JUDGMENT NO. 264 YEAR 2012

In this case the Court considered a challenge to legislation modifying the arrangements applicable to the calculation of pensions for workers who have spent all or part of their working life in Switzerland. Whereas under the previous interpretation of the legislation, payment of contributions in Switzerland established entitlement to a pension in Italy on the basis of Italian contributions at equivalent salary, irrespective of the fact that the contribution levels in Switzerland were significantly lower, following an enactment providing for an "authentic interpretation", the Italian pension was to be calculated on the basis of the actual level of Swiss contributions, thus resulting in lower pensions. The Court considered the case law in the light of the ECHR and the *Maggio* case, holding that the appellant had no legitimate expectation for his pension to be calculated in line with the previous arrangements, since the contested legislation was inspired by the principles of equality and solidarity, which prevailed within the balancing of constitutional interests.

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(777) of Law no. 296 of 27 December 2006 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2007), initiated by the Employment Division of the Court of Cassation in the proceedings pending between the *INPS* [National Institute for Social Security] and Lorenzon Guido Luciano, by the referral order of 15 November 2011, registered as no. 10 in the Register of Orders 2012 and published in the Official Journal of the Republic no. 6, first special series 2012.

Considering the entry of appearance by the *INPS*, and the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Mario Rosario Morelli at the public hearing of 9 October 2012;

having heard Counsel Sergio Preden for the *INPS* and the State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1.— The Court has been called upon the decide whether Article 1(777) of Law no. 296 of 27 December 2006 (Provisions on the formation of the annual and multi-year budget of the State − Finance Law 2007) which, in laying down an interpretation of Article 5(2) of Presidential Decree no. 488 of 27 April 1968 (Increase and new system for calculating pensions paid out of obligatory general insurance), essentially stipulates that income earned abroad, on which the calculation of the pension is to be based, must be adjusted in order to establish the same percentage ratio provided for in respect of contributions paid over the same period in Italy, thereby introducing into Italian law an interpretation of the legislation concerned with an effect which is detrimental to the interests of insured individuals, may breach Article 117(1) of the Constitution, in the light of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955 (Ratification and implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and of the Additional Protocol to the Convention, signed in Paris on 20 March 1952), as interpreted by the European Court of Human Rights.

2.— In particular, the ruling by the European Court referred to is the judgment of 31 May 2011 in the case of *Maggio and others v. Italy*, according to which, in enacting the contested provision, the Italian State infringed the applicants' rights by intervening in a decisive manner to ensure that the outcome of proceedings to which it, through the *INPS*, was a party were favourable to it, notwithstanding the absence of compelling general interest reasons and, in stipulating that more favourable pension treatment would (only) be guaranteed if already liquidated before the entry into force of the law, rendered pointless the continuation of proceedings for an entire category of individuals in the same situation as the appellants in the proceedings before the lower court.

3.— The question is groundless.

3.1.— As a preliminary matter, in order to frame the problem correctly, it is necessary to provide a summary account of the development of legislation in relation to the question of "Swiss pensions" originating from the different pension arrangements resulting from the entry into force of the contested provision in relation to workers who have worked in the Swiss Confederation.

Under the "defined benefit" system for calculating pensions paid out of obligatory general insurance introduced by Presidential Decree no. 488 of 1968, pensions are calculated by applying a coefficient which is proportionate to the total number of weeks of contribution accumulated by the interested party to annual pensionable pay, that is to the average annual remuneration earned by the worker during a certain reference period.

3.1.1.— As regards the regime applicable to contributions paid in Switzerland and transferred to Italy under the terms of the Additional Agreement to the Italo-Swiss Convention on Social Security of 14 December 1962, concluded in Berne on 4 July 1969 and ratified by Law no. 283 of 18 May 1973, a position had been established within the case law – though which had always been disputed by the *INPS* – according to which an Italian worker requesting the transfer to that body of contributions paid in Switzerland on his behalf was entitled for his pension to be determined according to the defined-benefit method on the basis of the remuneration actually earned in Switzerland, notwithstanding that the contributions thereby credited had been paid according to the rate provided for under Swiss legislation, which is lower than that stipulated under Italian law. This view was asserted in, *inter alia*, judgments no. 7455 of 2005, no. 4623 and no. 20731 of 2004 of the Court of Cassation.

The Finance Law 2007 (Law no. 296 of 2006) was subsequently enacted, Article 1(777) of which provided that "Article 5 (2) of Presidential Decree no. 488 of 27 April 1968 and subsequent modifications must be interpreted to the effect that, in the event of transfer of contributions paid to foreign welfare entities to the Italian obligatory general insurance scheme, as a consequence of international social security treaties and conventions, the pensionable remuneration relative to the employment period abroad is calculated by multiplying the amount of transferred contributions by a hundred and dividing the result by the contribution rates for the invalidity, old-age and survivors insurance scheme, as applicable during the relevant contributory period. More

favourable pension treatment already liquidated before the entry into force of the current law is exempted".

3.1.2.— The Court of Cassation raised a question concerning the constitutionality of that provision with reference to Articles 3(1), 35(4) and 38(2) of the Constitution, on the grounds that it had introduced an interpretation of the applicable legislation which was detrimental to the interests of the insured individuals.

By judgment no. 172 of 2008, this Court rejected those doubts that the legislation was unconstitutional, holding *inter alia* that the contested provision had made explicit a principle which was already contained within the legislation to which the authentic interpretation applied, and that therefore, in this regard, it was not unreasonable. Moreover it observed that, in ascribing a meaning to the contested provision which fell within the possible readings of the original text, it did not result in any breach of the legitimate expectations of private individuals in legal certainty, also because in that case the pension body continued to dispute the interpretation supported by the private counterparties, which had been endorsed within the case law, which meant that the interpretative doubt was genuine.

Similarly, it held that there had been no violation of the principle of equality, because the exemption for workers to whom the pension treatment had already been liquidated according to a more favourable criterion complied with the requirement to respect the legitimate expectations and the rights of those workers which had already been acquired.

Furthermore, there had been no violation of Article 35(4) of the Constitution, since Article 1(777) of Law no. 296 of 2006 does not provide for less favourable treatment in relation to work performed abroad compared to that performed in Italy, but on the contrary ensures the overall rationality of the pension system by avoiding situations in which, on the basis of a negligible contribution paid in a foreign country, the same benefits may be obtained as those which a person who has worked exclusively in Italy may only obtain thanks to a much more onerous contribution.

Finally, the Court held that there had been no breach of Article 38(2) of the Constitution since the contested provision did not result in any *ex post* reduction in the pension treatment due to workers. Ultimately, it did not do anything other than impose a statutory interpretation which could already be inferred from the provisions interpreted.

Furthermore – the Court also stressed – the referring court had not offered any grounds for concluding that the provision resulted in pension treatment which was not satisfactory in order to meet the day-to-day requirements of the worker.

Following that ruling, the Court of Cassation changed its approach, accepting that Article 1(777) of Law no. 296 of 2006 (see Court of Cassation, Joint Divisions, judgment no. 17076 of 2011; Cass., no. 23754 of 2008) had the status of an enactment of authentic interpretation.

3.1.3.— However, the European Court of Human Rights subsequently ruled on an identical question and held, in its judgment delivered in the *Maggio* case, that in enacting that provision the Italian State had violated the rights of the applicants by intervening in a decisive manner to ensure that the outcome of proceedings to which it was a party were favourable to it.

In that judgment the Court based its ruling on the following arguments, as are stated in the referral order: 1) although the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute; 2) 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, 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; 3) in the case under examination, the Law expressly excluded from its scope court decisions that had become final (pension treatments already liquidated) and settled once and for all the terms of the disputes before the ordinary courts retrospectively. Indeed, the enactment of Law 296/2006, while the proceedings were pending, in reality determined the substance of the disputes and the application of it by the various ordinary courts made it pointless for an entire group of individuals in the applicants' positions to carry on with the litigation; 4) for the purpose of determining whether there are compelling general interest reasons which are capable of justifying interference by the legislature in the administration of justice, respect for the rule of law and the notion of a fair trial require that the reasons adduced to justify such measures be treated with the greatest possible

degree of circumspection; 5) financial considerations cannot by themselves warrant the legislature substituting itself for the courts in order to settle disputes; after 1982, the *INPS* applied an interpretation of the law in force at the time which was most favourable to it as the disbursing authority: this system was not supported by the majority case-law; 6) as to the Government's argument that the Law had been necessary to re-establish an equilibrium in the pension system by removing any advantages enjoyed by individuals who had worked in Switzerland and paid lower contributions, while the European Court accepts this to be a reason of general interest, the Court 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 to which the State was a party.

3.2.— And it is precisely with regard to the arguments set out underlying the *Maggio* judgment that the referring court now suspects that Article 1(777) of Law no. 296 of 2006 is unconstitutional due to violation of Article 117(1) of the Constitution, in the light of Article 6(1) ECHR, as interpreted by that judgment.

The referring court stresses that it is for this Court to review compliance with the "principle of counterlimits", especially in this case, in which it has already adopted a judgment addressing the substantive provisions at issue with reference to different principles of constitutional law, and has considered the assertions of the European Court itself according to which, whilst allowing for exemptions for compelling general interest reasons which call for the national legislature to enact interpretative legislation, the individual contacting States must be left at least "part of the task and duty of identifying them, as the body in the best position to carry out this task, since moreover the case concerns interests at the root of the exercise of legislative powers".

4.— For the purposes of the review of the question raised, it is important to refer to the settled case law on the efficacy and role of ECHR provisions which are invoked in order to supplement the principle laid down under Article 117(1) of the Constitution.

Starting from judgments no. 348 and no. 349 of 2007, this Court has constantly held that "the provisions of the ECHR – in their meaning as determined by the European Court of Human Rights, which was specifically established in order to implement and apply them (Article 32(1) of the Convention) – supplement as interposed rules the constitutional principle set forth in Article 117(1) of the Constitution, insofar as the

latter requires that national legislation comply with the restrictions resulting from international obligations" (judgments no. 236, no. 113 and no. 80 – which upheld the validity of that account following the entry into force of the Treaty of Lisbon of 13 December 2007 – and no. 1 of 2011, no. 196 of 2010 and no. 311 of 2009).

Therefore, in the event of a potential contrast between a national provision and an Article of the ECHR, "the national ordinary court must verify on a preventive basis whether it is practicable to interpret the former in accordance with the Convention, applying all normal instruments of legal interpretation" (judgments no. 236 and no. 113 of 2011, no. 93 of 2010 and no. 311 of 2009). If this verification gives a negative result and the contrast cannot be resolved through interpretation, since the ordinary court cannot set aside the national provision and cannot apply it, having concluded that it breaches the ECHR as interpreted by the Strasbourg Court, and hence also breaches the Constitution, it must rule that they are incompatible and raise a question of constitutionality with reference to Article 117(1) of the Constitution, or Article 10(1) of the Constitution in cases involving a Convention provision which acknowledges a generally recognised rule of international law (judgments no. 113 of 2011, no. 93 of 2010 and no. 311 of 2009).

4.1.— The case law of the Constitutional Court has also repeatedly asserted that, when fundamental rights are at issue, respect for international law obligations cannot in any case constitute grounds for a reduction in protection compared to those already available under national law, but on the contrary may and must constitute an effective instrument for expanding that protection.

Moreover, Article 53 of the Convention provides that the interpretation of the provisions of the ECHR may not entail a reduction in protection to a lower level than that guaranteed under national law.

Consequently, the comparison between the protection provided for under the Convention and the constitutional protection of fundamental rights must be carried out whilst aiming to achieve the broadest scope for guarantees, a concept which – as clarified in judgments no. 348 and no. 349 of 2007 – must be deemed to include the necessary balancing against other interests protected under constitutional law, that is with other provisions of the Constitution which in turn guarantee fundamental rights liable to be affected by the expansion of individual protection.

The reference to the national "margin of appreciation" – a principle adopted by the Strasbourg Court itself and which is of relevance when toning down the rigidity of the principles formulated on European level – must at all times be included within the assessments of this Court, which is not unaware that the protection of fundamental rights must be systemic and not piecemeal across a series of uncoordinated provisions in potential conflict with one another.

4.2.— Ultimately – as this Court has asserted on various occasions (judgments no. 236, no. 113 and no. 1 of 2011, no. 93 of 2010, no. 311 and no. 239 of 2009, no. 39 of 2008 and no. 349 and no. 348 of 2007) – whilst the Constitutional Court cannot substitute its own interpretation of a provision of the ECHR for that given by the Strasbourg Court upon application in the specific case, thereby exceeding the bounds of its own powers in breach of a precise commitment made by the Italian State in signing and ratifying the Convention without derogations, it is however required to assess how and to what extent the application of the Convention by the European Court interacts with the Italian constitutional order. Since an ECHR provision effectively supplements Article 117(1) of the Constitution, as an interposed rule, it becomes the object of a balancing operation in accordance with the ordinary procedures which this Court is required to follow in all proceedings falling within its jurisdiction (judgment no. 317 of 2009). The purpose of such operations is not to assert the primacy of the national legal system, but rather to supplement protection.

5.— The question under examination in this case must be resolved in accordance with such principles.

5.1.— In the present case, the limitation on the Court consists in the application by the European Court in the *Maggio* judgment of Article 6(1) of the European Convention on Human Rights, in providing that "although the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute". The European Court held that it was "not persuaded" of the fact that the general interest reason was compelling enough to overcome the dangers inherent in the use of retrospective legislation, and thus concluded that, in the case before it, the State

had infringed the applicants' rights under Article 6 § 1 by intervening in a decisive manner to ensure that the outcome of proceedings to which it was a party were favourable to it.

5.2.— Moreover, that position coincides essentially with the principles asserted by this Court with regard to the prohibition on the retroactivity of the law which, whilst constituting a fundamental value of legal culture, does not benefit from privileged protection within the legal system pursuant to Article 25 of the Constitution (judgments no. 15 of 2012, no. 236 of 2011 and no. 393 of 2006). In accordance with that rule – as held in the judgments referred to – Parliament may enact retrospective legislation, including enactments laying down an authentic interpretation, provided that the retrospective effect is adequately justified by the need to protect principles, rights and interests of constitutional standing, all of which amount to "compelling general interest reasons" for the purposes of the case law of the Strasbourg Court.

Therefore, the Convention provision referred to, as applied by the European Court, supplements as an interposed provision the general rule under Article 117(1) of the Constitution, with reference to which the referring court raises a question regarding the constitutionality of Article 1(777) of Law no. 296 of 2006.

5.3.— However, within the balancing operation against other interests protected under constitutional law which – as clarified above – this Court is required to engage in also in this case, the protection of the overall countervailing interests, which are of equal constitutional standing, affected by the legislation laid down by the contested provision prevails over the protection of the interest underlying the principle of constitutional law, duly supplemented as described above. Therefore, in relation to this balancing operation, there are therefore compelling general interests capable of justifying the recourse to retrospective legislation.

Indeed, the effects of the said provision are felt within the context of a pension system which seeks to strike a balance between the available resources and benefits paid, in accordance also with the requirement laid down by Article 81(4) of the Constitution, and the need to ensure that the overall system is rational (judgment no. 172 of 2008), thus preventing changes to financial payments to the detriment of some contributors and to the benefit of others. In doing so it guarantees respect for the

principles of equality and solidarity which, due to their foundational status, occupy a privileged position within the balancing operation against other constitutional values.

Indeed, a law which takes account of the fact that contributions paid in Switzerland are four times lower than those paid in Italy, and hence applies an adjustment in order to bring the contributions into line with disbursements, to equalise treatment in order to avoid inequality and to strike a sustainable balance within the pension system in order to guarantee those who receive disbursements is inspired by the principles of equality and proportionality.

5.4.— Moreover, the fact that the judgment of the European Court (which is required to protect the various values in play in a sectoralised manner, that is with reference to individual rights) on the one hand considered the applicants' rights to a fair trial to have been violated in this case, awarding compensation on this basis only, whilst on the other held that there had been no violation of Article 1 of Protocol no. 1, notwithstanding that it had been averred by the applicants with regard to the interference in the peaceful enjoyment of their possessions as a result of the reduction in their pensions, is not without significance.

The European Court justified its conclusion that there had been no violation of Article 1 of Protocol no. 1 on the grounds that Law no. 296 of 2006 pursues a general interest, namely that of providing a harmonised method for calculating pensions, in order to guarantee a sustainable and balanced pension system, avoiding a situation in which the applicants may benefit from unwarranted advantages, whilst ensuring that the sacrifice suffered by them is not such as to result in the impairment of the essence of their pension rights, given that they had only lost a partial amount of the pension. Accordingly, the judgment rejected the request that the pension be liquidated a second time, and not without considering "the wide margin of appreciation afforded to a State" when reforming its pension system.

As specified above, in contrast to the European Court, this Court carries out a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time, and is therefore required to carry out that balancing operation, which falls to this Court alone, and which in this case results in the solution mentioned above.

This solution is to be adopted also if it is considered that, were on the contrary a decision other than a ruling that the question was groundless to be adopted, which thus eliminated the contested provision from the legal order, this would necessarily impinge upon the pension system under examination, thus contradicting not only the national system of values as they interact with one another, but also the essence of the European Court's decision, which declined to accept the applicants' request that it recognise that the method for calculating contributions which was more favourable to them should be applied.

In conclusion, the question of constitutionality raised by the referral order mentioned in the headnote must be ruled groundless.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question regarding the constitutionality Article 1(777) of Law no. 296 of 27 December 2006 (Provisions on the formation of the annual and multi-year budget of the State – Finance Law 2007), raised by the Employment Division of the Court of Cassation with reference to Article 117(1) of the Constitution in the light of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955 (Ratification and implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and of the Additional Protocol to the Convention, signed in Paris on 20 March 1952), as interpreted by the European Court of Human Rights, is groundless.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 November 2012.

(omitted)