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

FIRST SECTION

# DECISION

Application no. 74064/17
Giovanni GELSOMINO
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. 74064/17) 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 9 October 2017 by Mr Giovanni Gelsomino ("the applicant"), an Italian national born in 1967, who is detained in Parma and was represented by Ms L. Ancona, a lawyer practising in Alcamo (Trapani);

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, 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 domestic regulations and the applicant's sentence to life imprisonment

2. The applicant was brought to trial for murder and other crimes committed in 1995 and cumulatively punishable by life imprisonment with daytime isolation.

3. On 22 January 1997 the Caltanissetta Assize Court found the applicant guilty as charged and sentenced him to life imprisonment without daytime isolation. The applicant appealed against the conviction.

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. At a hearing on 26 January 2000, the applicant asked to be tried under the summary procedure.

6. In the absence of transitional provisions, the request was denied, and, by a judgment of 31 May 2000, the Caltanissetta Assize Court of Appeal upheld the conviction.

7. On 8 June 2000, Decree-Law no. 82 of 7 April 2000, as amended and converted into Law no. 144 of 5 June 2000, entered into force. Pursuant to its section 4 *ter*, defendants liable to a sentence of life imprisonment were allowed to request to be tried under the summary procedure at their next hearing, provided that evidentiary hearings were still ongoing in their case, either at first or second instance.

8. On 24 November 2000, Decree-Law no. 341 of 2000 entered into force. Section 7 of the Decree-Law established that "life imprisonment", as referred to 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.

9. The applicant appealed on points of law complaining, among other things, of the impossibility to submit a request for the summary procedure before the Court of Cassation and asking that the question of constitutionality of section 4 *ter* of Decree-Law no. 82 of 2000 be referred to the Constitutional Court.

10. By a judgment of 17 May 2001, deposited with its registry on 3 August 2001, the Court of Cassation dismissed his request and upheld the conviction.

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

11. 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.

12. 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*

13. 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*

14. 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.

15. 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 13 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. Constitutional Court's order no. 235 of 16 July 2013*

16. By order no. 235 of 16 July 2013, published in the Official Gazette on 31 July 2013, the Constitutional Court declared inadmissible the question of constitutionality of section 4 *ter* of Decree-Law no. 82 of 2000 (see paragraph 7 above) in the part where it prevented defendants in proceedings pending before the Court of Cassation from the possibility to request the

summary procedure. The Constitutional Court observed that in the referred case the defendant had not submitted such a request between 2 January 2000 and 24 November 2000, that is during the applicability of Law no. 479 of 1999 (see paragraph 13 above), so he had not acquired the right to be tried under the summary procedure and subsequently to obtain a modification of the final sentence by means of a review of the enforcement order.

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

17. On 3 December 2014 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. His application was rejected firstly by the enforcement judge and then by the Court of Cassation, with judgment no. 3134 of 20 October 2016, deposited with its registry on 10 April 2017. The domestic courts, while noting that the applicant was not eligible to be tried under the summary procedure due to the stage at which his criminal case was pending at the time of his request (namely, before the Court of Cassation), relied, among other things, on the above-mentioned Constitutional Court's judgment no. 210 of 2013 to highlight that, conversely to Mr Scoppola, the applicant (despite having submitted his request between 2 January 2000 and 24 November 2000) had not been successful in obtaining to be tried under the summary procedure (see paragraph 13 above), therefore he was not entitled to have his sentence reduced by way of a review of the enforcement order.

### E. The applicant's complaints before the Court

19. The applicant complained that the denial of access to the summary procedure due to the stage at which his proceedings were pending had deprived him of the benefit of the provision prescribing a more lenient penalty, as set out in *Scoppola (no. 2),* cited above, in breach of Article 7.

## THE COURT'S ASSESSMENT

20. The Government argued that the application had been lodged outside the six-month time-limit, the applicant's request for the review of his enforcement order being an extraordinary remedy and thus not relevant for the purposes of Article 35 § 1 of the Convention. They also observed that no violation of the alleged provisions had occurred in this case.

21. The applicant reiterated his complaints and submitted that the review of the enforcement order relating to his sentence had been the only available remedy in his case.

22. 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).

23. Where an applicant has tried to avail himself or herself of a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the six-month time-limit and this may lead to the application being rejected as out of time (see *Ulyanov v. Ukraine* (dec.), no. 16472/04, 5 October 2010).

24. 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 (see paragraph 15 above).

25. The Court nonetheless considers that, at the latest from 31 July 2013 (date of publication in the Official Gazette of the Constitutional Court's order no. 235 of 16 July 2013; see paragraph 16 above), it was clear that those who had been sentenced to life imprisonment and could not request to be tried under the summary procedure due to the stage of their proceedings at the time of the entry into force of Law no. 479 of 1999 (see paragraphs 4 and 7 above), could not obtain a reduction of their sentence by way of an application for the review of the enforcement order (see paragraph 16 above; compare *Ambrosio v. Italy* [Committee] (dec.), no. 47271/16, 22 October 2020); therefore such remedy would be ineffective in their situation.

26. The Court notes that the applicant lodged his application for the review of his enforcement order on 3 December 2014, that is, after the publication of the abovementioned Constitutional Court's order no. 235 of 2013.

27. It follows that, in the circumstances of the present case, the remedy of an application for review of an enforcement order cannot be considered an effective remedy and, consequently, cannot be considered for the purpose of calculating the six-month time-limit. Accordingly, the final domestic decision to be taken into account to that effect pursuant to Article 35 §§ 1 and 4 of the Convention is the final judgment convicting the applicant, namely

[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).

the Court of Cassation's judgment of 17 May 2001, deposited with its registry on 3 August 2001 (see paragraph 10 above).

28. Considering that the applicant's conviction became final more than six months prior to 9 December 2017, the date on which he 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.

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| Liv Tigerstedt<br>Deputy Registrar | Péter Paczolay<br>President |