of the Constitutional Court. It provided that the State would reimburse the amounts by distribution of State bonds to the pensioners over a period of six years. Article 1(3) of Legislative Decree no. 166 extinguished all pending proceedings concerning the reimbursement in question and provided that each party would bear its own legal costs and that the judicial decisions which, on the day of entry into force of the Legislative Decree no. 166, had not yet become final would produce no legal effects.

Legislative Decree no. 166/1996 was never converted into a law, but its effects were maintained by section 1(183) of Law no. 662 of 23 December 1996 and section 36 of Law no. 448 of 23 December 1998, which reiterated, *inter alia*, that the judicial decisions which, on the day of entry into force of the Legislative Decree no. 166, had not yet become final would produce no legal effects.

In respect of the above proceedings that the applicant had instituted on behalf of numerous pensioners and which were pending before the Court of Cassation, the latter by numerous judgments given in 1999 and 2000 declared the proceedings extinguished and the legal costs divided between the applicant and the INPS, in accordance with the above-mentioned laws.

Some judges in 1999 and 2000 applied to the Constitutional Court for review of the above-mentioned sections of Laws nos. 662/1996 and 448/1998. By judgment no. 310 of 20 July 2000, the Constitutional Court declared the said laws compatible with the Italian Constitution.

On 2 April 2001 the applicant was served with an injunction granted to the INPS by the Macerata magistrate court ordering him to pay the sum of 227,646,556 Italian lire [about 117,569.63 euros]. This sum had been paid to the applicant as a consequence of the first instance decisions of the magistrates' courts' (see above).

On 12 May 2001 the applicant appealed against the order and instituted proceedings before the Macerata magistrate's court against the INPS. By a judgment issued on 28 May 2003 and filed with the registry on 20 June 2003 the magistrate's court rejected the applicant's claim because the proceedings had been extinguished and the legal costs divided in accordance with the above-mentioned laws and because the first instance decisions of the magistrates' courts' had not become final.

It is not clear whether the applicant appealed against this judgment.

B. Relevant domestic law

Under Article 91 of the Code of Civil Procedure, the unsuccessful party in the proceedings bears all legal costs, including the lawyer's fees, costs and expenses incurred by the other party or parties.

Under Article 92, the judge can divide the legal costs between the parties when neither is entirely successful or when there are other equitable grounds (“*altri giusti motivi*”) therefore.

Under Article 93 of the Code of Civil Procedure, a lawyer whose client is of limited means can declare that he has advanced the costs and expenses of the proceedings on behalf of his client and has not been paid his fees (*onorari*), and can accordingly request that, if his client is successful and is thus entitled to be awarded legal costs under Article 91, the court should award the costs directly to the lawyer (*distrazione delle spese*). Article 93 thus grants a special protection to the lawyer, who enters into a direct relationship with the opposing party. He can subsequently act autonomously against the losing party in order to recover his fees, costs and expenses. The lawyer remains entitled to claim his fees from his client, however.

Under Legislative Decree no. 166/1996 all pending proceedings concerning the reimbursement of taxes unjustifiably paid by pensioners were extinguished and the legal costs were divided between the parties.

Under Article 77 (3) of the Italian Constitution, a legislative decree is a provisional Act which ceases to be valid if not converted into a law.

Legislative Decree no. 166/1996 was not converted into a law. However, its effects were maintained by section 1(183) of Law no. 662 of 23 December 1996 and section 36 of Law no. 448 of 23 December 1998. Law no. 448 of 23 December 1998 entered into force on 1 January 1999.

Under Article 1 of Constitutional Law no. 1 of 9 February 1948 “The question of the constitutionality of a law or equivalent act of the Republic which has been raised either by the judge or by any of the parties to the proceedings and has not been considered manifestly ill-founded by the judge shall be referred to the Constitutional Court for decision.”

COMPLAINTS

The applicant complained under Article 1 of Protocol No. 1 to the Convention, that he had been deprived of his right to the payment of his fees, costs and expenses in connection with the proceedings terminated by Laws nos. 662/96 and 448/1998. He argued that the State had decided to depart - for its own benefit and to his detriment - from the general principle that the unsuccessful party bore the legal costs incurred by the other party.

THE LAW

The applicant complained that he had been deprived of his right to the payment of his fees, costs and expenses in connection with the proceedings terminated by Laws nos. 662/1996 and 448/1998. He invoked Article 1 of Protocol No. 1 to the Convention, which provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The Court must first ascertain whether the application has been submitted in time, i.e. “within a period of six months from the date on which the final decision was taken” for the purposes of Article 35 § 1 of the Convention.

The Government submitted that the six-month period ran from 1 January 1999 date of the entry into force of Law no. 448/1998.

The applicant argued that the six-month period ran from 20 July 2000, which was the date of the decision of the Constitutional Court, when it finally ruled on whether Laws nos. 662/1996 and 448/1998 were compatible with the Italian Constitution. In particular, he alleged that he had not sustained any damage until the Constitutional Court gave judgment.

The Court notes that one could also argue that the six-month period ran from the unspecified dates in 1999 and 2000 on which the Court of Cassation's judgments declaring the cases extinguished became final.

The Court observes that, by virtue of the said laws, the applicant was not awarded the fees, legal costs and expenses in the proceedings, as each party was required to bear its own costs. The laws in question caused damage to the applicant which had an automatic effect. The violation complained of, and the damage resulting from it, were thus a direct effect of the above-mentioned laws.

The Court recalls that where no domestic remedy is available in respect of the effects of a law, the entry into force of the law complained of must normally be taken as the "final decision" for the purposes of Article 35 § 1 (see *X v. the United Kingdom*, no. 7379/76, Commission decision of 10 December 1976, Decisions and Reports (DR) 8, pp. 211-213, and *X v. the United Kingdom*, no. 8206/78, Commission decision of 10 July 1981, DR 25, pp. 147-152).

The Court remarks that the Court of Cassation, like the other courts that had to declare cases extinguished, was bound by the law from the date of its entry into force and had no discretion whatsoever. Therefore, the proceedings then pending cannot be considered remedies whose exhaustion is required under Article 35 of the Convention (see, *mutatis mutandis*, *Hazar and Others v. Turkey* (dec.), no. 62566/00-62577/00 and 62579/00-62581/00, 10 January 2002).

As far as the Constitutional Court's judgment is concerned, the Court observes that in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the Constitutional Court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention (see *Brozicek v. Italy*, judgment of 19 December 1989, Series A no. 167, p. 17, § 34; *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 42, ECHR 1999-V; and *De Jorio v. Italy* (dec.), no. 73936/01, 6 March 2003). Furthermore as in Italy there is no time-limit on the filing of an application for review of a law's constitutionality after the entry into force of the law and as this application for review can be made several times at any stage of proceedings, the Court notes that this could have unreasonable consequences as far as the six-months rule is concerned if the Constitutional Court's judgment was to be considered the final decision within the meaning of Article 35 of the Convention.

Therefore, in the circumstances of the present case, the Court finds that the decision of the Constitutional Court given on 20 July 2000 is not the final decision within the meaning of Article 35 § 1 of the Convention

As a consequence, the six-month period ran from the entry into force of the law complained of.

In this respect, the Court considers that where the law complained of is a provisional act, such as the legislative decree in the present case, the “final decision” within the meaning of the Convention is the definitive Law which embodies that act. As Legislative Decree no. 166/1996 was never converted into a Law, the Court finds that Law no. 448/1998 was the final decision, as it maintained the effects of the said legislative decree. Consequently, the six-month period started to run from the date of entry into force of that law, that is on 1 January 1999.

It follows that the Government's objection is well-founded and that the application, which was introduced on 27 November 2000, is out of time and must be rejected under Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President