

**APPLICATION N° 29966/96**

Pietro VENEZIA v/ITALY

**DECISION** of 21 October 1996 (Striking out of the list of cases)

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**Article 3 of the Convention** *Extradition to the United States of America - risk of being sentenced to death and subjected to the 'death row phenomenon' there (Striking out of the list of cases)*

**Article 30, paragraph 1(a) of the Convention** *Extradition to the United States of America - risk of being sentenced to death and subjected to the 'death row phenomenon' there - Striking out of the list of cases - Application withdrawn following a decision of the Italian Constitutional Court rendering the decision to extradite the applicant inoperative - Lack of general interest*

**Article 30, paragraph 1(b) of the Convention** *Extradition to the United States of America - risk of being sentenced to death and subjected to the 'death row phenomenon' there - Striking out of the list of cases - Matter resolved following a decision of the Italian Constitutional Court rendering the decision to extradite the applicant inoperative - Lack of general interest*

**Article 1 of Protocol No. 6** *Extradition of an individual to a country where the crime with which he is charged is punishable by the death penalty (Striking out of the list of cases)*

**Rule 36 of the Rules of Procedure** *Case to which this provision applies - extradition of an individual to a country in which the crime with which he is charged is punishable by the death penalty (Striking out of the list of cases)*

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## THE FACTS

The applicant is an Italian citizen, born in 1953 in Laterza (Taranto province). He lived in the United States of America (State of Florida) until he fled the country on 27 December 1993.

He was represented before the Commission by Mr. Pietro Aló, a Senator and then ex-Senator of the Italian Republic.

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

### A. *The circumstances of the case*

The applicant was accused of murdering a tax official on 24 December 1993 in Florida (United States of America). He is a strong suspect, as he was seen at the place of the crime and, furthermore, confessed to the murder to Italian journalists, while claiming to have acted in self-defence.

On 19 April 1994 the applicant was arrested in Italy. Shortly afterwards, the competent prosecuting authority in Florida (the Dade County State Attorney's Office) requested the Italian authorities to extradite him.

Under Florida State law, the crime with which the applicant is charged is punishable by life imprisonment or the death penalty.

After receiving the request for the applicant's extradition, the Italian Ministry of Justice sent the application to the appropriate legal authority, as part of the relevant judicial procedure laid down in the Italian Code of Criminal Procedure for ensuring that the requirements for an extradition are met. At the same time, the Ministry of Justice sought an assurance from the United States authorities that the applicant would not be executed in the event of his conviction, in accordance with the provisions of the Bilateral Extradition Treaty and section 698(2) of the Italian Code of Criminal Procedure (hereinafter called "C.C.P."; see "B. *Relevant domestic law*", below).

In a "note verbale" of 28 July 1994, the United States Embassy in Rome, acting on instructions of the Department of Justice of the Federal Government, gave the Italian Ministry of Justice an assurance from the United States Government that the applicant would not be executed in the event of his conviction.

In a judgment of 25 November 1994, Lecce Court of Appeal held that the assurances given by the United States authorities were sufficient and that they satisfied the relevant requirements of the Extradition Treaty.

However, the applicant appealed on points of law, alleging, *inter alia*, a violation of Article IX of the Extradition Treaty

The Court of Cassation first informed the Italian Ministry of Justice that the assurances contained in the "note verbale" of 28 July 1994 could not be considered sufficient

The United States Embassy in Rome therefore sent a second note verbale to the Italian Ministry of Justice, dated 24 August 1995. In that note, the Embassy, acting on instructions of the Department of State of the Federal Government of the United States, presented the Italian Ministry the assurances of the United States Government that, if the Italian Government extradited the applicant to the United States to stand trial for capital murder in the State of Florida, the death penalty would neither be imposed nor inflicted on him.

In a decision of 12 October 1995, the Court of Cassation held that the assurances contained in the second note verbale satisfied the requirements of Article IX of the Extradition Treaty and Sections 698 and 700 of the Italian Code of Criminal Procedure. The Court of Cassation considered, in particular, that the assurances required under the Extradition Treaty had indeed been given by the authority competent to give them, i.e. the Federal Government of the United States, that is the body which had signed the Extradition Treaty and had assumed the obligations flowing therefrom. The Court of Cassation held that any contrary decision of the Federal State authorities would therefore be of no legal effect. The Court of Cassation also recalled its finding in a similar case (Hawkins judgment of 28 April 1992) that, before giving such assurances the State Department of the Federal Government normally ascertained the intentions of the relevant authorities of the Federal State concerned.

The Court of Cassation also considered that a note verbale was a document commonly used in diplomatic relations and was therefore a valid form of undertaking by the United States, even if unsigned.

The Court of Cassation found that any failure by the United States authorities to honour their undertaking *vis à vis* the applicant would amount to a serious violation of international law and a breach of the principle of mutual trust on which international judicial co-operation is based.

Once the judicial procedure for ensuring that the applicant could legally be surrendered for extradition was completed the Italian Ministry of Justice, which gives the final decision in extradition proceedings, requested further information from the United States authorities.

In a letter of 23 October 1995 sent to the Italian Ministry of Justice through the United States Embassy in Rome, a senior official of the United States Department of

Justice specified that, before he had informed the Italian Government that the applicant would not be sentenced to death, his department had received the usual assurances from Florida State Attorney's Office. This official also referred to Article 6 para 2 of the Constitution of the United States, which provides that

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding "

According to the senior official at the Department of Justice, the undertakings given by the United States Government pursuant to Article IX of the Extradition Treaty signed with Italy therefore constituted the "supreme Law of the Land" and the Florida authorities were obliged to honour them. Should they fail to do so, the Federal Government would enforce them, if necessary with the use of force, as had been done in the sixties in order to guarantee the civil rights of a minority group

On 29 November 1995 the United States Department of Justice sent the Italian Justice Ministry a statement from the Florida State Attorney. This statement was dated 2 August 1995 and had been signed by W.S.S, one of the Assistant State Attorneys for Dade County. This statement was copied, for information, to other members of the State Attorney's Office, including the Assistant State Attorney dealing with the applicant's case.

This statement was worded as follows:

"As a duly empowered Assistant State Attorney and after consultation with the trial prosecutor, Assistant State Attorney H.R., I am able to offer the following assurances to the Italian Government.

(The applicant) has been charged with First Degree Murder which carries with it a term of life imprisonment with a minimum mandatory of 25 years or death. Should he be convicted of First Degree Murder, the State of Florida will assure the Italian Government that the death penalty will not be imposed or inflicted upon (the applicant) for these offences "

In this connection, the applicant obtained from his lawyer in the United States a letter dated 21 December 1995 to the effect that a promise by an Assistant State Attorney was insufficient to rule out the possibility of the death penalty being enforced. The lawyer added that the Assistant State Attorney in question had still not repeated her undertaking on oath in open court (this being the sole means, he argued, of binding the State Attorney's Office) despite her stated intention to do so.

On 14 December 1995 the Italian Ministry of Justice delivered an opinion in favour of the applicant's extradition, stating that it considered the assurances given by the United States authorities to be sufficient, having regard also to relations between the two countries.

At that time the applicant's case had also been the subject of two motions submitted to the Italian Parliament by a group of senators and a group of MPs respectively, and of other motions submitted by regional and district councils, all fearing that the Florida authorities had failed to give a clear undertaking not to impose or inflict the death penalty on the applicant.

After the Commission had first applied Rule 36 of its Rules of Procedure on 25 January 1996 (see Proceedings before the Commission below) the Italian authorities decided to stay the applicant's extradition in accordance with the Commission's request and until the date specified.

On 20 March 1996 the applicant was thus able to apply to the Regional Administrative Court (*Tribunale amministrativo regionale*, hereinafter called T.A.R.) of Latium. Such an application does not automatically stay the main proceedings, as this requires a decision by the court.

In bringing this appeal, the applicant was making a direct application for judicial review of the decree of the Ministry of Justice dated 14 December 1995, complaining also that it had never been served on him directly. He requested the court, in the first place, to stay the extradition proceedings and to refer a question to the Constitutional Court regarding the constitutionality of the relevant provisions of the Extradition Treaty signed between Italy and the United States and of Section 698 (2) of the C.C.P. Latium. T.A.R. granted the applicant's requests. It referred his case to the Constitutional Court, on the ground that the question of constitutionality raised by the applicant could not be considered manifestly ill founded, and ordered the decision to extradite the applicant not to be enforced until the T.A.R. judges had met in Chambers (which they were due to do immediately after the Constitutional Court had given its ruling) to decide whether or not to stay the extradition proceedings. They had in any event been

stayed *de facto* until then, as the Italian authorities had consistently complied with the Commission's Rule 36 indications

In judgment no 223 of 25-27 June 1996, the Constitutional Court held that Section 698 (2) of the Code of Criminal Procedure, and Law No 225 of 1984 in so far as it implemented Article IX of the Extradition Treaty between Italy and the United States, were unconstitutional on the ground that they were incompatible with Articles 2 and 27(4) of the Italian Constitution

In particular, the Constitutional Court first allowed the Government of the United States to join the proceedings before it and dismissed the preliminary objection raised by the Italian Government's lawyers that the proceedings before the T A R concerned the applicant's legitimate interest (*interesse legittimo*) in the correct exercise of the Minister's politico-administrative power and not his personal right (*diritto soggettivo*) to life, which had already been examined by the ordinary courts having exclusive jurisdiction (*competenza esclusiva*) in that area Regarding the latter point, the Constitutional Court held, *inter alia*, that the scrutiny by the administrative courts of an act falling within a minister's competence must also be exercised with due regard for constitutional principles, which are, moreover, of paramount importance in guiding the deliberations of any State court

As regards the merits, the Constitutional Court observed first that the prohibition on the death penalty, like any prohibition on inhuman punishment, has a special place within the Italian constitutional order and flows directly from the protection afforded to the fundamental right to life, safeguarded by Article 2 of the Constitution The Constitutional Court then recalled that assistance provided by the Italian State in enforcing penalties which cannot be inflicted in peacetime is in itself contrary to the Constitution (see judgment no 54 of 1979) The question was therefore whether the mechanism of guarantees and assurances provided for in the provisions in question constituted an adequate remedy

The Constitutional Court accepted that a case-by-case assessment of the assurances offered by the requesting State has the advantage of considerable flexibility and means that the rules can be adapted to fit changing circumstances on the basis of criminal-policy considerations However, the 'sufficient assurances' test laid down both in Section 698(2) of the C C P and in Article IX of the Extradition Treaty is constitutionally unacceptable, as the values safeguarded by Article 27(4) of the Constitution above all the fundamental right to life, are absolute It is therefore irrelevant whether there are, in this case, remedies under United States law guaranteeing respect for international obligations or whether Article 6 of the United States Constitution can be interpreted to support the applicant's case "The issue at stake here concluded the Italian Constitutional Court, is not the remedies contained in a

foreign legal system but the intrinsically inadequate nature of the mechanism established in the Code of Criminal Procedure and the Implementing Law of the Treaty, when set against the constitutional provisions as the above mentioned principle laid down in the Constitution is absolute, there is no room for a case by case discretionary assessment of the degree of reliability and effectiveness of the assurances granted by the requesting State

#### B *Relevant domestic law*

Article IX of the Extradition Treaty signed between Italy and the United States of America on 13 October 1983 and implemented in Italy by Law No. 225 of 26 May 1984 provides that where the offence for which extradition is requested is punishable by death under the laws of the requesting State but not under the laws of the requested State, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be carried out

An analogous provision is contained in Section 698(2) of the C C P

In addition, Section 700 of the C C P sets out the formal conditions which the request for extradition must fulfil. In particular, it must be accompanied by an arrest warrant or copy of the conviction and sentence pursuant to which the request is made and by other supporting documents, such as a statement of the offence with which the person to be extradited is charged and, in particular, the relevant legal provisions and an indication as to whether the offence for which extradition has been requested is a capital offence and, if so, which assurances the requesting State can offer that the death penalty will not be imposed on the individual concerned or, if it has already been imposed, that it will not be enforced.

Article 2 of the Italian Constitution provides: the Republic recognises and guarantees the inviolable rights of man both as an individual and as a member of the social groups in which his personality finds expression, and imposes the performance of duties of a political, economic and social nature from which no derogation is possible.

Additionally, Article 27(4) of the Constitution provides: 'the death penalty is not admitted save in cases specified by military laws in time of war'

## COMPLAINTS

The applicant complains that his extradition to the State of Florida would expose him to a risk of being sentenced to death as the death penalty is still in force in that State

The applicant also complains that, given the internal situation in Florida and the circumstances of the crime with which he is charged, even a prison sentence is likely to expose him to inhuman and degrading treatment

The applicant therefore alleges a violation of Article 3 of the Convention and Article 1 of Protocol No 6 to the Convention, which Italy has ratified

## PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 19 January 1996 and registered on 25 January 1996

On 25 January 1996 the Commission decided to indicate to the Italian Government, in accordance with Rule 36 of the Commission's Rules of Procedure, that it would be desirable in the interests of the parties and of the proper conduct of the proceedings to refrain from extraditing the applicant before the end of the next session of the Commission, that is 8 March 1996

On the same date (25 January 1996), the Commission decided, in accordance with Rule 48 para 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to ask for their written observations on its admissibility and merits. The parties were asked to make observations on the following points in particular

- what was the nature and precise wording of the guarantees given by the Florida authorities to the Government of the United States of America that the applicant would not be sentenced to death, these assurances being referred to in, *inter alia*, a letter sent by the United States Department of Justice to the Italian Justice Ministry on 23 October 1995,  
  
whether, under the relevant provisions on criminal procedure in force in the State of Florida, the death penalty can be pronounced where the prosecuting authorities have not requested it,
- whether it was true, as the lawyer assisting the applicant in the United States proceedings claimed, that the undertaking given by the Assistant Attorney of the County of Dade in a letter dated 2 August 1995 not to request application of the death penalty was not binding unless repeated before a circuit court judge



The Government submitted their observations on 19 February 1996 and the applicant replied on 1 March 1996

On 8 March 1996 the Commission decided to hold a hearing and to prolong until 19 April 1996 the indication given to the respondent Government in accordance with Rule 36 of the Commission's Rules of Procedure

On 26 March 1996 the President of the Commission decided to cancel the hearing fixed for 12 April 1996 in view of the developments which had since occurred in the applicant's case. *Latum T A R* had, in the meantime, ruled that the decision to extradite the applicant should be stayed and had referred a question of constitutionality to the Constitutional Court. Thus, on 18 April 1996 the Commission decided to adjourn its examination of the admissibility of the application, pending a decision of the Constitutional Court, and to lift the Rule 36 indication given to the Italian Government

Following the decision of the Italian Constitutional Court of 25-27 June 1996, the respondent Government submitted observations on 1 July 1996 and the applicant replied on 24 September 1996

## **REASONS FOR THE DECISION**

1 The applicant complains that his extradition to the State of Florida would expose him to a risk of being sentenced to death as the death penalty is still in force in that State

The applicant also complains that, given the internal situation in Florida and the nature of the crime with which he is charged, even a prison sentence is likely to expose him to inhuman and degrading treatment

*The applicant therefore alleges a violation of Article 3 of the Convention and Article 1 of Protocol No. 6 to the Convention, which Italy has ratified*

2 In the initial phase of the proceedings before the Commission, the Government had first considered that there were sufficient grounds for believing that, once extradited to the United States, the applicant would not be sentenced to the death penalty. The Government had stressed that Italy has always been the first to promote international campaigns for a general moratorium on capital punishment and that in this case, it had studied the assurances given by the United States authorities very carefully. The assurances provided by those authorities were subjected to a double scrutiny (judicial and political) and in both cases they were considered sufficient to rule out any possibility that the applicant would, if convicted, be executed

The respondent Government also drew the Commission's attention to the consequences of any decision casting doubt on the credibility of the undertakings given by the Government of the United States which, in giving an assurance that the applicant would not be sentenced to death, gave a clear commitment to Italy under international law by which they were bound

Furthermore, according to the Government, the mechanism set up under Article IX of the Extradition Treaty between Italy and the United States is very similar to that provided for in the European Convention on Extradition, signed in Paris on 13 December 1957 under the auspices of the Council of Europe Article 11 of that Convention provides that if the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurances as the requested Party considers sufficient that the death penalty will not be carried out The Government contend that, were the Commission to give a decision criticising the operation of the Extradition Treaty between Italy and the United States, which is more restrictive than the European Convention on Extradition, this might cast doubt on all extradition mechanisms throughout the European continent

The applicant submitted that the respondent Government have failed to answer the Commission's questions both as to the form which an undertaking on the part of Miami State Attorney's Office should take in order to be considered binding and as to the issue whether, in Florida a court may sentence an individual to death even in the absence of a relevant request from the State Attorney's Office As regards the first point, the applicant indicated that, in his case, the only undertaking given, referred to in the letter of 2 August 1995 mentioned by the Government, was that of an Assistant State Attorney That undertaking was not signed by the State Attorney, cannot bind the Office as a whole and was copied merely for information to the Assistant State Attorney dealing with the applicant's case Above all that letter gave no guarantee and contained no explicit undertaking by the State Attorney's Office not to seek the death penalty

Additionally, the applicant noted that, in the statement of 2 August 1995, the Assistant State Attorney had given an undertaking that the death penalty would not be imposed *or* inflicted on him Even supposing that such an undertaking could be considered binding (which in the applicant's view, it cannot), the wording of it appeared to leave open the possibility that the death penalty might nonetheless be imposed This would expose the applicant to the death row phenomenon which the Convention organs have considered to be contrary to Article 3 of the Convention In order to rule this possibility out the Assistant State Attorney should have given an undertaking that the death penalty would be *neither* imposed *nor* inflicted

Lastly, the applicant pointed out that the Bilateral Extradition Treaty contained no obligation to extradite in the circumstances provided for under Article IX of that Treaty On the contrary, the requested State has a discretion in this regard The Italian

Government should have exercised that discretion in accordance with the principle set forth in Protocol No. 6 to the Convention that the death penalty should be abolished.

3 Following the decision of the Italian Constitutional Court of 25-27 June 1996, the respondent Government expressed the opinion that the application should therefore be rejected for failure to exhaust domestic remedies.

The applicant, for his part, considered that the alleged violation of the Convention and of Protocol No. 6 has been remedied by the decision of the Constitutional Court and observed that the domestic remedies, in particular the proceedings before the Constitutional Court, which heard his case following application by the Commission of Rule 36 of its Rules of Procedure, have been fully satisfactory. In the circumstances he does not wish to pursue the proceedings before the Commission.

4 The Commission notes that in declaring unconstitutional Section 698(2) of the C.C.P. and Law No. 225 of 1984 to the extent that it enforced Article IX of the Extradition Treaty between Italy and the United States, the Constitutional Court has allowed the applicant's appeal and has thus deprived the decision to extradite him of its legal basis. That decision is now inoperative and the applicant will not be extradited to the United States. In the circumstances the matter has evidently been resolved by the Italian courts and, moreover, the applicant himself has informed the Commission that he does not intend to pursue his application.

Furthermore, the Commission considers that in view of the circumstances relevant to this case and its outcome in Italy, there is no ground of general interest concerning compliance with the Convention requiring the Commission to pursue its examination of the application. The circumstances of the case therefore justify striking the application out of the Commission's list of cases pursuant to Article 30 para. 1 (a) and (b) of the Convention.

For these reasons the Commission unanimously

**DECIDES TO STRIKE THE APPLICATION OUT OF ITS LIST OF CASES**