



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

THIRD SECTION

CASE OF BELLIZZI v. MALTA

(Application no. 46575/09)

JUDGMENT

STRASBOURG

21 June 2011

FINAL

28/11/2011

*This judgment has become final under Article 44 § 2 (c) of the Convention.
It may be subject to editorial revision.*

In the case of Bellizzi v. Malta,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,

Corneliu Bîrsan,

Alvina Gyulumyan,

Ján Šikuta,

Luis López Guerra,

Nona Tsotsoria, *judges*,

David Scicluna, *ad hoc* judge,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 24 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 46575/09) against Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Maltese nationals, Mr Joseph Bellizzi, Jonathan Belizzi and Ms Tiziana Bellizzi (“the applicants”), on 15 August 2009.

2. The applicants were represented by Dr T. Azzopardi, a lawyer practising in Valetta. The Maltese Government (“the Government”) were represented by their Agent, Dr Silvio Camilleri, Attorney General.

3. The applicants particularly alleged that there had been a violation of Article 6 of the Convention in view of the lack of impartiality of the Constitutional Court and an interference with their property rights contrary to Article 1 of Protocol No.1 to the Convention and Article 14 of the Convention.

4. On 1 February 2010 the Court decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr Vincent De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). Accordingly the President of the Chamber decided to appoint Judge David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACT

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1960, 1988 and 1991 respectively and live in Kirkop, Malta. The second and third applicants lodged their application in their capacity as heirs of their late mother, Marianne Bellizzi.

A. The background of the case

7. The first applicant is a full-time boatman who earns a living from his boat, which he has moored at berth 15 of the Wied iz-Zurrieq Pier for over twenty years.

8. The first applicant's family had made use of the berth for many years on the basis of an encroachment permit issued to the first applicant's uncle (MB) on 10 June 1970. Such usage had been tolerated by the State in the absence of legislation regulating such matters. In a judgment of 21 March 1970 liquidating the movable assets bequeathed by the first applicant's grandparents, it was held that the said berth should be left for the common use of the first applicant's father and uncle. In the event that there would not be sufficient space to moor both of their boats, mooring would be done on a first-come first-served basis. This practice was respected by the first applicant and his cousin, X (a part-time boatman since 1975), as successors to their late parents, following the first applicant's taking up full-time boatmanship in 1981.

9. Notwithstanding the above arrangement, the permit continued to be issued in the name of the first applicant's uncle MB. The latter passed away in 1983. In 1986 when the Commissioner of Lands ("COL") became aware of this, he revoked the encroachment permit and did not issue a new one in anyone else's name.

10. In 1992 X (MB's son) wrote to the COL, informing him that his father had died in 1983 and requesting that the encroachment permit be issued in his name. The COL replied that the permit had been revoked with effect from 1986.

11. Between 1991 (when the Malta Maritime Authority ("MMA") took over the powers of the COL) and 1995, neither the applicant nor his cousin attempted to regularise their position and made no requests to be allocated the berth.

12. On 21 June 1995 X was invited to apply for a temporary mooring permit and was told that there would be no objection to its issuance. On 26 June 1995 he applied to the MMA for a temporary mooring permit. One day later, on 27 June 1995, he was granted a temporary mooring permit for his sole use.

13. On 18 July 1995 the first applicant also applied for a permit. His application was rejected on the basis that a permit in respect of that berth had already been issued and that it would not be possible to issue two permits for the same berth.

14. His cousin having refused to share the berth with him, the first applicant and his wife lodged civil proceedings. While these proceedings were pending the first applicant's wife died. Consequently, the second and third applicants intervened in the proceedings in their capacity as children and heirs of the deceased claimant.

15. According to the Government, in the meantime the first applicant made alternative arrangements and continued operating his boat in Wied iz-Zurrieq as he was and is still licensed to do to date by the Authority for Transport (successor to the MMA).

B. Ordinary proceedings

16. On 30 April 1999 the Civil Court found against the applicants, holding that it was the MMA which issued permits and that the latter was not bound by previous inheritance rights in respect of alleged permits for public land. Although various individuals had shared berths, it was a matter of policy not to issue more than one permit and once the MMA had acted within the parameters of the law it was not for the court to interfere with its decisions.

17. The applicants appealed.

18. On 5 June 2001 the Court of Appeal rejected their claims, holding that all previous permits and arrangements (which were moreover only customary and valid for as long as tolerated by the authorities) had terminated once the MMA was established. To determine their rights, individuals had been required to make an application within a specified time-limit, as X had done, but the applicant had failed to do so.

C. Proceedings before the Civil Court in its constitutional jurisdiction

19. On 28 October 2002 the applicants instituted constitutional redress proceedings claiming violations of Article 1 of Protocol No.1 to the Convention, and Articles 6, 13 and 14 of the Convention. They emphasised that the court's decisions had been based on a misconceived idea that there was a time-limit within which the first applicant had had to apply but had failed to do so. However, this alleged time-limit had had no legal basis.

20. On 6 May 2008 the Civil Court (First Hall) in its constitutional jurisdiction held that the rights of use in respect of a berth undoubtedly constituted a possession and a civil right according to domestic case-law. It noted that the cousins had the same rights, derived in the same manner, and

that nowhere was it established in the law that previous owners of such rights of use should be deprived of them. Moreover, to date, X had been the only person to have been granted such a permit in the area and there was no policy disallowing the issue of multiple permits for the same berth.

21. In the Civil Court's view, it was even more worrying that the ordinary court decisions had been based on the fact that the applicant had applied outside the time-limit. In reality, no law had stipulated such a time-limit. In fact, there had not even been a call for such applications and the authority had to be reprimanded for its erroneous oral testimony, especially in cases with such serious implications for the individuals concerned as the present case. Indeed, the decision taken by one person in favour of X, without in any way considering the applicants' rights as the MMA was duty bound to do, had been totally arbitrary. It followed that the applicants' property rights had been breached and that there had been a violation of Article 1 of Protocol No.1 to the Convention.

22. For the same reasons the court found a violation of Article 6 of the Convention. It further found a violation of Article 14 in conjunction with Article 1 of Protocol No.1 to the Convention, in that although no one else in the area had applied for or had been granted a permit and although the cousins had the same rights, the MMA had privileged X to the first applicant's disadvantage. In consequence of these findings it was not necessary to consider the complaint under Article 13. It ordered the revocation of X's permit and the issuance of a permit in the name of both users.

D. Proceedings before the Constitutional Court

23. On 27 February 2009, on appeal, the Constitutional Court reversed the first-instance judgment.

24. It considered that a situation where a State tolerated a series of events or customs did not create a right. Thus, the first applicant had neither a right to the berth nor any legitimate expectation and, therefore, no possession, and the relevant Article was not applicable. The same applied in respect of Article 13. However, on the basis of the 1970 judgment the applicant could have requested the enforcement of his cousin's obligation towards him, but this had nothing to do with the MMA.

25. As to Article 6, the Constitutional Court held that the first-instance court had not been competent to review the merits of the case. Moreover, the applicant could have brought proceedings claiming that there had been false testimony and in consequence requested a retrial. As to the proceedings taken as a whole, it did not appear that they had been unfair. However, Article 6 had not been applicable to the case in issue in any event. Moreover, it considered that since the Court of Appeal had rejected his claim, holding that the applicant had lost his *locus standi* when he failed to

apply for the said permit, and since this judgment had become *res judicata*, the applicant could no longer complain of an unfair trial.

26. It followed that since neither Article 1 of Protocol No. 1 to the Convention nor Article 6 applied, Article 14 could not be called into question.

27. The applicant alleged that the Legal Secretary of the Office of the Chief Justice (the latter having presided over the proceedings in question) had drafted the relevant judgment and was one of the team of lawyers representing the MMA.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Encroachment permits

28. Use of moorings at Wied iz-Zurrieq had been regulated by “encroachment permits” until 1991. The permits were issued by the Commissioner of Lands as administrator of the Government’s immoveable property. The encroachment permits were of their very nature precarious in that they granted no rights to the foreshore and could be withdrawn at the discretion of the Government.

B. The Malta Maritime Authority

29. Act XXVII of 1991 established the Malta Maritime Authority, which has the power, *inter alia*, to prohibit, control or regulate the use by any person of a port or port facility. This authority is governed by Chapter 352 of the Laws of Malta, namely the Malta Maritime Authority Act.

C. Judicial assistants

30. Judicial assistants are employed either part-time or full-time. They are appointed by the President of Malta after selection by a panel consisting of judges and one member appointed by the Public Service Commission. Prior to commencing his or her duties, a judicial assistant has to take an oath of office before the Court of Appeal that he/she will act faithfully, honestly and to the best of his/her ability in the performance of his/her duties as a judicial assistant. Judicial assistants are assigned to a particular court (or, where more than one judge or magistrate sits in a court, to a particular judge or magistrate) by the Chief Justice. Once a judicial assistant is so assigned he/she acts under the direction and control of the court or of the particular judge or magistrate. In addition to any power lawfully assigned to him/her by such court, a judicial assistant has the power to order the attendance of

any person for the purpose of giving evidence or to make an affidavit or a declaration, or to produce documents, at such place and time as he/she may specify in the order.

31. According to section 97A (3) and (4) of the Code of Organisation and Civil Procedure (the “COCP”), Chapter 12 of the Laws of Malta, the duties of judicial assistants include:

“ (3) (a) to assist in the judicial process and at the request of the court to participate in the proceedings pending before a court, including any research or other work required therefor, and for the purpose of carrying out such duties and exercise such powers as they may be required or authorised to perform by such court;

(b) to administer oaths;

(c) to take the testimony of any person who is produced as a witness in any proceedings;

(d) to take any affidavit on any matter, including a matter connected with any proceedings taken or intended to be taken before any court or any court or tribunal of civil jurisdiction established by law;

(e) to receive documents produced with any testimony, affidavit or declaration, including in particular a testimony, affidavit or declaration as is referred to in this Code;

(f) to hold such sittings as may be directed by the court, to meet with the advocates and legal procurators of the parties for the purpose of planning the management of the lawsuit, and to issue deadlines for the submission of evidence, pleadings or other judicial acts by the parties.

(4) In the performance of their functions judicial assistants shall be assigned to a court and shall act under the direction and control of the court before which the case is pending and shall, in addition to any power lawfully assigned to them by such court, have the power to order the attendance of any person for the purpose of giving evidence or to make an affidavit or a declaration, or to produce documents, at such place and time as they may specify in the order.”

32. Section 97C of the COCP provides as follows:

“Without prejudice to the provisions of sub-article (2) of article 97B, where in proceedings before a judicial assistant a question arises relating to or connected with the same proceedings, that question shall in the first place be decided by the judicial assistant who shall without delay and in any case not later than three days from the date of the said decision, inform the court of the decision, and the decision of the judicial assistant shall be binding unless the court shall by decree, decide otherwise.

33. Section 97B of the COCP deals with (i) the oath to be taken by judicial assistants; and (ii) grounds of challenge, stating that the provisions of Sub-Title II of Title II of Book Third (regarding the challenge of judges and magistrates) shall apply to judicial assistants, except that the decision on any such matter shall be taken by the court before which the case is

pending. In this respect, sections 734 and 735 of Book Third of the COCP, in so far as relevant, read as follows:

Section 734

“(1) A judge may be challenged or abstain from sitting in a cause – (...)

(d) (i) if he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependent thereon; (...)”

Section 735

“(1) Any judge being aware of the existence in his respect of any of the grounds of challenge mentioned in the last preceding article, shall make a declaration to that effect previously to the trial of the cause, either verbally in open court, in which case a record of such declaration shall be entered in the proceedings of the cause, or in writing, in which case it shall be lodged in the registry before the day appointed for the trial of the cause, notice thereof being given to the parties.”

34. One of the advocates holding the post of judicial assistant performs the functions of the Legal Secretary to the Chief Justice.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

35. The applicants complained that the Constitutional Court had not been impartial, because the Legal Secretary of the Office of the Chief Justice had been one of the team of lawyers representing the MMA. They relied upon Article 6 of the Convention, which reads as follows:

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

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

(a) The parties' submissions

36. The Government submitted that the applicants had failed to institute a new set of constitutional proceedings on the basis of Article 6 complaining of the alleged lack of fairness of proceedings before the Constitutional Court, as the conduct of those proceedings was a separate issue from that originally raised. Arguing that such a remedy would be

effective, the Government made reference to domestic case-law, namely *Lawrence Cuschieri v the Honourable Prime Minister* (6 April 1995), *Perit Joseph Mallia v the Honourable Prime Minister* (15 March 1996), and *The Honourable Judge Dr. Anton Depasquale v the Attorney General* (19 September 2001), where the constitutional jurisdictions had taken cognisance of complaints against the Constitutional Court in relation to the fairness of proceedings under Article 6 of the Convention. In the first of these cases, the Constitutional Court held that it could not *a priori* exclude review of questionable behaviour/actions by the constitutional jurisdictions. In the *Perit Joseph Mallia* case, both the first-instance court exercising its constitutional jurisdiction and the Constitutional Court on appeal had upheld the applicant's claims and had found a violation of Article 6. The Government further argued that the length of such proceedings could not impinge on their effectiveness.

37. The applicants highlighted that the original violation complained of had occurred in 1995 and that in that same year they had instituted an ordinary civil action which had been determined in 2001. Following that determination, they had instituted constitutional redress proceedings which had ended in 2009. In their view, being required to embark on a fresh set of constitutional proceedings to contest the impartiality of the Constitutional Court would reduce to nothing the concept of an effective remedy as understood by the Court.

(b) The Court's assessment

38. In accordance with Article 35 § 1 of the Convention, the Court may only deal with an issue after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Zarb Adami v. Malta* (dec.), no. 17209/02, 24 May 2005). However, the rule of exhaustion of domestic remedies requires an applicant to have normal recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009-...). The speed of the procedure of the remedial action may also be relevant to whether it is practically effective for

the purposes of Article 35 § 1 (see, *mutatis mutandis*, *McFarlane v. Ireland* [GC], no. 31333/06, § 123, ECHR 2010-...).

39. The Court observes that in *Ferré Gisbert v. Spain* (no. 39590/05, § 39, 13 October 2009), it held that the sole remedy available against a Constitutional Court judgment is an individual petition before the Court under Article 34 of the Convention. In this case the Spanish legal system did not allow, either in practice or in law, the institution of a new set of constitutional proceedings against the proceedings and a final judgment of the Constitutional Court. Such a limitation is common amongst member States adopting constitutional court remedies for alleged human rights breaches (for example, Cyprus, Czech Republic, Germany and Poland). However, in the Maltese legal system the applicants could have – both in law and in practice – lodged a fresh set of constitutional proceedings complaining of the first set of constitutional proceedings. As established by the Government, such cases would not *a priori* be declared inadmissible.

40. In such a circumstance the Court is called on to examine whether the constitutional remedy against a Constitutional Court judgment could be considered accessible and effective, in the present case.

41. The Court considers that, as evidenced by a plurality of cases brought before the Maltese Constitutional Court, there is no reason to doubt that Constitutional Court proceedings are accessible and that they are a remedy capable of providing redress for human rights violations by means of binding judgments.

42. However, what is of concern to the Court is the length of another set of constitutional proceedings at a stage where an applicant's initial complaint would have been conclusively decided after several years of litigation before various levels of the domestic courts, including the constitutional jurisdictions. The Court notes that lodging a constitutional application involves a referral to the First Hall of the Civil Court and the possibility of an appeal to the Constitutional Court. The Court has already held that this is a cumbersome procedure, especially since practice shows that appeals to the Constitutional Court are lodged as a matter of course (see *Sabeur Ben Ali v. Malta*, no. 35892/97, § 40, 29 June 2000 and *Kadem v. Malta*, no. 55263/00, § 53, 9 January 2003, where the Court held that the relevant proceedings are invariably longer than what would qualify as “speedy” for Article 5 § 4 purposes). The length of these proceedings is furthermore aggravated by the fact that they may be adjourned *sine die* pending any proceedings concerning the substantive complaints before this Court. In consequence, the Court considers that, even though the domestic legal system allows for such a new complaint to be lodged, the length of the proceedings detracts from their effectiveness. It notes that in the present case the applicants had been involved in proceedings at different levels for ten years, seven of which have been before the constitutional jurisdictions.

43. Moreover, the Court observes that while the constitutional jurisdictions (the Civil Court and the Constitutional Court in case of an appeal) assessing complaints relating to Constitutional Court proceedings would be differently constituted, the former would most likely have to rule on the conduct of the Chief Justice (the President of the Constitutional Court) and other hierarchically superior judges. Such a scenario may raise issues in respect of the impartiality and independence.

44. It follows that, even though in the Maltese legal system domestic law provides for a remedy against a final judgment of the Constitutional Court, in view of the specific situation of the Constitutional Court in the domestic legal order (see *Ferré Gisbert*, cited above, § 39) the Court considers that in circumstances such as those of the present case it is not a remedy which is required to be exhausted.

45. The Government's objection that domestic remedies have not been exhausted is therefore rejected.

2. Conclusion

46. The application of Article 6 to the constitutional proceedings in the present case has not been disputed by the parties.

47. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

48. The applicants submitted that the Constitutional Court had not been impartial since the Legal Secretary (judicial assistant) (Dr M.) of the Office of the Chief Justice had been one of the team of lawyers representing the MMA. Indeed, in the case file there was no record of the fact that she had ceased to represent the MMA or that she had taken over a post that precluded her from continuing such a mandate. Moreover, on a general level part-time judicial assistants are not precluded from private legal practice. This had created a structural conflict, which contrasted with the principle that justice must not only be done but be seen to be done. In the circumstances of the present case, the applicants claimed that they had had legitimate doubts as to the objective impartiality of the court. They further submitted that the public had not been made aware of which judicial assistant had been assigned to any particular court or judge and therefore they could not have raised a 'challenge' in this respect. Lastly, they argued that the Government's submissions on the merits of this complaint had been

entirely based on the Chief Justice's version of events. In consequence, there was no certainty that either of the two other judges on the bench had not consulted the said person in respect of the case. They argued that their doubts as to whether Dr M. had had anything to do with their case could not be dispelled, in view of the structural conflict which existed in practice, and the fact that Dr M. had failed to file a note in relation to her incompatibility.

49. The Government submitted that, as confirmed by a letter signed by the Chief Justice which was sent to the Court, Dr M. had indeed acted as defence counsel for the MMA in the first stages of the proceedings but withdrew in early 2003. During this time she had assisted the first legal counsel by replying to the application at first-instance and by appearing before the Civil Court. On 27 July 2004 she had been appointed as a judicial assistant, but according to the Chief Justice she had not at any stage been involved in the Constitutional Court proceedings complained of.

50. It was further noted that Dr M. had in fact been the judicial assistant assigned to the Office of the Chief Justice. The functions of a judicial assistant were provided for by law (see paragraph 31 above) and in the performance of their duties, judicial assistants were bound by the same rules of challenge and abstention applicable to judges and magistrates (Chap 12, article 97 B sub article 2). The Chief Justice had been of the opinion that an individual would not be required to make a note in a case-file to the effect that she or he had become a judicial assistant, as judicial assistants were automatically precluded from being involved in a case when his or her signature appeared as counsel for the parties in the judicial acts, or he or she was in fact a party to the proceedings. In practice, not all cases were referred to judicial assistants, as in the majority of cases the judge rapporteur proceeded to draw up an opinion which might eventually become the court's judgment without any assistance. This is what had happened in the present case which had not been referred to a judicial assistant. Indeed, no judicial assistant had been involved in assisting either the judge rapporteur or any of the other two judges. In consequence, the allegation that Dr M. could have influenced the Constitutional Court's judgment was manifestly unfounded.

2. The Court's assessment

(a) The general principles

51. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any

legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, 24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII). It should be reiterated that the principles established in the Court's case-law apply to jurors as they do to professional judges and lay judges (see *Holm v. Sweden*, 25 November 1993, § 30, Series A no. 279-A, and *Pullar v. the United Kingdom*, 10 June 1996, § 29, *Reports of Judgments and Decisions* 1996-III), and to other officials exercising judicial functions, such as assessors (see *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, 30 November 2010). Similarly, court officials dealing with a case, such as "referendaries" are not excluded (see, by implication, *Jenny v. Switzerland*, Commission Decision no. 27043/95, 16 January 1996, and *Huuhtanen v. Finland* (dec.), no. 44946/05, 13 October 2009).

52. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein*, cited above, § 43). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will for personal reasons (see *De Cubber v. Belgium*, § 25, 26 October 1984, Series A no. 86).

53. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein*, cited above, § 44; and *Ferrantelli and Santangelo v. Italy*, § 58, 7 August 1996, *Reports* 1996-III).

54. In itself, the objective test is functional in nature: for instance, the exercise of different functions within the judicial process by the same person (see *Piersack v. Belgium*, 1 October 1982, Series A no. 53, pp. 14-15), or hierarchical or other links with another actor in the proceedings (see cases regarding the dual role of a judge, for example, *Wettstein*, cited above, § 47, and *Mežnarić v. Croatia*, no. 71615/01, 15 July 2005, representing the applicant's opponents and subsequently judging in a single set of proceedings and overlapping proceedings respectively), give rise to objectively justified misgivings as to the impartiality of the tribunal, which thus fail to meet the Convention standard under the objective test (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-XIII). It must therefore be decided in each individual case whether the connection in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Pullar*, cited above, § 38). The time-frame is relevant when assessing the significance of a judge's previous relationship to an opposing party (see *Walston v. Norway* (dec.), no. 37372/97, 11 December 2001).

55. In this respect even appearances may be of a certain importance, or, in other words, “justice must not only be done, it must also be seen to be done”. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009-...).

56. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature’s concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Mežnarić*, cited above, § 27). The Court will take such rules into account when making its own assessment as to whether the tribunal was impartial and, in particular, whether the applicant’s fears can be held to be objectively justified (see, *Micallef*, cited above, § 70).

(b) Application to the present case

57. The Court recalls at the outset that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *Minelli v. Switzerland*, 25 March 1983, § 35, Series A no. 62). Accordingly, in the present case the applicants have not emphasised that the basis of the complaint is the fact that judicial assistants may be recruited on a part-time basis, and no details in relation to this aspect have been given in the parties’ submissions. Moreover, the Court recalls that legislation and practice on the part-time judiciary in general may be framed so as to be compatible with Article 6 (see *Wettstein*, cited above, § 41). Therefore, what is at stake in the present case is solely the impartiality of the Constitutional Court in the applicants’ case as a result of Dr M.’s position.

58. The Court considers that while court officials are not impervious to the requirement of impartiality, the applicability of this condition is dependent on the specificities of the role of the court official in question within the domestic legal and judicial system.

59. The Court observes that in the Maltese system, the Legal Secretary of the Chief Justice is an appointed judicial assistant. In consequence it is the judicial assistants’ role that needs to be examined. The Court notes that functions of judicial assistants include, *inter alia*, assistance in the judicial process and, at the request of the court, participation in the proceedings, taking witness testimony and affidavits on matters connected with proceedings, receiving documents produced with any testimony, and holding sittings as may be directed by the court, together with issuing deadlines for the submission of evidence, pleadings or other judicial acts by

the parties. As stated in the Government's submissions, judicial assistants may also draw up opinions in respect of the cases put to the court. In this light, the Court considers that the tasks entrusted to a judicial assistant in the Maltese system may be of important significance to the judicial process, and consequently, an individual performing the abovementioned tasks must be impartial for the proceedings to be Article 6 compliant.

60. The Court notes that in the present case, as admitted by the Government, Dr M. actively represented the applicants' opponents at an earlier stage of the proceedings (see paragraph 49 above). It is true that her previous involvement was temporary as she represented the applicants' opponents for only a few months from October 2002 until an unspecified date in 2003 when she withdrew. This was almost six years before the decision of the Constitutional Court of 27 February 2009. However, the proceedings dealt with the same subject matter, *inter alia*, the compliance of the MMA's actions with the Constitution and the Convention, and the consequent effects on the applicants' rights (see, conversely, *Puolitaival and Pirttiäho v. Finland*, no. 54857/00, § 51, 23 November 2004). What remains to be ascertained is the actual participation of Dr M. in the constitutional proceedings.

61. The Court firstly notes that quite apart from her general role as judicial assistant to the Chief Justice the applicants have not provided any evidence which suggests that Dr M. had been entrusted with the case. Indeed, it transpires from the relevant Maltese law that a judicial assistant may be involved in any named case only at the court's request. It may therefore be the case that a judicial assistant has no involvement in a particular suit as was in fact declared by the Chief Justice in relation to the present case. The applicants expressed no doubt as to the veracity of that statement, at least in so far as it related to the lack of Dr. M's assistance to the Chief Justice. The Court further observes that the applicants' statement that they were not aware that Dr M. was the Chief Justice's judicial assistant, confirms that, in the impugned proceedings, Dr M. had not taken any witness testimony or affidavits, nor received documents produced with any testimony, or held sittings or issued deadlines for the submission of evidence, pleadings or other judicial acts by the parties. In this light, as the Court does not find it established that Dr M. participated as a judicial assistant in the impugned proceedings, it follows that there are no ascertainable facts capable of raising legitimate doubts as to the impartiality of the Constitutional Court in the present case.

62. In these circumstances, the Court finds that there has not been a violation of Article 6 § 1 of the Convention as regards the requirement of an impartial tribunal.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

63. The applicants further complained that the right to the peaceful enjoyment of their possession (the use of the berth), from which the first applicant had made a living for his family, had been breached. They relied on Article 1 of Protocol No.1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

64. The Government contested that argument.

Admissibility

1. The parties' observations

65. The Government submitted that Article 1 of Protocol. No. 1 to the Convention was not applicable to the present case. They submitted that berths were not capable of being the subject of private rights since they were essentially part of the public domain. Any permits in their respect merely allowed holders to moor their boats on sufferance and had been precarious in nature. They submitted that the first applicant had never had an encroachment permit issued in his name or in that of his father and the right he was claiming was solely based upon a private settlement of inheritance claims to which the Government, as owner or administrator of the mooring, had not been a party. As stated by the Constitutional Court, where the holders of title to Government land had reached arrangements with third parties about such land, these arrangements did not create rights in relation to the Government. The first applicant's arrangement with his cousin had been one such arrangement. Moreover, the applicant's father could not have left by inheritance a right which he himself had not had, given that the permits issued had not been in his name. Furthermore, the last permit issued had expired in 1991 and had not been renewed and the applicant's situation from 1995 onwards had been that of a person making use of a public mooring without a permit. The Government submitted that mooring at a particular place had not been an indispensable element of the applicants' business, comparable to a licence, and it could not be considered as “one of the principal conditions for the carrying on of the applicants'

business” (*Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159). In consequence, notwithstanding the autonomous meaning of the concept of possessions for the purposes of the Convention, the Government submitted that the applicants had not had a possession in the present case.

66. The Government noted that the second and third applicants had only become parties to the proceedings following their mother’s death and had definitely not had title to the berth in question. However, even assuming that the applicants had had a possession the Government considered that the enjoyment of that possession could not be considered “peaceful” within the meaning of Article 1 of Protocol No.1 to the Convention, since the alleged possession had been abusive and had not been authorised by any permit, being grounded only in a private family agreement. In consequence, there had not been an interference with the applicants’ peaceful enjoyment of that possession.

67. The applicants submitted that, as held by the Civil Court in its constitutional jurisdiction, they had had a possession, at least in the form of a legitimate expectation, within the meaning of Article 1 of Protocol. No.1 to the Convention.

2. The Court’s assessment

68. The Court reiterates that the concept of “possessions” referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II; and *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 65, 29 March 2010).

69. “Possessions” can be “existing possessions” or assets, including, in certain well-defined situations, claims. For a claim to be capable of being considered an “asset” falling within the scope of Article 1 of Protocol No. 1, the claimant must establish that it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. Where that has been done, the concept of “legitimate expectation” can come into play (see *Maurice v. France* [GC], no. 11810/03, § 63, ECHR 2005-IX; and *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 35 and 48-52, ECHR 2004-IX).

70. Generally speaking, the imprescriptibility and inalienability of public land have not prevented the Court from concluding that “possessions” within the meaning of this provision were at stake (see *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII; *N.A. and Others v. Turkey*, no.

37451/97, ECHR 2005-X; *Tuncay v. Turkey*, no. 1250/02, 12 December 2006; *Köktepe v. Turkey*, no. 785/03, 2 July 2008; *Turgut and Others v. Turkey*, no. 1411/03, 8 July 2008; and *Şatır v. Turkey*, no. 36192/03, 10 March 2009). However, in those cases, except for the case of *Öneryıldız*, the applicants' property titles were not disputable under domestic law because the applicants could legitimately consider themselves to be "legally secure" in respect of the validity of those titles before they had been annulled in favour of the Treasury (see *Turgut and Others*, cited above, § 89; and *Şatır*, cited above, § 32).

71. In the instant case, it was not disputed before the Court that the mooring was part of maritime public property. What is in dispute is the legal consequences of the encroachment permit of 1970 *vis-à-vis* the applicants.

72. The Court firstly observes that the Civil Court in its constitutional jurisdiction held that rights of use in respect of a berth undoubtedly constitute a possession and a civil right according to domestic case-law (see paragraph 20 above). However, the other domestic courts ruled out any recognition of a right or a legitimate expectation to keep using the berth by obtaining a permit. In consequence, neither the law itself nor the final decisions in the national proceedings, or any other jurisprudence, confirmed the applicants' claim. However, the fact that the domestic laws of a State do not recognise a particular interest as a "right" or even a "property right" does not necessarily prevent the interest in question, in some circumstances, from being regarded as a "possession" within the meaning of Article 1 of Protocol No. 1 (see *Brosset-Triboulet*, cited above, § 71).

73. In the present case, the Court also observes that the encroachment permit issued in 1970 had never been in the first applicant's name or in that of his father, as it had always been issued in his uncle's name. Moreover, the permit was revoked in 1986 and no other permit was issued until ten years later. Indeed it has not been contested that this type of permit was at all times precarious and could be withdrawn at the discretion of the Government. Thus, the applicant made use of the public property in question for approximately twenty years on the sufferance of the authorities and that of his family, who for a period of time were also without a valid permit. In consequence, unlike the majority of the Turkish cases mentioned above, at no point did the applicants have a valid title in respect of the use of the mooring. Moreover, even though the procedure to apply for permits appears to be unclear in law, the Court also gives weight to the fact that the applicant did not take any action to regularise his position once the COL's powers were abolished in favour of the MMA in 1991. The Court considers that had the first applicant believed he had a legitimate expectation to obtain a permit on the basis of the permit bequeathed to him or on the basis of the unhindered use he had made of the mooring for a number of years, he could have at least been expected to take action to have the alleged proprietary

interest recognised and enforced by the MMA as the newly competent authority.

74. In conclusion, bearing in mind the first applicant's passivity, the Court considers that the fact that the first applicant used the mooring for a considerable amount of time, from 1975 to 1995, without having any sort of title to it, does not suffice to hold that the applicants were vested with a proprietary interest in the peaceful enjoyment of the mooring that was sufficiently established and weighty to amount to a "possession" within the meaning of the rule expressed in the first sentence of Article 1 of Protocol No. 1.

75. In the light of the above, the fact that the first applicant's grandparents disposed of the alleged possession in their will which was subsequently confirmed by a court judgment has no bearing on whether the applicants had a possession.

76. It follows that Article 1 of Protocol No.1 is not applicable to the present case, and therefore the complaint is incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

III. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No.1 TO THE CONVENTION

77. The applicants further complained that, both before and after the permit was issued, the first applicant had been discriminated against. They relied on Article 14 of the Convention, which reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

78. The applicants submitted that the use of the mooring had not been precarious at all, and that had the MMA not favoured X by granting him a permit arbitrarily, the applicants would have continued to make use of it. The applicants referred to criminal proceedings which had been instituted against MMA officials regarding widespread corruption in issuing permits.

79. The Government argued that as the applicants had had no possessions within the meaning of Article 1 of Protocol No.1, Article 14 could not be applicable. However, even if it were so, the Government had played no part in the agreement between the cousins, and the State was not obliged to recognise irregular arrangements between private parties. Thus, the authorities' actions had been legitimate, because the applicant had not been in the same position as his cousin, no previous permit having ever been issued in his name. Therefore, it could not be said that the applicants had suffered discrimination at the hands of the authorities.

80. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence as it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those other provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports* 1997-I, p. 184; and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II, p. 585).

81. Having regard to the above principles and to the conclusion that Article 1 of Protocol No. 1 is not applicable, the Court considers that Article 14 cannot apply in the instant case (see *Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, § 76, ECHR 2002-VII; and *Beshiri and Others v. Albania*, no. 7352/03, § 91, 22 August 2006).

82. It follows that the complaint under Article 1 of Protocol No. 1 taken together with Article 14 is incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

IV. OTHER COMPLAINTS

83. The applicants also complained under Article 6 that the MMA had not exercised its quasi-judicial powers appropriately, in that it had acted arbitrarily and had not allowed the first applicant to make representations in the proceedings granting the permit. Moreover, the first applicant had been denied an effective remedy in accordance with Article 13 in respect of the MMA’s actions, as there had been no panel or board to which the first applicant might have complained in order to establish the material facts and which could have provided redress.

84. The Court considers that the non-judicial administrative procedure by which a third party asked the authorities to grant a permit, and to which the first applicant was not a party, did not concern any dispute over a civil right possessed by the first applicant himself. It further notes that the MMA is not a tribunal for the purposes of the Convention. In consequence Article 6 did not apply to the purely administrative procedure conducted at that stage and therefore the complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

85. In so far as the MMA’s decisions may have subsequently given rise to a dispute over the existence of a “civil right” of the first applicant, the Court reiterates that the role of Article 6 § 1 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by those of Article 6 § 1 (see *Vasilescu v. Romania*, 22 May 1998, § 43, *Reports of*

Judgments and Decisions 1998-III). Article 6 provides for the “right to a court”, of which the right of access is one aspect. The Court notes that the first applicant was able to institute ordinary civil proceedings contesting the MMA’s actions, which, if successful, would have remedied the situation. Moreover, the applicants also had the opportunity, of which they availed themselves, to institute constitutional redress proceedings. Indeed the Civil Court found in their favour, but the Constitutional Court reversed the judgment on appeal. In these circumstances, the Court is of the view that the applicants had full access to multiple courts.

86. It follows that this complaint must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 6 § 1 in respect of the impartiality of the Constitutional Court admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 21 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President