FIRST SECTION

DECISION

Application no. 18773/13
Salvatore MATTEO
against Italy

The European Court of Human Rights (First Section), sitting on 21 September 2021 as a Committee composed of:

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

Having regard to the above application lodged on 28 February 2013,

Having regard to the decision to give notice to the respondent Government of the complaints concerning legislative interference with pending proceedings and to declare inadmissible the remainder of the application;

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

Having deliberated, decides as follows:

1. THE FACTS

1.  The applicant, Mr Salvatore Matteo, is an Italian national, who was born in 1938 and lives in Castelpagano. He was represented before the Court by Mr E. Lizza and Mr M. Curatolo, lawyers practising in Rome.

2.  The Government were represented by their Agent, Mr L. D’Ascia and their former co-Agent, Ms M.G. Civinini.

* + 1. The circumstances of the case

3.  The circumstances of the case are analogous to those described in *Maggio and Others v. Italy* (nos. 46286/09 and 4 others, 31 May 2011), and *Stefanetti and Others v. Italy* (merits) (nos. 21838/10 and 7 others, 15 April 2014).

4.  On 3 March 2005 the applicant, who had transferred to Italy the pension contributions he had paid in Switzerland, lodged an application with the Istituto Nazionale della Previdenza Sociale (“INPS”) for his pension to be recalculated, in accordance with the 1962 Italo-Swiss Social Security Convention (see paragraph 12), on the basis of the contributions he had paid in Switzerland in respect of work that he had performed there over several years. As a basis for the calculation of his pension (in respect of his average remuneration over the final five years of his working life), the INPS employed a theoretical level of remuneration (“*retribuzione teorica*”) instead of the actual remuneration (“*retribuzione effettiva*”). The former resulted in a readjustment on the basis of the existing ratio between the social security contributions paid in, respectively, Switzerland (8%) and in Italy (32.7%), which meant that the calculation had as its basis a notional salary, which, according to the applicant, led him to receive a much lower pension than the pension he should have received.

5.  On 23 August 2005 the INPS rejected the applicant’s request. Consequently, on 4 September 2006, the applicant lodged a claim with the Benevento District Court (the body responsible for labour and social security disputes), contending that the INPS’s decision was contrary to the spirit of the Italo-Swiss Convention.

6.  When the relevant proceedings before the Benevento District Court were pending, Law no. 296 of 27 December 2006 (“Law no. 296/2006”; see paragraph 12) entered into force on 1 January 2007.

7.  On 19 June 2007, in view of the entry into force of Law no. 296/2006, the Benevento District Court dismissed the applicant’s claim.

8.  The applicant appealed against the first instance judgment to the Naples Court of Appeal.

9.  On 23 May 2008, judgment no. 172 of the Constitutional Court declared ill-founded a question of constitutionality of Law no. 296/2006 lodged in a different set of proceedings by other applicants.

10.  The applicant, considering that after the judgment of the Constitutional Court domestic courts were bound to dismiss claims such as his, deemed that his participation to proceedings was useless and could only put him at risk of paying costs and expenses. Therefore, he did not show up at two consecutive hearings in front of the Naples Court of Appeal.

11.  Consequently, the Naples Court of Appeal declared inadmissible the appeal on 16 July 2011, pursuant to Article 348 of the Code of Civil Procedure (“CCP”) (see paragraph 13).

* + 1. Relevant domestic law and practice

12.  The relevant domestic law and practice concerning the case are to be found in *Maggio and Others* (cited above, §§ 27-35), and in *Stefanetti and Others* (merits) (cited above, §§ 13-27).

13.  Article 348 of the CCP, in the relevant parts thereof, reads:

“Article 348 – Discontinuance of the appeal (*Improcedibilità dell’appello*)

...

If the appellant does not appear at the first hearing, despite having filed an entry of appearance, the panel postpones the case to a second hearing with an unchallengeable order, of which the registry informs the appellant. If the appellant does not appear at the new hearing, the appeal is declared inadmissible (*improcedibile*) ...”

1. COMPLAINTS

14.  The applicant complained under Article 6 § 1 of the Convention and Article 1 of Protocol no. 1 that the legislative intervention – namely the enactment of Law no. 296/2006, which changed well-established case-law while proceedings were pending – had denied him his right to a fair trial and had unlawfully and disproportionately interfered with his property rights.

1. THE LAW
	* 1. Complaint under Article 6 of the Convention

15.  The applicant complained that the enactment of Law no. 296/2006 had denied him his right to a fair hearing under Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

* + - 1. Non-exhaustion of domestic remedies

16.  The Government argued that the applicant should have complained to the domestic courts of the unconstitutionality (because of its alleged contrariety to the Convention) of Law no. 296/2006. Only after a refusal by the domestic courts to refer the case to the Constitutional Court or after a decision by the latter in the very applicant’s case, the applicant would have exhausted all available and effective domestic remedies.

17.  The applicant did not contest the Government’s argument.

18.  The Court notes that according to Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see among many authorities *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 52-53, 15 December 2016, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002 X, 15 December 2016). In the present case, the Government did not raise an objection as to the non-exhaustion of domestic remedies in their observations of 24 April 2019 on the admissibility and merits. The question of a failure by the applicant to request the referral of a question of constitutionality of Law no. 296/2006 was raised only in their additional observations and submissions on just satisfaction. The Court further notes that during the proceedings before it the Government did not indicate any impediment by which they had been prevented from referring, in their initial observations of 24 April 2019 on the admissibility and merits of the case, to a failure by the applicants to propose to domestic courts to raise a question of constitutionality.

19.  It follows that the Government are estopped from relying on a failure to exhaust domestic remedies.

* + - 1. Six-month rule

20.  The Government contended that the application had been lodged out of time. They argued that the final decision of the Court of Appeal had been delivered on 16 July 2011, whereas the applicant had introduced his application on 28 February 2013. Moreover, since the entry into force of Law no. 296/2006 did not leave any possibility to the domestic courts to decide in a different way and since the applicant had affirmed that, following judgment 172/2008 of the Constitutional Court, the remedy he had exhausted was bound to fail, he should have lodged his application within six months of the entry into force of the law, or, at most, within six months of the Constitutional Court’s judgment.

21.  The applicant did not contest the Government’s thesis.

22.  The Court reiterates that, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Where an applicant avails himself 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 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 (*Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 157, ECHR 2009, and *Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

23.  Having regard to the above-mentioned principles, the Court notes that it is the applicant himself who declared, in his application form, that following judgment 172/2008 of the Constitutional Court he had become aware that the remedy he was pursuing (the appeal to the Naples Court of Appeal) was bound to fail (see paragraph 10 above). For this reason, he decided not to show up to two consecutive hearings, causing the discontinuance of his case. No explanation whatsoever has been given by the applicant as to the delay between the publishing of judgment 172/2008 and the filing of his application with the Court.

24.  The Court therefore finds that the six-month period started to run on 23 May 2008 when the Constitutional Court rendered its judgment and, since the application was lodged with the Court on 28 February 2013, the applicant’s complaint under Article 6 of the Convention is inadmissible for failure to comply with the six-month rule. It must thus be rejected under Article 35 §§ 1 and 4 of the Convention.

* + 1. Complaint under Article 1 of Protocol No. 1 to the Convention

25.  The applicant further complained that the enactment of Law no. 296/2006 and its application to his case constituted an unjustified interference with his possessions, contrary to Article 1 of Protocol No. 1 to the Convention, which reads 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”.

* + - 1. Non-exhaustion of domestic remedies

26.  The Government contested that the applicant did not exhaust all available and effective domestic remedies, since he failed to complain to the domestic courts of the unconstitutionality of Law no. 296/2006.

27.  The applicant did not contest the Government’s thesis.

28.  Referring to its findings in respect of the applicant’s complaint under Article 6 § 1 of the Convention, the Court reiterates that the Government did not raise such objection in their observations of 24 April 2019 on the admissibility and merits.

29.  Consequently, the Government are estopped from relying on a failure to exhaust domestic remedies.

* + - 1. Six-month rule

30.  The Government argued that the interference caused by the legislative intervention would cause, if any, an “instantaneous” violation and that, as such, the complaint would be out of the six months for the same reasons set forth in relation to the applicant’s complaint under Article 6 § 1 of the Convention (see paragraph 20 above).

31.  In the alternative, they claimed that even if the Court were to adhere to the thesis according to which Law no. 296/2006 would continuously interfere with the applicant’s right to property, the complaint under Article 1 of Protocol No. 1 would still be lodged out of time. The Government observed that the applicant should have known that he had no possibility to obtain the recalculation of his pension since the entry into force of Law no. 296/2006 or, at the latest, since judgment 172/2008 of the Constitutional Court. Therefore, he should have lodged his application within six months of the entry into force of the law, or, at most, within six months of the Constitutional Court’s judgment. In this context, they referred to the duty of diligence on persons wishing to apply to the Court to complain about continuing situations.

32.  The applicant did not contest the Government’s thesis.

33.  Referring to its findings in respect of the applicant’s complaint under Article 6 § 1 of the Convention, the Court reiterates that the applicant himself declared, in his application form, that following judgment 172/2008 of the Constitutional Court in 2008 he had become aware that the remedy he was pursuing (the appeal to the Naples Court of Appeal) was bound to fail (see paragraph 23 above).

34.  For this reason, the Court finds that, irrespective of the instantaneous or continuous nature of the situation complained of, the applicant had a duty of diligence and initiative to lodge his application with the Court without unexplained or excessive delay in order to ensure legal certainty since he no longer had any hope of obtaining a solution at the domestic level (see, *mutatis mutandis*, *Samadov v. Armenia* (dec.), no. 36606/08, §§ 12 and 14, 26 January 2021). He should therefore have lodged his application within six months from judgment 172/2008 of the Constitutional Court, dated 23 May 2008.

35.  Therefore the applicant’s complaint under Article 1 of Protocol No. 1 is inadmissible as out of time and must be rejected under 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 14 October 2021.

Liv Tigerstedt Péter Paczolay
Deputy Registrar President