



UNIVERSITA' DEGLI STUDI DI PERUGIA
DIPARTIMENTO DI DIRITTO PUBBLICO

*"L'effettività dei diritti alla luce della giurisprudenza della Corte europea
dei diritti dell'uomo di Strasburgo"*



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

**AFFAIRE MENNITTO c. ITALIE
CASE OF MENNITTO v. ITALY**

(Requête n°/Application no. 33804/96)

ARRÊT/JUDGMENT

STRASBOURG

5 octobre/October 2000

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In the case of Mennitto v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mrs E. PALM,

Mr J.-P. COSTA,

Mr A. PASTOR RIDRUEJO,

Mr L. FERRARI BRAVO,

Mr G. BONELLO,

Mr J. MAKARCZYK,

Mr R. TÜRMEŒ,

Mrs V. STRÁŒNICKÁ,

Mr P. LORENZEN,

Mr M. FISCHBACH,

Mr V. BUTKEVYCH,

Mr J. CASADEVALL,

Mrs H.S. GREVE,

Mr A.B. BAKA,

Mrs S. BOTOUCHAROVA,

Mr M. UGREKHELIDZE,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 8 March, 7 June and 6 September 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), by the European Commission of Human Rights (“the Commission”) and by Mr Mario Mennitto (“the applicant”), an Italian national, on 3 June and 12 May 1999 respectively (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 33804/96) against the Italian Republic lodged with the Commission by the applicant under former Article 25 of the Convention on 2 January 1996. The applicant alleged that his case had not been heard within a reasonable time, as required by Article 6 § 1 of the Convention.

The Commission declared the application admissible on 10 September 1998. In its report of 4 March 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry.], it expressed the opinion that Article 6 was not applicable to the proceedings in issue and that there had accordingly been no violation of that provision (thirteen votes to ten).

3. Before the Court, the applicant was represented by his counsel; the Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza, and their co-Agent, Mr V. Esposito.

4. On 20 September 1999 a panel of the Grand Chamber determined that the case should be decided by the Grand Chamber (Rule 100 § 1 of the Rules of Court). Mr B. Conforti, the judge elected in respect of Italy, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Government accordingly appointed Mr L. Ferrari Bravo, the judge elected in respect of San Marino, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The applicant and the Government each filed a memorial.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 March 2000.

There appeared before the Court:

(a) *for the Government*

Mr V. ESPOSITO,

Co-Agent;

(b) *for the applicant*

Mr G. ROMANO, of the Benevento Bar,

Counsel,

Mr D.A. PARROTTA,

Adviser.

The Court heard addresses by Mr Romano and Mr Esposito, and their replies to the questions of two judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. On 15 March 1984, pursuant to Law no. 833/78, which created the National Health Service and required regional governments, *inter alia*, to adopt appropriate measures for the prevention, screening and treatment of disabilities, the Campania Regional Council enacted Regional Law no. 11

(“the Regional Law”). Article 26 of the Regional Law authorised local public health services (*Unità Sanitarie Locali* – “USLs”) to grant allowances for the first three years after its entry into force to families caring for disabled members of their household directly in their own homes.

8. On 5 December 1989 the Management Committee (*Comitato di gestione*) of Benevento USL no. 5, applying Article 26 of the Regional Law, decided that 134 persons, including the applicant's son, satisfied the conditions entitling their families to payment of the allowance. The decision authorised only distribution to qualifying beneficiaries, depending on the date when they had been recognised as 100% disabled, of the sum of 35,328,240 Italian lire (ITL) for the year 1985; the applicant received ITL 84,720 in respect of the months of November and December 1985.

9. By a notice to pay served on 12 June 1993, the applicant asked Benevento USL no. 5 to grant him the allowance. He pointed out that the placing of his son's name on the list of persons who satisfied the conditions required by the Regional Law for entitlement to the allowance had not been followed by the payment provided for in Article 26 of the Regional Law.

10. As the USL did not reply, the applicant brought proceedings against it in the Campania Regional Administrative Court (“the RAC”) on 2 August 1993. Relying on Article 26 of the Regional Law, he sought a declaration that the lack of an answer from the USL – amounting to a refusal – had been unlawful and that he was entitled to the allowance in question for the years 1985, 1986 and 1987.

11. On 13 August 1993 the applicant requested that a date be fixed for the hearing. On 27 July 1995 he submitted an urgent request for a hearing date to be fixed, observing, *inter alia*, that the USLs were to be restructured on 31 December 1995 and that Italian legislation made no provision for financial continuity between the old entities and the new ones. He was therefore asking for his case to be set down because after the end of 1995 he would no longer be able to obtain the allowance he sought.

In a pleading filed on a date which has not been specified, USL no. 5 submitted, among other arguments, that it did not have capacity to defend the action (*legittimazione passiva*), on the ground that only the Region was required to make available the financial resources needed for payment of the allowance. It maintained that the applicant, who had received the allowance for the year 1985, within the limits of the budgetary appropriations, should have challenged the decision of 5 December 1989, but as he had not done so it had become final and the amount paid could no longer be called into question.

12. The case was heard on 14 January 1997. In a judgment of 14 January and 4 February 1997, the text of which was deposited with the registry on 3 March 1997, the RAC observed in the first place that the applicant was not required to challenge the decision in issue as it did not contain a refusal to pay the full amount of the allowance. On the contrary, there had been two

valid alternative ways of interpreting the USL's conduct. For example, the applicant could have thought the USL was making a payment on account, while reserving final determination of the amount to be paid for a later assessment, or that it had decided to pay a larger sum with an initial instalment to be followed by others. On the merits, the RAC held that, once it had been verified that the statutory conditions for entitlement to the allowance had been satisfied, it should be paid in the quantum provided for in Article 26. The administrative authority thus had no discretionary power and its role should have been restricted to making a purely arithmetical calculation. The applicant had duly established that he was the father of a 100% disabled civilian living with his family; moreover, his son's name was the 95th in the list included in the decision of 5 December 1989. The USL should therefore have ruled on his application. However, as the Court of Cassation had stated when determining a dispute over jurisdiction (judgment no. 8297 of 11 October 1994), the applicant could not claim to have a “personal right” (*diritto soggettivo perfetto*) but only a “legitimate interest” (*interesse legittimo*), that is to say an individual position indirectly protected as far as was consistent with the public interest, which would remain the case until such time as the administrative authority adopted a decision to award the allowance and specified the total amount to be paid. The RAC therefore dismissed the applicant's action in so far as it concerned recognition of his entitlement to the allowance in question.

13. On 20 June and 5 July 1997 respectively USL no. 5 and the Campania Regional Council appealed to the *Consiglio di Stato*. By a decision of 30 August 1997 the *Consiglio di Stato* stayed execution of the first-instance judgment.

14. On 14 November 1997 the Director-General of the ASL (*Azienda Sanitaria Locale*), the body which had taken the place of the USL, approved the text of a friendly settlement reached on 7 November between the administrative authority and the applicant, among others. Noting that in numerous similar cases the competent courts had nearly always recognised that the plaintiffs were entitled to the allowance for the years 1985-87, further noting that the settlement had been signed after it had been verified that the conditions required by the Regional Law had been satisfied, and having regard to the fact that the settlement was about to put an end to a high-profile case which would in all probability have gone against the administrative authority, given the line the courts had taken on the question, so that the public purse would be saved billions of lire, the Director-General ordered payment of the allowance. By a judgment of 25 November 1997, the text of which was deposited with the registry on 27 December 1997, the *Consiglio di Stato* took formal note of the friendly settlement the parties had reached and struck the case out of its list.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. The allowance for the families of disabled civilians is governed by Article 26 of Regional Law no. 11 of 15 March 1984, the relevant parts of which provide:

“For three years after the entry into force of the present Law, local public health services shall be authorised to grant an allowance to families who undertake to provide direct care for persons suffering from mental or physical disabilities who are incapable of attending to their own primary needs and require constant assistance.

The allowance shall be granted in pursuance of the following objectives:

- (a) returning to their families disabled people formerly in full-time institutional care;
- (b) encouraging the practice of caring for disabled children within the family ...;
- (c) socialising the disabled person and improving his relations with those around him;
- (d) improving the lives of the families of disabled persons;
- (e) creating a favourable environment for the life of the disabled person;

...

The amount of the family carers' allowance shall be 25% of the daily charge for attendance on persons hospitalised full-time.”

16. The Court of Cassation has given a number of rulings on the carers' allowance in connection with appeals on points of law concerning disputes over jurisdiction.

17. For example, in judgment no. 5386 of 12 May 1993 it held that, where the jurisdiction of the ordinary courts had been recognised in a decision which had become final, disputes concerning Article 26 of the Regional Law fell into the category of disputes over mandatory assistance, which came within the jurisdiction of the magistrate's court, sitting as an employment tribunal.

In judgment no. 8297 of 11 October 1994 it held that the administrative courts had jurisdiction over disputes about entitlement to the allowance, ruling that the beneficiary could not claim to have a personal right but only a legitimate interest, that is to say an individual position indirectly protected as far as was consistent with the public interest, and that this would remain the case until such time as the administrative authority adopted a decision to award the allowance and specified the total amount to be paid.

The appellants in these two cases were in a similar situation to Mr Mennitto, but had applied to the ordinary courts.

18. The Campania RAC has upheld on many occasions the claims of other persons caring for disabled relatives.

In its judgment no. 251, deposited with the registry on 16 May 1995, it ruled:

“[The Court] declares that the claimant is entitled to receive the allowance provided for in Article 26 of [the Regional Law] ...;

Orders the respondent authority to pay the sum in question ...”

In that decision and in others (such as judgment no. 310 of 4 July 1995 and judgments nos. 323 and 324 of 6 February and 11 June 1996) the RAC gave the following reasons for its ruling:

“[Article 26 of the Regional Law] makes adoption of the decision to grant the allowance subject, among other requirements, to verification that beneficiaries satisfy the relevant qualifying conditions. When such verification had been made, determination of the amount to be paid should have required no more than a simple arithmetical calculation ...

In the light of these principles ..., exercise of the discretionary power pleaded by the USL has no bearing on the case, since otherwise it would be possible for an administrative decision to replace an assessment already ineluctably made by the legislature ...”

After finding that G.C. (the relative of the claimant in that case) was 100% disabled and required constant assistance, which was why, following tests carried out by the respondent authority, his name had been placed on the list of qualifying beneficiaries, the RAC ruled that there was an obligation to pay the allowance.

19. The *Consiglio di Stato*, ruling on the question of determination of the amount of the allowance, held that the Region could not be absolved from the obligation to make available to each USL a sum earmarked for families providing direct care to disabled persons and sufficiently large to ensure that each of these families would be able to receive the amount of allowance prescribed by law (judgment no. 766 of 3 October 1994).

In its judgment no. 172 of 17 February 1999 the *Consiglio di Stato* ruled that the amount of the allowance for families caring directly for disabled persons, in so far as it was fixed by law, could not suffer any reduction by the administrative authority, which in this matter had no discretion whatever with regard to quantum, and that that conclusion was not in contradiction with the nature of the legitimate interest of the disabled person's family.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained of the length of the proceedings he had brought in the Campania Regional Administrative Court (“the RAC”). He alleged a violation of Article 6 § 1 of the Convention, which provides:

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

A. Applicability

21. The applicant asserted that Article 6 § 1 was applicable in the present case because his application to the RAC concerned a civil right of an economic nature and the proceedings he had brought were decisive for his private rights and obligations, within the meaning of the Court's case-law. This was evidenced, firstly, by judgments on the same issue in which the administrative courts had ordered the administrative authority to pay the allowance in question to the families of other disabled persons, and secondly by the fact that the same allowance had been paid following the friendly settlement of 7 November 1997. Moreover, according to the applicant, once the name of his son had been placed on the list of persons who satisfied the conditions required by law (a serious disability requiring constant assistance, as established by a medical examination) there could be no doubt about the obligation to pay the allowance.

22. The Government argued to the contrary, asserting that the public-law features of the case were predominant. The allowance sought by the applicant was an *ex gratia* payment made by the State on account of an exceptional situation arising from the serious illness of the applicant's son and was prompted by considerations of social solidarity and public economic policy. No economic right could be recognised before the relevant administrative authority, which had broad discretion in the matter, had adopted a decision to grant the allowance. There had therefore been no dispute over a “civil” right. Moreover, the friendly settlement mentioned by the applicant had merely put an end to the proceedings complained of and did not imply any recognition of the right asserted. Lastly, the Government confined themselves to challenging the statement that the administrative courts had given judgments ordering the authorities to pay the allowance to persons in the same situation as the applicant.

23. The Court reiterates that, according to the principles laid down in its case-law, it must first ascertain whether there was a “dispute” (“*contestation*”) over a “right” which can be said, at least on arguable

grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question (see the following judgments: *Acquaviva v. France*, 21 November 1995, Series A no. 333-A, p. 14, § 46; *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1357, § 32; *Le Calvez v. France*, 29 July 1998, *Reports* 1998-V, pp. 1899-900, § 56; and *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, § 43, ECHR 2000-IV). Lastly, the right must be a “civil” right.

24. The Court notes, firstly, that the Government did not deny that, following the administrative authorities' tacit refusal, a dispute had arisen between the applicant and those authorities. The dispute was undoubtedly genuine and serious, since when the Campania RAC settled the applicant's claim it allowed it in part. The outcome of the proceedings was also decisive since it concerned the existence of the applicant's right to obtain the full amount of the allowance.

25. Secondly, the Court notes that Article 26 of Regional Law no. 11 of 15 March 1984 (“the Regional Law”) authorised the local public health services to pay the allowance in issue but did not automatically confer on families caring for mentally or physically disabled persons the right to receive it. That is how the RAC explained the situation in its judgment of 14 January and 4 February 1997 when it refused the applicant's application. The applicant could merely claim a legitimate interest in obtaining a reply from the local health authority (*Unità Sanitaria Locale* – “the USL”) to his notice to pay of 12 June 1993 (see paragraph 12 above). His entitlement to the allowance could not be recognised until such time as the USL had adopted a decision to grant the allowance and had specified the total amount. The RAC had followed the case-law of the Court of Cassation to the effect that, where there was a legitimate interest in challenging a decision of the administrative authorities but no personal right, the administrative courts, and not the civil courts, had jurisdiction. However, in the same decision the RAC held that the conduct of the USL, which had paid the applicant two monthly instalments, was open to two alternative interpretations; the applicant could have thought the USL was making a payment on account, while reserving final determination of the amount to be paid for a later assessment, or that it had agreed to pay a larger sum with an initial instalment to be followed by others. Moreover, the administrative authorities had no discretion over the amount of the allowance, which was fixed by law. After verifying that the applicant satisfied the conditions for entitlement to the allowance, the USL should simply have made an arithmetical calculation of the quantum (see paragraph 18 above). The same line was followed in a number of judgments in which the Campania RAC held that persons in the same situation as the applicant were entitled to the

allowance, although this was denied by the Government. The *Consiglio di Stato* has likewise affirmed that the administrative authorities have no discretion and ruled that the Region is under a duty to provide the necessary funds to guarantee payment of the allowance to beneficiaries in the amount laid down by law.

26. The Government's argument that the allowance was an *ex gratia* payment by the State is contradicted by the case-law of the Court of Cassation, which has ruled that, where the jurisdiction of the ordinary courts has been recognised in a decision which has become final, disputes concerning Article 26 of the Regional Law fall into the category of disputes over mandatory assistance, which are adjudicated by a magistrate's court, sitting as an employment tribunal (see paragraph 17 above).

27. The Court does not deem it necessary to consider whether the autonomous concept of a right for the purposes of Article 6 § 1 of the Convention covers only a “personal right” (*diritto soggettivo perfetto*) or a “legitimate interest” (*interesse legittimo*) also. It merely notes that Article 26 of the Regional Law had given rise to a jurisdictional dispute. Relying on those judgments of the RAC and the *Consiglio di Stato* which did not follow the case-law of the Court of Cassation, and the fact that, in the Italian system, the Court of Cassation does not have authority to impose a solution of the legal question in issue on the administrative courts, the applicant could claim, at least on arguable grounds, the right to receive the full amount of the allowance – especially as he had already received two monthly instalments, so that he could have been led to believe that he did indeed have such a right.

28. Lastly, the Court considers that the right in question, which was of an economic nature, was a “civil” right within the meaning of its case-law (see, among other authorities, the *Salesi v. Italy* judgment of 26 February 1993, Series A no. 257-E, pp. 59-60, § 19).

Consequently, Article 6 § 1 of the Convention is applicable in the case.

B. Compliance

29. It remains to be determined whether a “reasonable time” was exceeded. The period to be taken into consideration began on 2 August 1993 with the application to the RAC and ended on 27 December 1997, when the *Consiglio di Stato*'s judgment striking the case out of its list was deposited with its registry. It therefore lasted just under four years and five months.

30. The Court observes that it has found on a number of occasions (see, for example, *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V) that in Italy there is a practice incompatible with the Convention resulting from an accumulation of breaches of the “reasonable time” requirement. Where

the Court finds such a breach, the accumulation concerned constitutes an aggravating circumstance of the violation of Article 6 § 1.

Having examined the facts of the case in the light of the parties' arguments, and having regard to its case-law on the question, the Court considers that the length of the proceedings complained of did not satisfy the "reasonable time" requirement and that this was one more instance of the above-mentioned practice.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicant asked the Court to order the respondent State to pay him 150,000,000 Italian lire (ITL) solely for the non-pecuniary damage he had sustained.

33. The Government considered the sum claimed excessive and disproportionate. They argued that in view of the nature of the case the finding of a violation of the Convention would in itself constitute sufficient just satisfaction for the purposes of Article 41.

34. The Court considers that the applicant sustained a certain amount of non-pecuniary damage, regard being had to what was at stake in the dispute. However, the amount indicated by the applicant is exorbitant. Ruling on an equitable basis, as required by the Convention, the Court awards him ITL 5,000,000.

B. Costs and expenses

35. The applicant claimed reimbursement of ITL 21,464,628 for his costs and lawyers' fees for the proceedings before the Commission and then the Court, including a lump-sum charge of ITL 6,000,000 for the participation of his representatives at the hearing before the Court on 8 March 2000.

36. The Government left the matter to the Court's discretion, while pointing out that the applicant had received legal aid for the proceedings before the Court.

37. Having regard to the information in its possession and the relevant practice, the Court considers it reasonable to award the sum of ITL 10,000,000, less the amount paid by the Council of Europe in legal aid, namely 8,100 French francs.

C. Default interest

38. According to the information available to the Court, the statutory rate of interest applicable in Italy at the date of the adoption of the present judgment is 2.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by fifteen votes to two that Article 6 § 1 of the Convention is applicable in the case and has been breached;
2. *Holds* by fifteen votes to two
 - (a) that the respondent State is to pay the applicant, within three months, the following sums: ITL 5,000,000 (five million Italian lire) for non-pecuniary damage and ITL 10,000,000 (ten million Italian lire) for costs and expenses, less the amount paid by the Council of Europe in legal aid;
 - (b) that simple interest at an annual rate of 2.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 October 2000.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Ferrari Bravo joined by Mr Butkevych is annexed to this judgment

L.W.
M. de S.

DISSENTING OPINION OF JUDGE FERRARI BRAVO
JOINED BY JUDGE BUTKEVYCH

(Translation)

I regret that I am unable to vote in favour of the *Mennitto* judgment, but it seems to me that the Court is making light of a fundamental distinction, namely that between a “*diritto soggettivo*”, described by the Court as “*perfetto*”, and an “*interesse legittimo*”, when it states that it “does not deem it necessary to consider whether the autonomous concept of a right for the purposes of Article 6 § 1 of the Convention covers only” the former or also the latter (see paragraph 27 of the judgment). However persuasive some of Mr Mennitto's arguments may be, the fact remains that the distinction exists in Italian law and that the Court of Cassation has affirmed it. And it should be pointed out that, whatever the Court's opinion may be, the Court of Cassation's case-law in the event of jurisdictional disputes takes precedence over the case-law of the *Consiglio di Stato*.

This approach goes well beyond the scope of the *Mennitto* case, since it amounts to extending the Court's jurisdiction, and I doubt very much that this is the right way to go about it.