

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**



29 January 2021

Case Document No. 5

Sindacato Autonomo Pensionati OR. S.A. v. Italy
Complaint No. 187/2019

GOVERNMENT'S SUBMISSIONS ON THE MERITS

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davanti alla Corte europea dei diritti dell' uomo*

AVVOCATURA GENERALE DELLO STATO

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Collective complaint n. 187/2019

Sa.Pens. Or.Sa. vs Italy

Observations on the merits of the complaint

of the Italian Government

CT. 57354/19 (Avv. G. Greco)



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I. SUBJECT MATTER OF THE COMPLAINT

1. In order to better understand the matter at hand, a brief excursus in fact about the national legislation that is the subject of the complaint is appropriate.

2. The Italian legislation, in accordance with the constitutional principle of social solidarity (Articles 2 and 38 of the Italian Constitution), considers the death of the insured worker or pensioner as a protected event, socially significant need to be provided with adequate benefits, because it represents, for the surviving family members, for the surviving member of the civil union and for any dependent children, even the loss of the source of income on which, until then, they could rely.

3. Indeed, according to art. 38 of the Constitution, the State must ensure adequate means to meet the life needs of protected persons in cases of, among other things, invalidity and old age, which is why social security protection for surviving family members is closely linked to the discipline of general compulsory insurance for invalidity and old age, constituting an inseparable structural component.

4. Italian law provides that, in case of death of an insured or retired person, registered with one of the managements of INPS - Istituto Nazionale della Previdenza Sociale - for surviving family members, identified by art. 22 of the law of 21 July 1965, n. 903, the right to pension arises when certain conditions are met, such as:

1) that the giver is a direct pensioner (old age, early retirement, seniority, disability and invalidity pension) or, having the right to it, is in the process of liquidation (so-called survivor's pension);

2) that the deceased worker has accrued 15 years of insurance and contribution or n. 780 weekly contributions, or 5 years of insurance and contribution or n. 260 weekly contributions, of which at least 3 years or n. 156 weekly contributions in the five years preceding the date of death (so-called "indirect pension").



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5. For the purposes of perfecting the insurance requirements for the right to survivors' pension, the periods of enjoyment of the disability allowance in which no work has been done are also considered useful.

6. In the case of the surviving family members of a worker insured under the retributive or mixed regime, in the event that, at the date of the deceased's death, there is no right to an indirect pension, a death indemnity is paid in proportion to the amount of contributions paid. The right to the indemnity is subordinate to the circumstance that in the five years prior to the date of the death of the insured party, at least one year of contributions have been paid or credited.

7. Among the surviving recipients, entitled to the right to the pension treatment, there is first of all the spouse, who ceases to be entitled to it only if he/she remarries. In this case, the spouse will be entitled to an allowance equal to two annuities of the pension, pursuant to art. 3 of the legislative decree of 18 January 1945, no. 39, in the amount due at the date of the new marriage.

8. The separated spouse is also entitled to a survivor's pension, with the specification that in the event of the separation being debit, the same will be entitled to a pension only if he/she is the holder of a maintenance allowance established by the Court.

9. With regard to the surviving divorced spouse, the second paragraph of article 9 of law no. 898 of 1st December 1970, as substituted firstly by article 2 of the law no. 436 of 1st August 1978, and subsequently by article 13 of the law no. 74 of 9th March 1987, and by the law no. 263 of 28th December 2005, establishes that, in the event that the insured, following a divorce, has not remarried, the surviving divorced spouse is entitled to a pension in the presence of the following conditions:

1) he/she is entitled to the periodic divorce allowance pursuant to Article 5 of Law No. 898 of 1970;

2) he/she has not remarried;

3) the date of commencement of the insurance relationship with the deceased is prior to the date of the sentence pronouncing the dissolution or cessation of the civil effects of marriage;



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4) in the event of the death of the insured party, the insurance and contribution requirements established by law are fulfilled.

10. In the case of concurrence of divorced spouse and surviving spouse, given the lack of provisions regarding the pension rates due, the division will be made by the Court to which the divorced spouse must apply in order to obtain recognition of his/her right and determination of the relative amount. The total amount of the pension treatment attributable to the surviving spouse and the divorced spouse is equal to 60% of the pension already paid or which would have been due to the deceased insured.

11. The judge's sentence constitutes the legal title for the determination of the amount of the relative entitlements.

12. Pursuant to art. 22 of Law no. 903 of 21 July 1965, surviving children (both legitimate and natural) and persons treated as such who, on the date of death of the insured or pensioner, have not passed the age of 18 or, regardless of age, are recognized as being unable to work and dependent on the parent at the time of the latter's death, are also entitled to a pension.

13. For surviving children who are students, not in paid employment and dependent on the deceased parent at the time of death, the limit of 18 years of age is raised to 21 years of age in the case of attendance at middle school or vocational school and to the entire duration of the degree course, but not beyond the 26th year of age, in the case of attendance at university.

14. In the absence of a spouse and children or if, even if they exist, they are not entitled to a survivor's pension, the right to this pension is granted to the parents of the insured or retired person who, at the time of his/her death:

- have completed their 65th year of age;
- are not holders of a direct or indirect pension;
- are dependent on the deceased worker.

15. A parent who, after receiving a survivor's pension, becomes the beneficiary of another pension, loses the right to a survivor's pension with effect from the first day of the month following that in which the new pension takes effect.



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16. In the absence of a spouse, children or parent, or if, even though they exist, they are not entitled to a survivor's pension, the right to such pension is recognized to the unmarried brothers and sisters of the insured or pensioner who, at the time of the latter's death:

- are incapable of working
- are not holders of a direct or indirect pension;
- are dependent on the deceased worker.

17. A brother or sister who, after receiving a survivor's pension, becomes the beneficiary of another pension, loses the right to a survivor's pension with effect from the first day of the month following that in which the new pension takes effect. The cessation of the state of incapacity and the subsequent marriage also determine the loss of the right to the benefit from the first day of the month following that in which the aforesaid causes arise.

18. Art. 22 of Law no. 903 of 21st July, 1965, subordinates the recognition of the right to a survivor's pension in favour of children and persons treated as such who are over 18 years old, students or disabled, to the subsistence, on the date of the death of the parent, of the requirement of living as dependents of the deceased.

19. Children or equivalent aged under 18 are considered a priori dependent on the parent. The requirement of dependency is verified at the occurrence of the following two conditions: a) the state of need of the survivor, determined by his condition of economic non-self-sufficiency with reference to the average needs of the same food, to its sources of income, to the proceeds from any contribution to maintenance by other family members; b) habitual maintenance of the survivor by the predecessor, a condition that can be inferred from the actual behaviour of the latter towards the beneficiary.

20. For the purposes of habitual maintenance, it is necessary to ascertain that the predecessor contributed significantly and continuously to the maintenance of the survivor; it is not required that the insured or pensioner provided exclusively for the maintenance of the non-cohabiting child.



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21. Art. 22 of Law no. 903 of 21 July 1965, includes among the beneficiaries of the survivor's pension the children of any age who are recognized as being incapable of working and dependent on the parent at the time of death.

22. Moreover, minor children who have become incapacitated between the death of the parent and the coming of age of majority are also entitled to the benefit. The disability required for the right to a survivor's pension presupposes that the subject "because of the infirmity or physical or mental defect, is in the absolute and permanent impossibility of carrying out any work activity".

23. The survivor's pension begins on the first day of the month following that in which the pensioner or insured person died and is payable as a percentage of the pension already paid or which would have been payable to the insured person. The rates of survivor's benefits, applying the percentages envisaged by Law no. 335 of 8 August 1995, are established by legislation.

24. The amounts of the survivor's pension treatments can be accumulated with the income of the beneficiary (spouse, parents, brothers and sisters), within the limits of Table F of Law no. 335 of 8th August 1995.

25. The treatment deriving from the cumulation of income with the reduced survivor's pension cannot, however, be inferior to that which would be due to the same subject if the income were equal to the maximum limit of the bands immediately preceding that in which the possessed income is placed.

26. The limits of cumulability do not apply in the event that the beneficiary is part of a family nucleus with minor children, students or disabled, identified according to the discipline of the general obligatory insurance. They are, therefore, applicable in cases of survivor's pensions due only to the spouse, or to parents or brothers and sisters, and are not applicable in cases where the pension is payable to minor children, students or disabled persons, alone or together with the spouse.

27. For the purposes of this cumulability, INPS circulars no. 234 of August 25, 1995 and no. 38 of February 20, 1996 specified the income of the beneficiary to be evaluated: income subject to taxation on the income of physical persons (IRPEF), net of social security



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and welfare contributions, with the exclusion of severance indemnities, however denominated, and relative advances, the income from the home and back pay subject to separate taxation. In any event, the amount of the survivors' pension on which the reduction is to be made, if any, is not assessed. In the event that the survivor is the holder of more than one survivor's pension, such pensions are excluded from the calculation of the income to be evaluated for the application of the regulations in question.

28. Without prejudice to what has just been stated regarding the regulatory framework of reference, the Autonomous Retirement Workers' Union (hereinafter also referred to as Sa.Pens. Or.S.A.) and basic workers' union, with the complaint to which it resists, complains about the violation of articles 4, 12, 16, 20 and 23 of the European Social Charter (CSE) by Law no. 335 of 1995.

29. In particular, it believes that art. 1, paragraph 41, of the above-mentioned law has determined, by virtue of the requirements established for the attainment of the survivor's benefit, a form of ablation close to expropriation of the social security benefit.

30. According to the complaining union, these ablative effects would have been progressively accentuated, up to the most recent Budget Law for 2019 (Law no. 145 of 2018), to the detriment of the holders of survivor benefits who are also in receipt of a direct or own pension, by the provisions on the freeze on the equalization of pension treatments, which would have implied the progressive sterilization of the revaluation mechanism through which the amount of pension benefits is adjusted, in Italy, to the increase in the cost of living.

31. The appeal is unfounded and, therefore, deserves to be rejected.

* * *

II. UNFOUNDEDNESS OF THE COMPLAINT REGARDING THE ALLEGED VIOLATION OF ART. 4 OF THE EUROPEAN CHARTER OF SOCIAL RIGHTS

32. The complaining trade union asserts the violation of the right to fair pay guaranteed by art. 4 of the CSE by Italian legislation, and in particular by art. 1, paragraph 41, of Law 335/1995.



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33. This assumption is, however, manifestly unfounded.

34. It should be remembered that art. 1, paragraph 41, of the above-mentioned Law (on the Reform of the compulsory and complementary pension system), in a regulatory context aimed at a radical revision of the subject of pensions for the specific purpose of reducing expenses, introduced a partial prohibition of cumulation between the survivor's benefit and the beneficiary's income.

35. The regulation, in conjunction with attachment F to which it refers, states that "*The amounts of pension treatments for survivors can be accumulated with the income of the beneficiary, within the limits of the attached table "F", whereby, for the holder, as in this case, of an income exceeding five times the annual minimum treatment of the Employees' Pension Fund, calculated in an amount equal to thirteen times the amount in force at January 1st, the percentage of accumulation is fifty percent of the survivor's treatment*".

36. The described anti-cumulation legislation responds to a solidarity *ratio* in imposing an economic sacrifice on the beneficiaries of pension treatments who have incomes exceeding three, four or five times the minimum treatment: in this case, the reversionary treatment can be accumulated only in a percentage measure, by bands or brackets (respectively, seventy-five, sixty, fifty percent), thus achieving a reduction in pension expenditure for subjects who, according to the arguments put forward by INPS, being able to count on considerable earnings, do not allocate the amounts of the survivor's pension to satisfy the primary needs of life and, therefore, are in a situation of economic solidity which would justify, considering the survivor's pension in the amount gross of the non-cumulative quota, the imposition of the sacrifice represented by the temporary renunciation of the revaluation of the pension.

37. It is important to note that, with reference to the rule in question, the Constitutional Court has had occasion to pronounce on it, affirming its legitimacy, on the basis of the principle according to which the legislator can, in order to safeguard budget balances and contain social security expenditure, reduce pension treatments already in place.



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38. Therefore, the right to a legitimately awarded pension may well be subject to the effects of more restrictive regulations introduced not unreasonably by subsequent laws, as already affirmed by the Italian Constitutional Court, with sentence no. 446 of 2002.

39. This being the case and in view of the fact that the purpose of the institution is to satisfy the needs of the surviving beneficiary¹, the legislation in question, which regulates the amount of the survivor's pension in restrictive terms, but within the limits of reasonableness, cannot be questioned from the point of view of a possible violation of the right to a fair salary.

40. Indeed, Italian legislation, by linking the amount of the benefit paid to surviving relatives to their economic condition, does not neglect the social security dimension of the institution, but complies with the need to contain public expenditure.

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III. UNFOUNDEDNESS OF THE COMPLAINT WITH REGARD TO THE ALLEGED VIOLATION OF ART. 12, 16 AND 23 OF THE EUROPEAN CHARTER OF SOCIAL RIGHTS

41. What has already been stated above regarding the reasons that justify the imposition of an economic sacrifice on the beneficiaries of pension benefits in order to reduce public spending, leads to the exclusion of the feared violation of the fundamental rights protected by the CSE.

42. In particular, art. 1, paragraph 41, of Law no. 335/1995 does not operate a reduction tout court of the survivor's pension received by the legitimate survivor, but subordinates the reduction to the occurrence of specific conditions. It follows that, the higher the income, the greater will be the reduction in the amount of the pension received by the survivor, so that the national system requires a sacrifice only to those who have the economic capacity to bear it.

¹ In this regard, see Constitutional Court, sentences no. 495/1993 and no. 195/1990, according to which the pension is to be paid by the surviving beneficiary and the survivor's pension constitutes, for the survivor, a sort of projection of the function of sustenance that the deceased carried out in his/her favour when he/she was alive



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43. Whereas the measures introduced by Law No 335/1995 constitute a fundamental element for the financial sustainability of the pension system and public finance in the medium to long term sustainability of the pension system and public finance in the medium-long term, it is noted that a possible amendment in a more favourable sense for the recipients of Article 1, paragraph 41, of the aforementioned law, which governs pension treatment for survivors, would require a legislative measure quantifying the costs and indicating the relevant financial cover.

44. Therefore, there is no violation of the right to social security, of the right of the family to social, legal and economic protection, nor of the right of the elderly to social protection, since, in any case, the economic capacity of the recipient is in no way affected.

* * *

III. UNFOUNDEDNESS OF THE COMPLAINT REGARDING THE ALLEGED VIOLATION OF ART. 20 OF THE EUROPEAN CHARTER OF SOCIAL RIGHTS

45. Without prejudice to what has been asserted above, there is not even a violation of the fundamental principle of non-discrimination on grounds of sex pursuant to art. 20 of the CSE.

46. The complaining trade union believes that the domestic legislation is detrimental to the right to equal opportunities and treatment in employment and occupation, since the majority of recipients of survivor's pensions in Italy are women.

47. It is clear, however, that in the Italian social security system, there are no diversified prescriptions and, therefore, discriminating between female and male individuals.

48. Consequently, since the male mortality rate is higher than that of women, the fact that most of the beneficiaries of the survivor's pension are women is strictly dependent on biological factors and does not give rise to unequal treatment.

49. This excludes the violation of art. 20 CSE, since the purpose of the legislation in question is to protect the surviving spouse, regardless of the latter's sex.

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CONCLUSIONS

50. In the light of the foregoing, the Government insist that the complaint is declared inadmissible or, in the alternative, manifestly unfounded in relation to all of the questions raised by the applicant; anyway, to reject any claim of the applicant's.

Roma, 17.01.2021

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