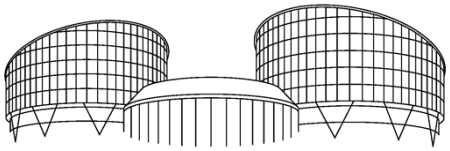

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF FACCHINETTI v. ITALY

(Application no. 34297/09)

JUDGMENT

STRASBOURG

3 September 2020

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

In the case of Facchinetti v. Italy,

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

Aleš Pejchal, *President,*
Pauliine Koskelo,
Tim Eicke, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application 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") by an Italian national, Ms Elisabetta Facchinetti ("the applicant"), on 11 June 2009;

the decision to give notice to the Italian Government ("the Government") of the complaint concerning legislative interference with pending proceedings and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 7 July 2020,

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

INTRODUCTION

The case concerns legislative intervention in the course of ongoing proceedings. In particular, the applicant complained, under Article 6 § 1 of the Convention, that the enactment of Law no. 296/2006 had denied her her right to a fair trial.

THE FACTS

1. The applicant was born in 1939 and lives in Gorlago. She was represented by Mrs E. Fatuzzo, a lawyer practising in Bergamo.

2. The Government were represented by their former Agent, Mrs E. Spatafora, and their former co-Agent, Mrs M. L. Aversano.

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. In June 1999 the applicant's late husband, S.B., 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 "Relevant legal framework and practice" below and the authorities cited therein), 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 S.B., led him to receive a pension equal to one fourth of the pension he should have received.

5. The INPS dismissed S.B.'s application. Consequently, in 2002, S.B. lodged a claim with the Bergamo Tribunal (the body responsible for labour and social security disputes), contending that that was contrary to the spirit of the Italo-Swiss Convention.

6. On 7 February 2003, the Bergamo Tribunal upheld S.B.'s claim and ordered the INPS to recalculate S.B.'s pension.

7. Following an appeal by the INPS, on 11 December 2003, the Brescia Court of Appeal reversed the first-instance judgment.

8. When the relevant proceedings before the Court of Cassation were pending, Law no. 296 of 27 December 2006 ("Law no. 296/2006") entered into force on 1 January 2007.

9. S.B. died on 19 January 2006.

10. On 11 December 2008, in view of the entry into force of Law no. 296/2006, the Court of Cassation dismissed with final effect S.B.'s appeal against the Brescia Court of Appeal's judgment.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

11. 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).

12. The relevant Articles of the Code of Civil Procedure (CCP), in the relevant parts thereof, read:

Article 110 – Legal succession in respect of proceedings (*Successione nel processo*)

> If a party to an action [is unable to further participate in that action] owing to [his or her] death or for another reason, the proceedings [in question] are continued by his universal successor ...

Article 299 – Party's death or loss or capacity prior to appearing before a judge (*Morte o perdita della capacità prima della costituzione*)

> If, before joining the proceedings before the registry or before the judge in charge of the preparation of the proceedings in question, one of the parties or his legal representative dies ..., the proceedings shall be interrupted ...

Article 300 – Death or loss of capacity on the part of a party appearing before a judge or by a party that fails to appear (*Morte o perdita della capacità della parte costituita o del contumace*)

> If any of the events described in the previous Article arises in respect of a party who has joined the proceedings while represented by his lawyer, the latter declares the occurrence of that event at the hearing or notifies the other parties thereof. The proceedings shall be interrupted from the time of such a declaration or notification ... Should the party who joined the proceedings be unrepresented, the proceedings shall be interrupted from the time of the [occurrence of the] event [in question]. ....

13. In several judgments (for example, Court of Cassation judgments nos. 1383 of 1998, 5755 of 1999, and 5626 of 2002), the Court of Cassation has maintained that (by contrast with proceedings pending before lower civil courts) proceedings before it are characterised by a specific process that does not depend on the activities of the parties. Proceedings before the Court of Cassation are in fact uniquely aimed at the solution of legal questions to which only the lawyer of the party in question, and not the party, can make his or her technical contribution (*contributo tecnico*) (Court of Cassation judgment no. 20004 of 2005). The permissible grounds set out Articles 299 and 300 of the CCP for interrupting legal proceedings are therefore not applicable to proceedings before the Court of Cassation. By implication, as a general principle, all the consequences of the trial – as well as all the other legal relationships of the deceased – pass on the heirs.

14. In the event that heirs wish to participate in proceedings in place of the deceased, they cannot formally join those proceedings (*comparsa di costituzione*), but they can simply lodge an application to become an intervener (*atto di intervento o ricorso*) (see, for example, Court of Cassation judgment no. 4233 of 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

15. The applicant complained that legislative intervention – namely the enactment of Law no. 296/2006, which altered the well-established relevant case-law while proceedings were still pending – had denied her her right, as S.B.'s heir, 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 ..."

A. Admissibility

16. The Government disputed the applicant's *locus standi*, limiting themselves to arguing that she had not been a party to the domestic proceedings.

17. The applicant contested that argument.

18. The Court has previously accepted that deceased applicants' close relatives may maintain applications regarding complaints concerning various aspects of Article 6 of the Convention, provided that they have a sufficient interest in so doing (see *Raimondo v. Italy*, 22 February 1994, Series A no. 281-A; *Andreyeva v. Russia* (dec.), no. 76737/01, 16 October 2003; *Mihailov v. Bulgaria* (dec.), no. 52367/99, 9 September 2004; *Stojkovic v. "the former Yugoslav Republic of Macedonia"*, no. 14818/02, § 26, 8 November 2007; and *Grosz v. France* (dec.), no. 14717/06, 16 June 2009). In other cases concerning complaints under Articles 5, 6 or 8 the Court has been prepared to recognise the victim status and the standing of close relatives to submit an application where they have shown a material interest on the basis of the direct effect on their patrimonial rights (see *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, §§ 29-30, 5 July 2005; *Ressegatti v. Switzerland*, no. 17671/02, § 25, 13 July 2006; *Milionis and Others v. Greece*, no. 41898/04, §§ 23-25, 24 April 2008; and *Ljajic v. Serbia*, no. 58385/13, §§ 17-18, 21 July 2015).

19. In the present case, the Court notes that the applicant declared herself to be the heir of S.B. and that the Government did not contest that fact. Indeed they identified the applicant as S.B.'s heir. The Court furthermore notes that the applicant has a "definite pecuniary interest" in the proceedings at issue, given the fact that the alleged violation of Article 6 § 1 had a direct effect on her patrimonial rights in that a judgment in favour of her late husband would have affected her, as his heir (see paragraph 13 above).

20. With regard to the possibility of the applicant's taking part in the proceedings, the Court notes that it has repeatedly stated that an applicant's participation in the relevant domestic proceedings has been found to be only one of several relevant criteria (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 100, ECHR 2014 and the jurisprudence cited therein). In respect of the current case, the Court notes that the applicant could have intervened in the proceedings before the Court of Cassation by means of an act of intervention (see paragraph 14 above). However, it finds that that would have been redundant and would have imposed a disproportionate burden, in addition to weighing down the domestic procedure, to ask a heir to intervene in proceedings which he or she cannot formally join and in respect of which he or she deems his or her initiatives and actions to be irrelevant (see paragraph 13 above), only in order to secure victim status for the purposes of a future (and only potential) application to the Court.

21. Given all the above, the Court finds that the applicant has standing to proceed with his application. Accordingly, the Government's objection must be dismissed.

22. The Court furthermore notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

23. The applicant submitted that by means of the enactment of Law no. 296/2006 the Government had interfered in favour of one of the parties in pending proceedings. Law no. 296/2006 introduced an interpretation of the relevant legal provisions that was diametrically opposed to the meaning given to them by the established case-law of the Court of Cassation (particularly after its 2004 judgment - see *Stefanetti and Others v. Italy* (merits), nos. 21838/10 and 7 others, § 17, 15 April 2014).

24. The Government did not make any submissions on the merits of this complaint.

25. The Court observes that virtually identical circumstances gave rise to a violation of Article 6 in the cases of *Maggio and Others v. Italy* (nos. 46286/09 and 4 others, 31 May 2011) and *Stefanetti and Others* (merits) (cited above), and is satisfied that there is no reason to hold otherwise in the present application.

26. There has accordingly been a violation of Article 6 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

27. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

28. The applicant claimed 324,762 euros (EUR) in respect of pecuniary damage and EUR 25,000 in respect of non-pecuniary damage.

29. The Government disputed the applicant's claims and the calculation criteria employed with regard to the pecuniary damage. They asserted that the difference between what should have been paid as a pension to S.B. in the absence of Law no. 296/2006 and the amount actually received amounted to EUR 224,239. With regard to non-pecuniary damage, the Government contested the applicant's claims as excessive.

30. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6 in respect of the fairness of the proceedings. While the Court cannot speculate as to the outcome of the trial had the

position been otherwise, it does not find it unreasonable to regard the applicant as having suffered a loss of real opportunities (see *Maggio and Others v. Italy*, cited above, § 80). Having regard to the calculation made by the INPS (see *Stefanetti and Others v. Italy* (just satisfaction), nos. 21838/10 and 7 others, § 22, 1 June 2017), which took into account the difference between what should have been paid as a pension to S.B. had Law no. 296/2006 no come into effect, and the amount actually received, the Court awards EUR 11,212 to the applicant.

31. With regard to non-pecuniary damage, making its assessment on an equitable basis, as required by Article 41, the Court awards EUR 5,000 under this head.

B. Costs and expenses

32. The applicant also claimed a lump sum of EUR 10,000 for the costs and expenses incurred before the domestic courts and before the Court.

33. The Government contested the claim as excessive.

34. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 500, covering costs under all heads.

C. Default interest

35. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) EUR 11,212 (eleven thousand two hundred and twelve euros) in respect of pecuniary damage;
      (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 500 (five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 3 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Aleš Pejchal
Deputy Registrar	President