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

FIRST SECTION

DECISION

Application no. 15717/16
Salvatore COTENA
against Italy

The European Court of Human Rights (First Section), sitting on 4 June 2024 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. 15717/16) 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 16 March 2016 by Mr Salvatore Cotena ("the applicant"), an Italian national born in 1958, who is detained in San Gimignano and was represented by Mr L. Dell'Orfano, a lawyer practising in Naples;

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

the observations submitted by the Government;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the rejection of the applicant's request for a reduction of his sentence from life imprisonment to thirty years' imprisonment within proceedings for the review of the enforcement order relating to his sentence (*incidente di esecuzione*).

A. The applicant's sentence to life imprisonment

2. The applicant was brought to trial for being a member of a mafia-type association, of organisations dealing in drugs and firearms and for multiple murders. These crimes, committed between 1991 and 1992, were cumulatively punishable by life imprisonment with daytime isolation.

3. By a judgment filed with its registry on 13 January 2000, the Naples Assize Court found the applicant guilty on all counts and sentenced him to life imprisonment with daytime isolation.

4. On 2 January 2000, Law no. 479 of 1999 entered into force, reinstating the possibility (previously denied) for defendants liable to a sentence of life imprisonment to be tried under the summary procedure (a simplified process whereby a case can be decided as the file stands – *allo stato degli atti* – at the preliminary hearing). It provided that in the event of a conviction following trial under such a procedure, life imprisonment was to be replaced by thirty years' imprisonment.

5. Pursuant to section 4 *ter* of Decree-Law no. 82 of 7 April 2000, as amended and converted into Law no. 144 of 5 June 2000 (which entered into force on 8 June 2000), defendants could request to be tried under the summary procedure at the first subsequent hearing, provided that evidentiary hearings were still ongoing, either at first or second instance.

6. On 24 November 2000, Decree-Law no. 341 of 2000 entered into force. Section 7 of the Decree-Law provided that "life imprisonment", as stated in Law no. 479 of 1999, should be taken to mean "life imprisonment without daytime isolation". In other words, only those liable to a sentence of life imprisonment without daytime isolation could be eligible for a reduction to thirty years' imprisonment, while those liable to a sentence of life imprisonment with daytime isolation, such as the applicant, would only be eligible, in the event of trial under the summary procedure, for a reduction to life imprisonment without daytime isolation.

7. On 11 October 2001, at the first hearing subsequent to the enactment of Decree-Law no. 82 of 7 April 2000, while the proceedings were pending on appeal, the applicant requested to be tried under the summary procedure. The request was granted on the same day.

8. On 11 March 2002 the Naples Assize Court of Appeal upheld the applicant's conviction and modified his sentence to life imprisonment without daytime isolation.

9. The applicant appealed on points of law. By a judgment which became final on 29 November 2002, the Court of Cassation rejected the applicant's request.

B. The judgment in *Scoppola v. Italy (no. 2)*

10. In *Scoppola v. Italy (no. 2)* ([GC], no. 10249/03, 17 September 2009), the Court concluded that Italy had failed to discharge its obligation to grant the applicant in that case, who had been tried under the summary procedure and sentenced to life imprisonment, the benefit of Law no. 479 of 1999 (which prescribed a more lenient penalty), in violation of Article 7 of the Convention.

11. It also concluded that Article 6 § 1 of the Convention had been breached as a result of the frustration of the applicant's legitimate expectation that thirty years' imprisonment was the maximum sentence to which he was liable.

C. Domestic case-law following *Scoppola v. Italy (no. 2)*

1. Plenary Court of Cassation judgment no. 34233 of 19 April 2012

12. In a case known as *Giannone*, the plenary Court of Cassation decided that the *lex mitior* (that is, the law providing for a reduced sentence) was only applicable in cases where the accused was tried under the summary procedure following a request made during the period when Law no. 479 of 1999 had been in force (that is to say, between 2 January 2000 and 24 November 2000).

2. Constitutional Court judgment no. 210 of 3 July 2013

13. Within enforcement proceedings in a case known as *Ercolano*, the plenary Court of Cassation referred to the Constitutional Court the question of whether the retrospective application of section 7 of Decree-Law no. 341 of 2000 was compatible with the Constitution in the case of those who had made their request to be tried under the summary procedure while Law no. 479 of 1999 had been in force and had been sentenced afterwards.

14. By judgment no. 210 of 3 July 2013, published in the Official Gazette (*Gazzetta ufficiale*) on 24 July 2013, the Constitutional Court found that section 7 of Decree-Law no. 341 of 2000 was unconstitutional in that respect and that, should the conditions set forth by the plenary Court of Cassation (see paragraph 12 above) be met, a review of the enforcement order was the appropriate means of securing the benefit of the more lenient penalty of thirty years' imprisonment.

3. Plenary Court of Cassation, judgment no. 18821 of 7 May 2014

15. Following the Constitutional Court's judgment above, the plenary Court of Cassation, in the case of *Ercolano*, by judgment no. 18821 of 24 October 2013, deposited with the registry on 7 May 2014, concluded that the defendant's life sentence in that case (determined in accordance with section 7 of Decree-Law no. 341 of 2000) was to be replaced with thirty

years' imprisonment following an application for the review of the enforcement order.

16. Among other things, the Court of Cassation, subscribing to the principles expressed in *Giannone* (see paragraph 12 above), reiterated that the applicability of the more lenient penalty of thirty years' imprisonment – in the context of proceedings for the review of the enforcement order – was conditional upon a specific event, namely the submission of the defendant's request to be tried under the summary procedure between 2 January and 23 November 2000.

D. The applicant's request for the review of the enforcement order relating to his sentence

17. On 25 November 2010 the applicant instituted proceedings for the review of the enforcement order relating to his sentence, requesting that his sentence be reduced to thirty years' imprisonment, allegedly in line with the principles set out in *Scoppola (no. 2)* (cited above).

18. On 17 December 2010 the Naples Assize Court of Appeal, acting as an enforcement judge (*giudice dell'esecuzione*), deemed the request inadmissible, reasoning that the final conviction could not be modified.

19. On 2 October 2014 the Naples Assize Court of Appeal dismissed the application, considering that the applicant had been granted the summary procedure and that his life sentence without daytime isolation was the reduced penalty related to it.

20. On 14 October 2014 the applicant appealed on points of law. On 13 October 2015 the Court of Cassation dismissed the appeal, relying on its well-established case-law, namely the above-mentioned *Ercolano* and *Giannone* cases (see paragraphs 12 and 15 above) and finding that the conditions set out in those judgments to modify a final conviction (namely the submission of a request for the summary procedure between 2 January and 23 November 2000) were not met in the applicant's case.

E. The applicant's complaints before the Court

21. The applicant relied on Article 7 of the Convention, alleging that the domestic courts had failed to grant him the benefit of the provision prescribing a more lenient penalty, as set out in *Scoppola (no. 2)* (cited above).

22. He also complained of a violation of Article 6 § 1 of the Convention, arguing that if his trial had ended before 23 November 2000, he would have been sentenced to the more lenient penalty of thirty years' imprisonment.

THE COURT'S ASSESSMENT

23. The Government argued that the application had been lodged outside the six-month time-limit on two grounds. Firstly, they pointed out that the applicant has been sentenced to life imprisonment by a judgment of the Court of Cassation which became final on 29 November 2002. He should then have brought his complaint before the Court immediately after his conviction. The Government stated that, the case *Scoppola (no. 2)* (cited above) is indeed substantially different from the case at stake, the applicant having introduced a request for the summary procedure after the entry into force of Decree-Law no. 341 of 2000. Secondly, they submitted that the application for the review of an enforcement order is an extraordinary remedy, thus not relevant for the purposes of Article 35 § 1 of the Convention. In any event, in the applicant's case such remedy was void of any prospect of success in that, again, the applicant's case differed from the case *Scoppola (no. 2)* (cited above).

24. The Government also contended that no violation of the alleged provisions had occurred in this case.

25. The applicant filed his observations outside the time-limit and they have thus not been included in the case file for the consideration of the Court (Rule 38 § 1 of the Rules of Court).

26. The Court notes at the outset that, within their additional written observations, the Government objected for the first time that the applicant failed to raise his complaints before the Court of Cassation during the procedure on the merits of his case and that therefore he did not exhaust the available domestic remedies. However, the Court discerns no exceptional circumstances which could have released them from their obligation pursuant to Rule 55 of the Rules of Court to raise their objection in their written observations on the admissibility of the application. Consequently, the Government are estopped from raising that objection at this stage of the proceedings and it must be dismissed (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 52, 15 December 2016).

27. Concerning the Government's argument that the present application has not been lodged within the six-month time limit, the Court reiterates that in assessing whether an applicant has complied with Article 35 § 1 the requirements contained in that Article concerning the exhaustion of domestic remedies and the six-month period[1] are closely interrelated (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 75, 5 July 2016).

[1] Protocol No. 15 to the Convention has shortened to four months from the final domestic decision the time-limit provided for by Article 35 § 1 of the Convention. However, in the present case the six-month period still applies, given that the final domestic decisions were taken prior to 1 February 2022, date of entry into force of the new rule (pursuant to Article 8 § 3 of Protocol No. 15 to the Convention).

28. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where an applicant avails himself or herself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective it may be appropriate for the purposes of Article 35 § 1 of the Convention to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 260, ECHR 2014 (extracts), and *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 157, ECHR 2009).

29. In the present case, the Court observes that, by its judgment no. 210 of 3 July 2013, the Constitutional Court found that section 7 of Decree-Law no. 341 of 2000 was unconstitutional and that a review of the enforcement order was the appropriate means by which the benefit of the more lenient penalty of thirty years' imprisonment could be granted to those who had made a request to be tried under the summary procedure while Law no. 479 of 1999 had been in force and had been sentenced afterwards.

30. The Court nonetheless considers that at the latest from 7 May 2014, the date of the publication of the Court of Cassation's judgment no. 18821 in the *Ercolano* case, which was promptly published in all Italian legal journals, it was ultimately clear that those who had not submitted their request to be tried under the summary procedure between 2 January and 23 November 2000 could not obtain a reduction of their sentence by way of an application for the review of the enforcement order (see paragraphs 15 and 16 above); therefore such remedy would be ineffective in their situation.

31. The Court notes that the applicant's request for the review of his enforcement order, which was lodged on 25 November 2010, was rejected by the Naples Assize Court of Appeal, acting as an enforcement judge, on 2 October 2014 (see paragraph 19 above), that is after publication of the Court of Cassation's judgment in the *Ercolano* case. The Court considers that, at that time, the applicant, who had submitted his request to be tried under the summary procedure on 11 October 2001, ought to have been aware of the fact that the remedy of which he had availed himself had turned out to be ineffective in his case. He nevertheless lodged an appeal on points of law against the rejection.

32. In view of the above, the Court finds that such an appeal on points of law was doomed to failure from the outset (see *Jeronovičs*, cited above, § 75, *in fine*). Without it being necessary to examine the applicant's failure to lodge his application within six months of his final conviction, as alleged by the Government (see paragraph 18 above), in the circumstances of the present case, the final domestic decision to be taken into account to calculate the six-month time-limit pursuant to Article 35 §§ 1 and 4 of the Convention is, in any event, the Naples Assize Court of Appeal's decision of 2 October 2014 (see also *Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

33. Considering that this decision was handed down more than six months prior to 16 March 2016, the date on which the applicant lodged the present application, the Court concludes that this application is out of time and must be declared inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 27 June 2024.

Liv Tigerstedt Deputy Registrar	Péter Paczolay President