

## La Corte EDU sull'applicazione retroattiva di una legge in materia pensionistica nell'ambito di procedimenti pendenti

(CEDU, sez. I, sent. 17 febbraio 2022, ric. n. 46586/14)

Nella sentenza resa al caso in esame la Corte EDU ha deciso il ricorso presentato da una cittadina italiana la quale lamentava, ai sensi dell'articolo 6 § 1 della Convenzione, che l'emanazione di una legge sul sistema pensionistico italiano intervenuta nel corso del procedimento volto a ricalcolare l'ammontare della sua pensione di reversibilità, aveva violato il suo diritto alla difesa.

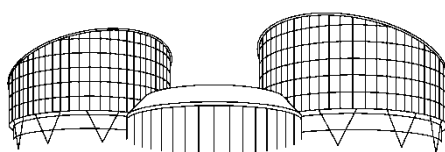
In generale, la Corte ha riaffermato che, sebbene al legislatore non sia impedito di emanare nuove disposizioni retroattive per disciplinare i diritti derivati dalle leggi in vigore, il principio dello Stato di diritto e la nozione di *equo processo* sancito dall'articolo 6 CEDU ostano a qualsiasi ingerenza del legislatore – se non per motivi imperativi di interesse pubblico – nell'amministrazione della giustizia diretta ad influenzare la definizione di una controversia.

Nel caso di specie, i giudici di Strasburgo hanno esaminato preliminarmente gli effetti della disciplina sopravvenuta, osservando che la stessa entrata in vigore della legge *de qua* aveva definito il merito delle controversie, e la sua applicazione aveva reso inutile il proseguimento di altri contenziosi simili a quello del soggetto ricorrente. Pertanto, essa aveva avuto l'effetto di modificare risolutivamente l'esito del procedimento pendente avallando la posizione dello Stato.

Premessa tale osservazione, la Corte ha ribadito che le motivazioni addotte per giustificare tali provvedimenti debbano essere trattate con il più ampio grado di circospezione e ponderazione. Per conseguenza, ragioni finanziarie non possono da sole giustificare l'intervento del legislatore e che l'obiettivo di armonizzare il sistema pensionistico, pur nell'interesse generale, non è di per sé sufficiente a giustificare l'adozione di una legislazione retroattiva che incida su una controversia pendente, riscontrando così la violazione dell'art. 6 § 1 della Convenzione.

In fine, con riferimento all'art. 41 CEDU, la Corte ha osservato che l'assegnazione di un'equa soddisfazione può basarsi solo se il ricorrente non abbia beneficiato delle garanzie inerenti l'equità del procedimento. Pertanto, nel caso di specie essa ha riscontrato una perdita di opportunità reale alla quale va aggiunto il danno morale e, per entrambi i profili, ha disposto il risarcimento.

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

FIRST SECTION

**CASE OF XXX v. ITALY**

(Application no. 46586/14)

JUDGMENT

STRASBOURG

17 February 2022

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of XXX v. Italy,**

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

Marko Bošnjak, *President,*

Péter Paczolay,

Alena Poláčková,

Erik Wennerström,

Raffaele Sabato,

Lorraine Schembri Orland,

Davor Derenčinović, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 46586/14) 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 Immacolata Filomena D’Amico (“the applicant”), on 18 April 2014;

the decision to give notice of the application to the Italian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 18 January 2022,

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

**INTRODUCTION**

1. 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 of 27 December 2006 (“Law no. 296/2006”) had violated her right to a fair hearing.

**THE FACTS**

2. The applicant was born in XXX and lives in XXX. She was represented before the Court by Mr A. Iuliano, a lawyer practising in XXX.

3. The Government were represented by their Agent, Mr L. D’Ascia, *Avvocato dello Stato*.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant's husband, A.C., retired on 1 January 1990. His pension, in accordance with section 2(1) of Law no. 324 of 27 May 1959 ("Law no. 324/1959"), included a special supplementary allowance (*indennità integrativa speciale* – "the IIS"), conceived as a cost-of-living adjustment separate from the main pension payment.

6. In accordance with the relevant laws applicable at the time, pensions of public servants were not based on the principle of "all-inclusiveness", as was the case for pensions of private-sector employees. Public servants' pensions were composed of a fixed salary element and a series of other independent elements, such as the IIS. This type of calculation method meant that whereas the pension paid to the survivor of a private-sector employee was calculated as a percentage of the overall pension, the pension paid to the survivor of a public-sector employee was calculated as a percentage of only the fixed salary element, and the ancillary allowances were paid in full.

7. Starting in 1994 the Italian Parliament passed a series of laws which were aimed at harmonising the pension schemes of employees in the public and private sectors. On 23 December 1994 Law no. 724/1994 was enacted. It provided for the harmonisation of the payment of pensions in the public and private sectors, meaning that the pensions of public servants were to be determined by a single calculation on the basis of the salary elements subject to contribution, including the IIS. At the same time, section 15(5) of that Law preserved arrangements which were already in place, such as those for A.C., who had been in receipt of a pension since 1990.

8. Subsequently, Law no. 335 of 8 August 1995 ("Law no. 335/1995") entered into force. Without explicitly repealing Law no. 724/1994, section 1(41) of Law no. 335/1995 extended the rules governing survivors' pensions to all forms of the general compulsory insurance scheme.

9. A.C. died on 1 April 2002. As a consequence, from 1 May 2002 the applicant received a survivor's pension (calculated as 60% of A.C.'s pension). In accordance with section 1(41) of Law no. 335/1995, the IIS was combined with A.C.'s salary and therefore paid as a percentage of A.C.'s overall original pension.

10. On 22 July 2005 the applicant brought proceedings against the National Public Service Social Security Institute (*Istituto Nazionale di Previdenza per i Dipendenti dell'Amministrazione Pubblica* – hereinafter "the INPDAP", whose functions, following its abolition in 2011, are currently carried out by the *Istituto Nazionale della Previdenza Sociale* (INPS) before the Basilicata Court of Auditors. She complained that the IIS should have been paid in its entirety, that is, as an ancillary allowance rather than as a percentage of the benefit originally paid to her late husband.

11. By a judgment of 2 April 2007 the Basilicata Court of Auditors granted the applicant's claim. Referring to judgment no. 8/QM of 17 April 2002 of the Joint Sections (*Sezioni Riunite*) of the Court of Auditors ("judgment no. 8/QM/2002"), it held that the new system provided for in Law no. 335/1995 only applied to direct pensions which had been paid after 1 January 1995. As A.C. began to receive his pension in 1990, the applicant should have received the IIS in its entirety pursuant to section 15(5) of Law no. 724/1994.

12. On 1 January 2007, while an appeal by the INPDAP was pending before the Central Section of the Court of Auditors, Law no. 296/2006 entered into force. Section 1(774) of that Law provided an authentic interpretation of section 1(41) of Law no. 335/1995, establishing that, in instances where survivors' pensions were received after the entry into force of Law no. 335/1995, regardless of the

date of the payment of the direct pension, the IIS had to be paid as a percentage, forming an integral part of the main pension.

13. Pursuant to the entry into force of Law no. 296/2006, on 21 October 2013 the Central Section of the Court of Auditors, acting as an appellate court in the applicant's case, allowed the INPDAP's appeal, reversed the first-instance judgment and dismissed the applicant's claim.

#### RELEVANT LEGAL FRAMEWORK AND PRACTICE

##### I. RELEVANT PROVISIONS

14. Section 2(1) of Law no. 324/1959 provided:

"Holders of ordinary pensions ... whether ... direct, indirect or reversionary ... shall be granted a special supplementary allowance which shall be determined for each year by applying ... the percentage variation in the cost-of-living index ..."

15. Section 15(5) of Law no. 724/1994 provided for the harmonisation of the pension systems of the public and private sectors and conferred on public-sector pensions the character of all-inclusiveness already adopted for the private sector. It also preserved former arrangements already in place, providing:

"The provisions relating to the payment of the special supplementary allowance on pension payments set out in section 2 of Law no. 324 of 27 May 1959 ... shall only apply to direct pensions paid until 31 December 1994 and to the respective survivors' pensions."

16. Section 1(41) of Law no. 335/1995 extended the rules governing survivors' pensions to all forms of the general compulsory insurance scheme.

17. Section 1(774) of Law no. 296/2006 provided an authentic interpretation of section 1(41) of Law no. 335/1995. It read:

"... Section 1(41) of [Law no. 335/1995] shall be interpreted as meaning that, in the case of survivors' pensions paid after the entry into force of [Law no. 335/1995], regardless of the starting date of the direct pension, the special supplementary allowance ... shall be paid as a percentage, as is generally provided in respect of survivors' pensions."

18. Section 1(775) of Law no. 296/2006 excluded from its scope survivors' pensions that had already been determined in final court decisions.

##### II. JUDGMENT No. 8/QM OF 17 APRIL 2002 OF THE JOINT SECTIONS OF THE COURT OF AUDITORS

19. In judgment no. 8/QM/2002, the Joint Sections of the Court of Auditors, in resolving a conflict of case-law that had emerged, held that in the event of the death of a pensioner whose retirement had started before 31 December 1994, the IIS was to be paid in its entirety to the holder of the relevant survivor's pension, regardless of the date of death of the original pensioner. It therefore established that section 1(41) of Law no. 335/1995 had not repealed section 15(5) of Law no. 724/1994.

##### III. CONSTITUTIONAL COURT'S JUDGMENTS IN RESPECT OF LAW No. 296/2006

20. In judgment no. 74 of 28 March 2008, the Constitutional Court acknowledged that Law no. 296/2006 was a law of authentic interpretation in which the legislature had chosen one of the possible readings of the original text of Law no. 335/1995. At the same time, it found that that reading was not unreasonable and was therefore compliant with Article 3 of the Constitution.

21. In judgment no. 228 of 24 June 2010, the Constitutional Court reiterated that the legislative intervention had been meant not only to curb public spending, but also to harmonise the pension benefits of the public and private sectors.

22. In judgments no. 1 of 5 January 2011 and no. 227 of 26 September 2014 the Constitutional Court reiterated that, while the contested law had taken as a reference a minority strand of case-law, it had chosen one of the possible meanings of the original 1995 text. The court also held that persons who were the beneficiaries of a social security scheme did not have a legitimate expectation of its immutability. Moreover, the amendments made to the relevant legal framework did not completely disregard acquired rights or entail unreasonable measures aimed at harmonising public and private pension payments. Law no. 335/1995 was indeed the first step towards a progressive harmonisation of the pension systems, with structural effects on public expenditure and budget balances, also with a view to ensuring compliance with European Union obligations on financial stability.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

23. The applicant complained that the legislative intervention – namely the enactment of Law no. 296/2006, which departed from well-established case-law while the proceedings in her case were still pending – had violated her 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 ...”

#### A. Admissibility

24. The Government asserted that the application was manifestly ill-founded, since the Constitutional Court had on several occasions held that the impugned law reinforced one of the possible meanings of the interpreted provision and that its enactment had been justified by the need to reform the Italian pension system.

25. The Government also submitted that the applicant had not suffered a significant disadvantage. They noted that, in accordance with the interpretation of Law no. 335/1995 adopted by the authorities and subsequently confirmed by the authentic interpretation provided in Law no. 296/2006, the applicant had received an overall amount of 41,523 euros (EUR) instead of EUR 50,762, which she would have received if the IIS had been paid to her in its entirety under section 15(5) of Law no. 724/1994.

26. The applicant contested those arguments.

27. The general principle *de minimis non curat praetor* underlies the logic of Article 35 § 3 (b), which seeks to ensure consideration by an international court of only those cases where violation of a right has reached a minimum level of severity. Violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case (see, among many other authorities, *Shefer v. Russia* (dec.), no. 45175/04, § 18, 13 March 2012).

28. Taking into account the calculations made by the Government, and having regard to the financial impact on the applicant – a pensioner of a certain age who did not receive a pension other than the one paid to her as A.C.'s surviving spouse – she cannot, in the Court's view, be deemed not to have suffered a significant disadvantage.

29. Therefore, the Court dismisses the Government's preliminary objections, with the exception of their argument that the applicant's complaint is manifestly ill-founded, as this objection must be joined to the merits of the application.

## B. Merits

### 1. *The parties' submissions*

30. The applicant argued that by enacting section 1(774) of Law no. 296/2006, the State had interfered in favour of one of the parties in pending proceedings.

31. The Government contested that argument. They reiterated that at the time of the enactment of Law no. 296/2006 there had been two distinct interpretations of Law no. 335/1995. While the majority of the case-law was favourable to the applicant, the interpretation applied by the INPDAP was consistent with a minority strand of case-law. They relied on the judgments of the Constitutional Court, which confirmed that the legislature had employed one of the possible meanings of the interpreted rule in order to resolve a case-law conflict. The Government further argued that the applicant could not have had any expectation that a specific interpretation of Law no. 335/1995 would have been applied in her case, as judgments of the Court of Auditors did not have binding effect on other cases brought under its jurisdiction.

32. The Government relied on the judgment in *Forrer-Niedenthal v. Germany* (no. 47316/99, 20 February 2003), arguing that interference by the legislature could be justified by historical generational reasons. They also submitted that the case was comparable to *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* (23 October 1997, *Reports of Judgments and Decisions* 1997-VII) and *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others v. France* (nos. 42219/98 and 54563/00, 27 May 2004), in which the Court had found no violation because the interference was aimed at ensuring respect for the original will of the legislature, and in which the Court had also given weight to the aim of remedying a technical imperfection in the interpreted law. In that connection, they asserted that in the present case the Italian public sector pension system had gone through a generational reform which had justified the interference. In particular, Law no. 335/1995 had been enacted to eliminate an irrational difference in treatment between the private and public sectors and to tackle the heavy financial imbalance of the pension system. The impugned law had been aimed at reintroducing the legislature's original intention to harmonise the pension system.

### 2. *The Court's assessment*

33. The Court has repeatedly held that although the legislature is not prevented from enacting new retrospective provisions to regulate rights derived from the laws in force (see, for example, *Anagnostopoulos and Others v. Greece*, no. 39374/98, § 19, ECHR 2000-XI), the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling public-interest grounds – with the administration of justice designed to influence the judicial determination of a dispute (see, among many other authorities, *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 9 others, §

57, ECHR 1999-VII). Although statutory pension regulations are liable to change and a judicial decision cannot be relied on as a guarantee against such changes in the future (see *Sukhobokov v. Russia*, no. 75470/01, § 26, 13 April 2006), even if such changes are to the disadvantage of certain welfare recipients, the State cannot interfere with the process of adjudication in an arbitrary manner (see, *mutatis mutandis*, *Bulgakova v. Russia*, no. 69524/01, § 42, 18 January 2007).

34. In the instant case, the Court must look at the effect of Law no. 296/2006 and the timing of its enactment. It notes that the law expressly excluded from its scope survivors' pensions that had already been determined in final court decisions and settled once and for all the terms of the disputes before the ordinary courts retrospectively. Indeed, the enactment of Law no. 296/2006 while the proceedings were pending did in fact determine the substance of the disputes, and its application by the various ordinary courts made it pointless for an entire group of individuals in the applicant's position to carry on with the litigation. Thus, the law had the effect of definitively altering the outcome of the pending litigation to which the State was a party, endorsing the State's position to the applicant's detriment.

35. The Court reiterates that only compelling general-interest reasons could be capable of justifying such interference by the legislature. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see *Maggio and Others v. Italy*, nos. 46286/09 and 4 others, § 45, 31 May 2011).

36. The Government repeatedly argued that there had been a minority strand of case-law that was unfavourable to individuals in the same position as the applicant, as confirmed by the Constitutional Court in its 2011 judgment (see paragraph 22 above). The Court notes that at the time of the enactment of the impugned legislation the Court of Auditors in its highest formation (the Joint Sections) had upheld the approach in favour of the applicant in judgment no. 8/QM/2002. Against this background, the Court cannot discern why the conflicting court decisions, especially after the judgment by the Joint Sections of the Court of Auditors, would have required legislative intervention while proceedings were pending. It reiterates that such divergences are an inherent consequence of any judicial system which is based on a network of courts with authority over the area of their territorial jurisdiction, and the role of a supreme court is precisely to resolve conflicts between decisions of the courts below (see, *mutatis mutandis*, *Zielinski and Pradal and Gonzalez and Others*, cited above, § 59).

37. As to the Government's argument that the law had been necessary to tackle the heavy financial imbalance of the pension system, the Court has previously held that financial considerations cannot by themselves warrant the legislature substituting itself for the courts in order to settle disputes (see, for example, *Zielinski and Pradal and Gonzalez and Others*, cited above, § 59, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 132, ECHR 2006-V, and *Maggio and Others*, cited above, § 47).

38. As to the Government's argument that the law had been necessary to achieve a homogeneous pension system, in particular by abolishing a system which favoured pensioners of the public sector over others, while the Court accepts this to be a reason of some general interest, it is not persuaded that it was compelling enough to overcome the dangers inherent in the use of retrospective legislation, which has the effect of influencing the judicial determination of a pending dispute (see *Arras and Others v. Italy*, no. 17972/07, § 49, 14 February 2012).

39. The Court further considers that the present case is different from that of *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited by the Government (see paragraph 32 above), where the institution of proceedings by the applicant societies was considered to amount to an attempt to take advantage of the authorities' vulnerability resulting from technical defects in the law, and as to frustrate the intention of Parliament (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, §§ 109 and 112). The instant case is also different from that of *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others*, also cited by the Government (see paragraph 32 above), where the applicants attempted to derive advantages as a result of a lacuna in the law, which the legislative interference aimed to remedy. In the above-mentioned two cases, the domestic courts had acknowledged the deficiencies in the law at issue and action by the State to remedy the situation was foreseeable (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, cited above, § 112, and *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others*, cited above, § 72). However, in the present case, there had been no major flaws in the law.

40. Against this background, even assuming that the law sought to reintroduce the legislature's original intention, the Court considers that the aim of harmonising the pension system, while in the general interest, was not compelling enough to overcome the dangers inherent in the use of retrospective legislation affecting a pending dispute. Indeed, even accepting that the State was attempting to adjust a situation it had not originally intended to create, the Court notes that it could have done so without resorting to a retrospective application of the law.

41. In the light of the above, the Court finds that there has been a violation of Article 6 § 1 of the Convention. Consequently, it dismisses the Government's preliminary objection to the effect that the complaint was manifestly ill-founded.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed 98,435.82 euros (EUR) in respect of pecuniary damage. She also sought an award in respect of non-pecuniary damage as compensation for the emotional distress that she had suffered.

44. The Government contested the amount claimed by the applicant in respect of pecuniary damage. They did not submit any comments as to non-pecuniary damage.

45. 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. Whilst 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*, cited above, § 80, and *Arras and Others*, cited above, § 88). To that must be added non-pecuniary damage, which the finding of a violation in this judgment does not suffice to remedy. Making its assessment on an equitable basis as required by



Article 41, the Court awards the applicant EUR 9,700 in respect of pecuniary damage and EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

46. The applicant also sought an award for the costs and expenses incurred before the Court. She did not quantify this claim or provide the Court with any supporting documentation.

47. According to the Court's settled case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017). In the present case the Court observes that the applicant's claim for reimbursement of costs and expenses manifestly fails to satisfy these requirements, since the amount claimed is not quantified nor substantiated by any supporting documents. The Court therefore rejects the claim made under this head.

C. Default interest

48. 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. *Dismisses* the Government's objection that the applicant did not suffer a significant disadvantage;
2. *Joins to the merits* the Government's objection that the application is manifestly ill-founded and *dismisses* it;
3. *Declares* the application admissible;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
5. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts at the rate applicable at the date of settlement:
    - (i) EUR 9,700 (nine thousand seven hundred euros), plus any tax that may be chargeable, in respect of pecuniary damage;
    - (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
  - (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;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar  
Marko Bošnjak President

