JUDGMENT NO. 166 YEAR 2017

In this case the Court heard a referral order objecting to legislation laying down a statutory interpretation of legislation governing the calculation of pensions, under which the pension entitlement of certain Italian workers who had worked and paid social security contributions in Switzerland had been significantly reduced. The Court dismissed the question as inadmissible, holding that the *Stefanetti* judgment of the ECtHR was not such as to change the position previously adopted by the Court in this area (see Judgment 172/08). The Court however noted that the *Stefanetti* judgment did not indicate a threshold below which reductions would be excessive, and that such a task fell to the legislature (although warned that prolonged inertia in adopting a solution would not be tolerable).

[omitted]

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 laying down "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 N. B. and the National Institute for Social Security (*Istituto nazionale della previdenza sociale*, hereafter INPS) by the referral order of 11 March 2015 registered as no. 96 in the Register of Referral Orders 2015 and published in the Official Journal of the Republic no. 22, first special series 2015.

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 20 June 2017;

having heard 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.– This Court has been requested once again to decide whether Article 1(777) of Law no. 196 of 27 December 2006 laying down "Provisions on the formation of the annual and multi-year budget of the state (Finance Law 2007)" – which, in stipulating how Article 5(2) of Presidential Decree no. 488 of 27 April 1968 (Increase and new system for calculating pensions payable out of mandatory general insurance) is to be interpreted, essentially provides that the remuneration received abroad that is to be used as a basis for calculating the pension must be adjusted in order to establish the same percentage relationship stipulated for contributions paid in our country during the same period, thereby introducing into Italian law an interpretation of the legislation in question that is detrimental to the interests of the insured persons – violates Article 117(1) of the Constitution in relation, in this case, to Article 1 of the Additional Protocol signed in Paris on 20 March 1952 and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (ECHR), ratified and implemented by Law no. 848 of 4 August 1955, as interpreted by the European Court of Human Rights.

2.− As has been recalled by the Employment Division of the Court of Cassation (which is also the referring court in these proceedings), the rule laid down by Article 1(777) of Law n. 296 of 2006 – which was found not to violate Articles 3, 35 and 38 of the Constitution (Judgment no. 172 of 2008) – also subsequently passed constitutional muster in relation to a suspected violation of Article 117(1) of the Constitution in relation to Article 6(1) ECHR, as interpreted by the judgment of the Strasbourg Court of 31 May 2011 in *Maggio and others v. Italy*, which had found that provision of the Convention to have been violated by the aforementioned provision of Italian law.

Reference must be made in this last regard to Judgment no. 264 of 2012 (followed by Order no. 10 of 2014) by which this Court concluded – having found that it fell to it to "carry out a systemic and non-isolated assessment of the rights affected by the relevant provision examined" – that, in striking the balance between the protection of the interest underlying the Convention provision invoked (Article 6(1) ECHR) and the protection of the other interests guaranteed under constitutional law, "out of the conflicting interests of equal constitutional significance that are affected overall by the legislation laid down by the contested provision, it is that in relation to which there are overriding general interests that justify recourse to retroactive legislation that prevails". In this case, this legislation has been acknowledged to be "inspired in fact by the principles of equality and proportionality" as it takes account of the fact that contributions paid in Switzerland are significantly lower than those paid in Italy and, on account of this fact, that "an adjustment [is applied] with the aim of ensuring that contributions are commensurate with benefits, of making payments at the same level in order to avoid inequality and in achieving a sustainable equilibrium within the pension system as a guarantee for those in receipt of pensions".

3.– The referring court does not dispute that the balancing of countervailing interests of equal constitutional significance that are affected by the provision considered to be unconstitutional must be "systematic" and not "piecemeal", nor that the resulting balancing operation must be "reserved to the Constitutional Court".

However, in view of precisely that premise, it considers that the "overall" and "complex" assessment of the interests in play, which need to be protected in the face of the retroactive legislation introduced by Article 1(777) of Law no. 296 of 2006, must be once again brought before this Court "with reference also to the […] violation of the substantive pension rights of migrant workers".

This is because the violation of those rights, which is liable to give rise to a breach of the interposed rule contained in Article 1 of the Additional Protocol to the ECHR (and thereby of the principle laid down by Article 117(1) of the Constitution) – which the 2011 judgment of the ECtHR in *Maggio and others v. Italy* found not to have occurred – was by contrast subsequently ascertained by the Strasbourg Court itself in the judgment of 15 April 2014 in *Stefanetti and others v. Italy*.

The referring court adds that "A comparison between this further and specific violation of an ECHR provision (Article 1 of the Additional Protocol) and other interests significant under constitutional law" that are affected by the contested national provisions "is not offered … by decision no. 264/2012, which by contrast insists as a relevant argument on the fact that the ECtHR did not rule against Italy in relation to this matter in the *Maggio* judgment".

4.– The "new fact" (and the sole ground for challenge) underlying the renewed objection to the rule laid down by Article 1(777) of Law no. 296 of 2006 thus consists in the aforementioned "Stefanetti" judgment of the ECtHR.

4.1.– By that judgment, the Strasbourg Court did in fact rule (albeit with two judges dissenting) that Article 1 (777) of Law no. 296 of 2006 violated Article 1 of the Additional Protocol to the ECHR. However, before doing so, it confirmed (in paragraph 58 of the judgment) that, in the previous case of *Maggio and others v. Italy*, the fact that the applicants had lost less than half of their pension constituted a "reasonable and commensurate reduction" (in keeping with the rebalancing goal of the 2006 national law cited), and only after having stressed – in line with and not departing from that premise – that the ECtHR was now reaching a different conclusion with specific and limited reference to the particular circumstances of the new applicants. As a consequence of the transfer to Italy of the contributions paid in Switzerland, they had been subject to a much more far-reaching deduction/curtailment (by approximately 2/3) of the pension to which they would otherwise have been entitled.

"In the light of all of the factors relevant" to the case under examination (the applicants had "paid contributions for their entire lives"; they had transferred to Italy the contributions accrued in Switzerland at a time when they expected to be able to receive higher pensions; they had ended up receiving "less than the average Italian pension"), this led the Strasbourg Court to conclude that "in this case", the reductions by the INPS in the amount of the pensions in accordance with the parameter laid down by the interpretative legislation "impinged upon the lifestyle of the applicants and precluded the substantive benefit thereof".

With regard to this breach – as thereby established – the ECtHR subsequently held, in a judgment of 1 June 2017, that compensation quantified in an amount not greater than 55 percent of the difference between the pension received and that to which each applicant would otherwise have been entitled under the legislation to which the subsequent contested interpretation related was in any case reasonable. [SP1]

4.2.– It is therefore not correct to state that, by the *Stefanetti* judgment, the ECtHR contradicted or otherwise ventured beyond the finding made in the previous "*Maggio*" judgment that the retroactive rule of 2006 was compatible with the Additional Protocol when confronted with pensions that had been reduced by less than one half because, rather, it expressly confirmed that such a reduction was "reasonable and commensurate".

Moreover, it is not exact to state that the "Stefanetti" judgment – as assumed by the referring court – traced back the violation of Article 1 of the Additional Protocol to the ECHR to "ordinary and so to speak systematic effects of the 2006 interpretative legislation"; by contrast, in that judgment, according to the reasons provided, the violation of the Convention principle resulted from the specific circumstances of the individual cases, in relation to which the overall assessment of specific contingent factual circumstances had highlighted a "disproportionate" sacrifice which was imposed on the applicants as a consequence of the adjustment of their pensions.

5.– In the light of the above, it must therefore be concluded that the new course adopted by the "Stefanetti" judgment does not reveal any aspect of incompatibility with Article 1 of the Additional Protocol to the ECHR that affects or could affect the national provision under examination in terms that, by virtue of its status as an interposed principle, entail its contrast – in its entirety – with Article 117(1) of the Constitution as argued by the referring court.

6.– On the other hand, the judgment of the European Court referred to acknowledges that the criterion of the recalculation of the benefit should be applied to the nine applicants, the reduction of whose pensions pursuant to Article 1(777) of Law no. 296

of 2006 was excessive and disproportionate and that their legitimate expectation in the law subject to interpretation had been breached unreasonably.
This suggests that a more circumscribed class of situations exists in relation to which the adjustment of the remuneration earned in Switzerland in accordance with the contested retroactive national provision may conflict with the ECHR principles invoked, and accordingly with the principles laid down by Articles 3 and 38 of the Constitution.
7.– However, the "Stefanetti" judgment does not indicate in general terms the threshold below which the reduction of the so-called "Swiss pensions" pursuant to Article 1(777) of Law no. 296 of 2006 will violate the workers' right to the life "benefit" consisting in their pension credit.
The ECtHR rather refers to a reduction entailing a loss of approximately two thirds of the pension although – as mentioned above – only with specific reference to the pensions of the individual applicants and after carrying out an assessment that takes account as "relevant aspects", *inter alia*, the long periods spent by them in Switzerland, the level of the contributions paid there, their employment category and the quality of their respective lifestyles, the enjoyment of which the Court considered specifically to have been "hindered... substantially" and disproportionately as it implied an "excessive burden" which individuals who have paid contributions for their entire life are required to bear.
It is in any case necessary to indicate a threshold (whether fixed or proportional) and an insuperable limit on the eligibility for reduction of "Swiss pensions" – for the purposes of a *reductio ad legitimitatem* of the contested provision that prevents it from impinging upon such pensions in a manner that violates the principles of the ECHR and national law invoked – and to identify a suitable and sustainable remedy that is capable of safeguarding the essential core of the right infringed; however, it is evident that these presuppose that a choice be made between a range of solutions, which as such falls to the discretion of the legislator.
8.– As things stand, the question raised is therefore inadmissible. However, in ruling it inadmissible, this Court must however assert that the excessive prolongation of legislative inertia in relation to the serious problem highlighted by the Strasbourg Court would not be tolerable.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 1(777) of Law no. 296 of 27 December 2006 laying down "Provisions on the formation of the annual and multi-year budget of the state (Finance Law 2007)", raised − with reference to Article 117(1) of the Constitution in relation to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and Article 1 of the Additional Protocol to the Convention, signed in Paris on 20 March 1952, ratified and implemented by Law no. 848 of 4 August 1955 − by the Employment Division of the Court of Cassation by the referral order mentioned in the headnote, is inadmissible.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 20 June 2017.