

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

FIRST SECTION

CASE OF GANGEMI v. ITALY

(Application no. 59233/17)

JUDGMENT

STRASBOURG

26 September 2024

This judgment is final but it may be subject to editorial revision.



In the case of Gangemi v. Italy,

The European Court of Human Rights (First Section), sitting as a Committee composed of:

Péter Paczolay*, President*,
Gilberto Felici,
Raffaele Sabato*, judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 59233/17) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 8 August 2017 by an Italian national, Mr Sergio Gangemi ("the applicant"), who was born in 1974, lives in Aprilia and was represented by Mr L. Giudetti, a lawyer practising in Latina;

the decision to give notice of the application to the Italian Government ("the Government"), represented by their Agent, Mr L. D'Ascia;

the parties' observations;

Having deliberated in private on 5 September 2024,

Delivers the following judgment, which was adopted on that date:

SUBJECT MATTER OF THE CASE

1. The application concerns the question of whether the legal basis for the imposition on the applicant of the measure of special police supervision and compulsory residence – notably Article 1 § 1 (a) and (b) of Decree no. 159 of 6 September 2011 (*Codice delle leggi antimafia e delle misure di prevenzione*, "Decree no. 159/2011") – was sufficiently clear and foreseeable, within the meaning of Article 2 of Protocol No. 4 to the Convention.

2. On 5 March 2013 the public prosecutor of the Latina District Court requested the applicant to be subjected, for a period of three years, to the preventive measure of special police supervision and the obligation to reside within the Municipality of Aprilia.

3. On 29 May 2014 the Latina District Court declared the applicant socially dangerous pursuant to Article 1 § 1 (a) and (b) of Decree no. 159/2011 (*pericolosità generica* or "ordinary dangerousness") as a person who, on the basis of factual evidence, may be regarded as a habitual offender and who habitually lives off the proceeds of crime. It therefore granted the preventive measure requested by the public prosecutor and imposed on the applicant the following obligations for a period of three years: to find a stable job; to lead an honest and law-abiding life and not give cause for suspicion; not to leave his domicile without reporting it to the police authority responsible for his supervision; to present himself to the police authority responsible for his supervision on Mondays and Fridays, between 4 and

6 p.m., and every time requested to do so; not to return home later than 10 p.m. or to leave home before 7.30 a.m., except in case of necessity and only after giving notice to the authorities in good time; not to keep or carry weapons; not to associate with persons who had a criminal record and who were subject to preventive or security measures; and to reside in the Municipality of Aprilia, located in the Lazio Region.

4. Upon the applicant's appeal, the measure was confirmed on 23 February 2016 by the Court of Appeal of Rome.

5. By judgment no. 31091 of 6 March 2017, which declared inadmissible the applicant's appeal on points of law, the measure was confirmed by the Court of Cassation and became final.

6. Relying on Article 2 of Protocol No. 4 to the Convention, the applicant complained of the alleged lack of clarity and foreseeability of the legal basis with regard to individuals to whom special police supervision, as a preventive measure, was applicable, and of the alleged vague and indeterminate content of the obligations imposed on him, including the compulsory residence order.

THE COURT'S ASSESSMENT

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion of domestic remedies

7. The Government objected that the application was inadmissible for non-exhaustion of the domestic remedies.

8. They observed that the applicant's appeal on points of law had been declared inadmissible by the Court of Cassation and, in any event, that the applicant had not complained of the lack of foreseeability of the obligations imposed on him in his appeal to on points of law.

9. The applicant observed that he could not have lodged before the Court of Cassation the complaint raised in the present case.

10. The Court reiterates that domestic remedies have not been exhausted when an appeal is not accepted for examination because of a procedural mistake by the applicant. However, non-exhaustion of domestic remedies cannot be held against an applicant if, in spite of his or her failure to observe the forms prescribed by law, the competent authority has nevertheless examined the substance of the appeal. Article 35 § 1 will be complied with where an appellate court examines the merits of a claim even though it considers it inadmissible (see *Asanović v. Montenegro*, no. 52415/18, § 51, 20 May 2021, with further references).

11. In the present case, the Court notes that the Court of Cassation declared the applicant's appeal on points of law inadmissible because the alleged lack of reasoning of the appeal judgment was not grounds for appeal on points of law in cases concerning preventive measures. However, it

examined the applicant's complaint, and observed that the Court of Appeal had given sufficient reasons as to the conditions for declaring the applicant socially dangerous. The Court of Cassation also expressly examined *proprio motu* the complaint raised in the present case. In particular, it cited the case-law of the Constitutional Court and observed that the provisions at stake did not contain a clear indication of the factual circumstances capable of justifying a declaration of social dangerousness, thereby leaving a wide margin of discretion to the judge. It therefore examined the issue concerning the foreseeability of the legal basis and the scope of discretion conferred to the domestic authorities.

12. As regards the Government's objection that the applicant had not raised the complaint concerning the alleged lack of foreseeability of the obligations imposed on him, the Court notes that the Court of Cassation would not have had the power to redress the violation alleged by the applicant, since it derived directly from the law.

13. It follows that the Government's non-exhaustion objection in these respects must be dismissed.

14. The Government further submitted that, following the Court's judgment in the case of *De Tommaso v. Italy* ([GC], no. 43395/09, 23 February 2017), and the subsequent Constitutional Court judgment no. 24 of 27 February 2019, the applicant could have lodged a request for revocation of the measure, pursuant to Article 28 of Decree no. 159/2011. In their view, the availability and effectiveness of such remedy was demonstrated by the domestic case-law (see Court of Cassation, judgment no. 33641 of 13 October 2020).

15. The applicant replied that the revocation request pursuant to Article 28 of Decree no. 159/2011 could be lodged in respect of financial preventive measures (confiscation) but not in respect of the measure of special police supervision, which was at stake in the present case.

16. The Court reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court (see *J.I. v. Croatia*, no. 35898/16, § 60, 8 September 2022). The development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (see, *mutatis mutandis*, *McFarlane v. Ireland* [GC], no. 31333/06, § 120, 10 September 2010).

17. In the present case, the Court notes that the application was lodged on 8 August 2017. By contrast, the Court of Cassation's judgment, which observed that the remedy of revocation was available in respect of complaints concerning the alleged lack of foreseeability of the legal basis for preventive measures on the basis of the Constitutional Court's judgment 24/2019, was adopted on 13 October 2020. Therefore, the applicant could not have been expected to use this remedy.

18. Moreover, the Court does not see any exceptional circumstances which would justify an exception to the general rule and require the applicant to avail himself of the new domestic remedy (see, *a contrario*, *Fakhretdinov and Others v. Russia* (dec.), nos. 26716/09 and 2 others, §§ 30-34, 23 September 2010, and *Beshiri and Others v. Albania* (dec.), nos. 29026/06 and 11 others, § 194, 17 March 2020).

19. In the light of the above, the Government's non-exhaustion objection in this respect must also be dismissed.

B. Victim status

20. The Government argued that the applicant lacked victim status, as the measure had been imposed on him under both letters (a) and (b) of Article 1 § 1 of Decree no. 159/2011. Accordingly, the hypothetical finding of the lack of foreseeability of the former provision would not affect the validity of the measure, which was also based on the latter since, in the Government's view, letter (b) would not lack in foreseeability.

21. The applicant contested this argument.

22. The Court observes that in the case of *De Tommaso* (cited above, §§ 117-18) it did not make any distinction between letters (a) and (b) of Article 1 § 1 of Decree no. 159/2011, which were both found to lack clarity and foreseeability within the meaning of the Convention.

23. It follows that the Government's objection must be dismissed.

C. Conclusions as to admissibility

24. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

25. As regards the issue submitted to it in the present case, the Court notes that in the case of *De Tommaso* (cited above, § 118) the Grand Chamber held that the law in force at the relevant time (section 1 of Act no. 1423 of 27 December 1956) did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts. It was therefore not formulated with sufficient precision to provide protection against arbitrary interferences and to enable the applicant to regulate his conduct and foresee to a sufficiently certain degree the imposition of preventive measures. The Grand Chamber further observed, as regards the measures provided for in sections 3 and 5 of Act no. 1423/1956, that some of them were worded in very general terms and their content was extremely

vague and indeterminate; this referred, in particular, to the provisions concerning the obligations to "lead an honest and law-abiding life" and "not give cause for suspicion" (ibid., § 119).

26. The Court further observes that Act no. 1423/1956 was repealed by Decree no. 159/2011, whose Article 1 reproduced section 1 of the former. Moreover, sections 3 and 5 of Act no. 1423/1956 were transposed into Articles 6 and 8 of Decree no. 159/2011. Accordingly, the provisions applied in the present case were the same as the provisions applied in the case of *De Tommaso*, in which the Grand Chamber found a violation of Article 2 of Protocol No. 4 on account of the lack of clarity and foreseeability of the legal basis for the contested measure. Moreover, the obligations to "lead an honest and law-abiding life" and "not give cause for suspicion" were also imposed on the applicant in the present case (see paragraph 3 above).

27. Having examined all the material submitted to it, the Court has not found any fact or argument capable of persuading it to reach a different conclusion on the merits of the applicant's complaints.

28. In particular, the Court is not convinced by the Government's argument that the legal basis became foreseeable in the light of the interpretation of Article 1 of Decree no. 159/2011 given by the Constitutional Court in judgment no. 24/2019. Without delving into the issue of whether this interpretation solved the problem of the lack of foreseeability of the applicable domestic provision, the Court observes that the Constitutional Court's judgment was subsequent to the facts of the present case and that the applicant had already served the three years of restrictions imposed on him. It was therefore not pertinent for the present case.

29. Accordingly, the applicant's complaints disclose a breach of Article 2 of Protocol No. 4.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. The applicant requested the Court to award just satisfaction on an equitable basis.

31. The Government submitted that the applicant's claims were unsubstantiated.

32. The Court, acting on an equitable basis and having regard to the circumstances and the nature of the violation, awards the applicant 7,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable.

33. Given that the applicant did not submit any claim in respect of costs and expenses, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Dismisses* the Government's preliminary objections;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 2 of Protocol No. 4 to the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 26 September 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Péter Paczolay President