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

FIRST SECTION

DECISION

Application no. 38908/15
Antonino ROTOLO
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. 38908/15) 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 31 July 2015 by Mr Antonino Rotolo ("the applicant"), an Italian national born in 1946, who is detained in Opera (Milan) and was represented by Ms M. Brucale and Ms M. Mori, lawyers practising in Rome;

the decision to give notice to the Italian Government ("the Government") represented by their Agent, Mr L. D'Ascia, of the complaints concerning the alleged violation of Article 6 § 1 of the Convention as to the applicant's expectation to incur a thirty-year imprisonment sentence and of Article 7 of the Convention as to the prohibition of retrospective application of criminal law to the applicant's disadvantage, and to declare the remainder of the application inadmissible;

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 multiple crimes committed between 1981 and 1991 and cumulatively punishable by life imprisonment with daytime isolation.

3. 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.

4. At a hearing on 9 June 2000 the applicant asked and was granted to be tried under the summary procedure.

5. 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.

6. Section 8 of Decree-Law no. 341 allowed defendants in ongoing proceedings to withdraw their requests to be tried under the summary procedure. Accordingly, on an unspecified date the applicant withdrew his request for the summary procedure.

7. On 27 December 2001 the Palermo Assize Court resumed the ordinary procedure and on 11 June 2004 sentenced the applicant to life imprisonment with daytime isolation.

8. On 23 October 2006 the Palermo Assize Court of Appeal upheld the applicant's conviction, which became final on 18 April 2008, following the rejection of the applicant's appeal on points of law.

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

9. 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.

10. 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

11. 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

12. 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.

13. 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 paragrah 11 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

14. 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.

15. While reiterating the principles expressed in *Giannone* (see paragraph 11 above), the Court of Cassation specified that those principles did not apply in situations where an accused had withdrawn his or her request for trial under the summary procedure, in accordance with section 8 of Decree-Law no. 341 of 2000. In those cases it was not open to a defendant to seek a change in the final sentence by way of review of the enforcement order, as his or her

withdrawal was a procedural choice "freely and knowingly made" whereby, opting for ordinary proceedings, the defendant could not obtain the benefit of the more favourable provisions of Law no. 479 of 1999.

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

16. On 25 October 2013 the applicant instituted proceedings for the review of the enforcement orders 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).

17. On 30 May 2014 the Palermo Assize Court of Appeal, acting as an enforcement judge (*giudice dell'esecuzione*) dismissed the request, relying on the plenary Court of Cassation's judgment no. 34233 of 19 April 2012 and observing that the applicant had been tried under the ordinary procedure, therefore he was not entitled to the reduction of sentence provided for by the law in connection with the summary procedure.

18. By judgment no. 12586 of 12 March 2015, filed with the registry on 25 March 2015, the Court of Cassation dismissed the applicant's appeal on points of law.

E. The applicant's complaints before the Court

19. 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).

20. He also complained of a violation of Article 6 § 1 of the Convention, arguing that he had been forced essentially to give up his right to receive a lighter penalty under the summary procedure as a result of the entry into force of Decree-Law no. 341 of 2000, which had been found later to be in violation of the Convention.

THE COURT'S ASSESSMENT

21. The Government argued that the application had been lodged outside the six-month time-limit, the applicant's application 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 has occurred in this case.

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

23. 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).

24. 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).

25. 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 13 above).

26. 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 clear that those who had withdrawn their request to be tried under the summary procedure could not obtain a reduction of sentence by way of an application for review of the enforcement order (see paragraph 15 above); therefore such a remedy would be ineffective in their situation.

27. The Court notes that the applicant's application for review of his enforcement order (lodged on 25 October 2013) was rejected by the Palermo Assize Court of Appeal, acting as an enforcement judge, on 30 May 2014 (see paragraph 17 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 withdrawn his request for the summary procedure, 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.

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[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. The Court finds that, in the light of the case-law of the Constitutional Court and of the plenary Court of Cassation (see paragraphs 13 and 15 above), such an appeal on points of law was doomed to failure from the outset (see *Jeronovičs*, cited above, § 75, *in fine*). Accordingly, in the circumstances of the present case, the final domestic decision to be considered to calculate the six-month time-limit pursuant to Article 35 §§ 1 and 4 of the Convention is the Palermo Assize Court of Appeal's decision of 30 May 2014 (see also *Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

29. Considering that this decision was handed down more than six months before 31 July 2015, 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