



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

THIRD SECTION

CASE OF ZAMMIT AND VASSALLO v. MALTA

(Application no. 43675/16)

JUDGMENT

STRASBOURG

28 May 2019

FINAL

28/08/2019

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

In the case of Zammit and Vassallo v. Malta,

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

Helen Keller, *President*,

Vincent A. De Gaetano,

Dmitry Dedov,

Branko Lubarda,

Alena Poláčková,

Gilberto Felici,

Erik Wennerström, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 7 May 2019,

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

PROCEDURE

1. The case originated in an application (no. 43675/16) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by seven Maltese nationals (see Annex), (“the applicants”), on 20 July 2016.

2. The applicants were represented by Dr A. Sciberras, a lawyer practising in Valletta. The Maltese Government (“the Government”) were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicants alleged that they had suffered a *de facto* expropriation, in that their property had been demolished abusively, and that a yearly recognition rent of 158.40 euros (EUR) and an award of non-pecuniary damage of EUR 1,500 had not redressed the breach they suffered. Moreover, they had been deprived of their property and in thirty years had not yet received any compensation while they had to disburse costs in litigation.

4. On 21 March 2018 notice of the application was given to the Government.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. The details of the applicants are available in the Annex.

A. Background to the case

6. The applicants are owners of a property situated at 8, Flat 1, Old Prison Street, Senglea, (hereinafter “the property”) which they inherited

from their ancestors. The property had been conceded to third parties by a title of temporary emphyteusis for a period of seventeen years, at an established ground rent of 40 Maltese liras (MTL - approximately EUR 98) per year, which was to expire in 1990.

7. On 1 September 1986 the Government issued a requisition order on the property. In October 1988 the Government derequisitioned the property and returned the keys to the applicants.

8. On 15 April 1989 the Commissioner of Land took over (occupied) the property.

9. In spring-summer 1989 the applicants became aware that the property had been demolished at some point between March and September 1989 in connection with a slum clearance project, in order to make way for the development of social housing.

10. By means of a President's declaration of 27 October 1989, that is after the property was demolished, the Commissioner of Land formally took over the property under title of possession and use (see relevant domestic law).

11. By means of a President's declaration of 4 October 1991 the Commissioner of Land issued an order to convert the title from one of possession and use into one of public tenure (see relevant domestic law).

12. On 22 March 1999, the Commissioner of Land submitted a notice to treat to the Land Arbitration Board (LAB), by means of which the sum of MTL 15.62 (approximately EUR 36.39) per year was offered to the owners (the Zammit family) as a yearly recognition rent. The sum was based on an estimate of the Land Valuation Office in line with their policies, but did not take account other factors, and was significantly lower than the rent at which the property had been leased prior to its demolition.

13. By means of a judicial letter of 12 April 1999 the owners refused the offer.

14. On 22 May 2000 the Commissioner of Land instituted proceedings before the LAB requesting them to order the transfer of the property and set the relevant compensation.

15. On 29 November 2006, the second and seventh applicants intervened in the proceedings as heirs of their deceased parent.

16. During these proceedings, the technical experts, appointed before the LAB, considered that in 1986 the property had been valued at MTL 1,000 (approximately EUR 2,320). On 10 August 2005 the applicants' ex-parte architect estimated the fair rent of the property in 2005 at the equivalent of EUR 229.64 per year, and its sale value at MTL 7,500 (approximately EUR 17,470.30) – the property having been demolished, his estimate was based on the plans of the building from which it transpired that it had a depth of 14.5 metres and a width of 5.5 metres. In 2011 the technical experts of the LAB considered that the rental value for the property was

EUR 158.40 per year, and its sale value (according to the terms of possession and use) was EUR 10,575.36.

17. By a decision of 7 March 2012, acknowledging that the property had been demolished prior to the formal taking by the Government, the LAB considered that it was inconceivable that rent be paid for a property which had been demolished in order to be built anew, and that the right course of action would have been to acquire the property by outright purchase. Nevertheless, given that Article 19 of Chapter 88 of the Laws of Malta concerning expropriation by public tenure did not preclude such an action, the LAB fixed the recognition rent at EUR 158.40 per year.

18. On 27 March 2012 the Commissioner of Land appealed against the amount of rent established. On 16 April 2012 the applicants filed a reply asking the court to declare the appeal null and void as appeals could only be lodged on points of law. It was also noted that constitutional redress proceedings were being lodged by the applicants concerning the illegalities in the procedure and the alleged unconstitutionality of the law. Following the constitutional redress proceedings (described below) the Commissioner of Land's appeal was withdrawn.

B. Constitutional redress proceedings

19. On 16 April 2012 the applicants filed constitutional redress proceedings. They claimed that the demolition of the property was illegal and amounted to a *de facto* expropriation contrary to the Constitution and the Convention and its Protocols; that Article 19 of Chapter 88 of the Laws of Malta and related articles were in breach of the Constitution and the Convention and its Protocols; they requested the court to annul the LAB's decision and to award them damages as well as any other relevant remedy.

20. The defendants filed their reply and produced a valuation by an architect appointed by the Commissioner of Land who estimated the sale value of the property at EUR 45,000. The report noted that the property had been demolished and was replaced by new residential apartments.

1. First-instance

21. By a judgment of 12 February 2014 the Civil Court (First Hall) in its constitutional competence delivered a partial judgment where it rejected the defendants' plea that the applicants had not exhausted ordinary remedies, and found a violation of the applicants' rights in so far as the recognition rent established for the taking under public tenure, which was not subject to any future increases, was too low and thus disproportionate. It rejected the remainder of the claims, and left the liquidation of damage to be established in the final judgment.

22. In particular the court was of the view that - despite the applicants' claim that the property had been demolished prior to it having been taken

under possession and use - the period in which the property had allegedly been taken and demolished must have been the same as that when it had been taken under title of possession and use, and thus the latter taking could not be considered illegal. According to domestic law the State could also have taken the property under title of public tenure in exchange for a recognition rent, to eventually demolish it. The demolition was thus lawful pursuant to Article 19 of Chapter 88 of the Laws of Malta. As to the impugned law, this could not be found to be incompatible with the Constitution since it had been in force before 1962. As to its compatibility with the Convention, the court found that the taking had pursued a public interest namely a slum clearance project. However, the recognition rent established in line with LAB policies, which was not subject to any future increases, was too low and thus disproportionate. There had therefore been a breach of the applicants' right of property.

23. During the continuation of the proceedings the applicants submitted an ex-parte architect valuation dated 2014 which established the sale value of the property at EUR 50,000 and its rental value at EUR 250 per year. The report noted that the property had been demolished, and that it had had the measurements identified above, which resulted in an area of 80 square metres for the apartment which was located in a block of two apartments. The defendants declared that they did not object to this valuation.

24. By a judgment of 27 May 2015 the Civil Court (First Hall) in its constitutional competence awarded EUR 15,000 in non-pecuniary damage, bearing in mind the value of the property, that no compensation had been paid since its demolition, that the applicants would never get their property back and the recognition rent would never increase. The court further held that pecuniary compensation would be decided by the LAB, when deciding on the Commissioner of Land's appeal. Costs were to be shared equally between the parties.

2. Appeal

25. The defendants appealed and the applicants cross-appealed. By a judgment of 18 February 2016 the Constitutional Court varied the first-instance judgment by limiting the basis of the violation, and reducing the compensation to EUR 1,500.

26. The Constitutional Court held that in view of the evidence, it could not agree with the first-instance court that the demolition had taken place after a legitimate taking. Indeed there had been relevant witness testimony to the effect that the property had been demolished around three months prior to the first taking, the LAB had accepted that it was so, and the Government had not objected to such fact, nor had they shown when the demolition took place. It followed that the demolition had taken place prior to the taking under possession and use and at a time when the Government

had no title over the property. However, even if this were not so, and that it had been demolished when it was under title of possession and use, the demolition would still have been unlawful, since according to law it was not possible to demolish a property under a title of possession and use the rights attached to which were limited. That illegality persisted until the Commissioner of Land acquired the property under title of public tenure; however, despite the passage of three years since the demolition the applicants did not challenge that measure. In any event that was no longer an issue, as the situation was sanctioned when the State took the property under title of public tenure (as provided for in Article 19 of Chapter 88 of the Laws of Malta). The measure thus became lawful, and pursued the general interest of slum clearance.

27. Moreover, the applicants were entitled to recognition rent for the property and, more importantly, for the land at issue. Indeed the fact that the taking consisted of land (as the property above it had been demolished) made it feasible to apply the taking under public tenure procedure. The Constitutional Court further rejected the applicants' claim that it would have been more appropriate to take the property by means of outright purchase, as they had not requested the LAB to order the Commissioner of Land to take such a course of action under the mentioned Article 19. The law granted the Commissioner of Land discretion as to which form of taking it would undertake and the Constitutional Court's role was limited to verifying whether the form of taking which was actually used breached the rights of an individual.

28. As to the proportionality of the measure, the Constitutional Court noted that the applicants had claimed recognition rent of EUR 229.64 yearly and were awarded by the LAB a rent of EUR 158.40 yearly which the applicants had not appealed. Thus, given the award, in the light of their claim, it could not be considered that there arose such a disproportionality leading to a violation of the applicants' property rights. Nevertheless, a breach did arise as a result of a failure to pay compensation since 1989, given that the applicants' refusal to accept the offer of MTL 15.62 (approximately EUR 36.39) had been entirely justified. The Constitutional Court noted that as the breach had occurred and continued to persist, there was no reason to await the outcome of the LAB proceedings.

29. As to redress the Constitutional Court considered that the applicants were to be awarded non-pecuniary damage for the violation suffered. It further considered that the taking had pursued two legitimate aims, firstly social housing, and secondly slum clearance. While the applicants claimed compensation of around EUR 50,000 the Constitutional Court noted that the sale value according to the applicant's *ex-parte* architect in 2005 was EUR 17,470.30 and that in 2011, according to the technical experts of the board, it was EUR 10,575.36. Thus, given the small size of the property, the area in which it was in, the fact that it had been demolished at the expense

of the Government and the fact that the recognition rent was adequate, the Constitutional Court considered that EUR 1,500 was an adequate amount of compensation to be shared by the applicants jointly. It further considered that it needed not examine the Convention compatibility of the relevant law *in abstracto*, it having already determined that its application in the present case constituted a breach. Costs of the first-instance proceedings were to remain shared by the parties, as were those of the main appeal; and costs of the cross appeal were to be paid by the applicants.

C. Other developments

30. At the date of lodging the application with the Court, the applicants had not received any compensation, nor had they received any recognition rent since the date of the demolition of the property. The property has been rebuilt as apartments for social housing.

II. RELEVANT DOMESTIC LAW

31. Section 5 of the Land Acquisition (Public Purposes) Ordinance (“the Ordinance”), Chapter 88 of the Laws of Malta (now repealed), provided for three methods of acquisition by the Government of private property. It reads as follows:

“The competent authority may acquire any land required for any public purpose, either -

(a) by the absolute purchase thereof; or

(b) for the possession and use thereof for a stated time, or during such time as the exigencies of the public purpose shall require; or

(c) on public tenure:

Provided that after a competent authority has acquired any land for possession and use or on public tenure the conversion into public tenure or into absolute ownership of the terms upon which such land is held shall always be deemed to be an acquisition of land required for a public purpose and to be in the public interest:

Provided also that, subject to the provisions of articles 14, 15 and 16, a competent authority may acquire land partly by one and partly by another or others of the methods in paragraphs (a), (b) and (c):

Provided further that where the land is to be acquired on behalf and for the use of a third party for a purpose connected with or ancillary to the public interest or utility, the acquisition shall, in every case, be by the absolute purchase of the land.”

32. Section 13 regarding compensation read, in so far as relevant, as follows:

“(1) The amount of compensation to be paid for any land required by a competent authority may be determined at any time by agreement between the competent authority and the owner, saving the provisions contained in subarticle (2).

(2) The compensation shall in the case of acquisition of land for temporary possession and use be an acquisition rent and in the case of acquisition of land on public tenure be a recognition rent determined in either case in accordance with the relevant provisions contained in article 27.”

33. The Ordinance provided that compensation in respect of absolute purchase was to be calculated in accordance with the applicable “fair rent”, as agreed by the parties following the Government’s offer or as established by the LAB. In respect of public tenure, Section 27(13) of the Ordinance provided as follows:

“The compensation in respect of the acquisition of any land on public tenure shall be equal to the acquisition rent assessable in respect thereof in accordance with the provisions contained in subarticles (2) to (12), inclusive, of this article, increased (a) by forty *per centum* (40%) in the case of an old urban tenement and (b) by twenty *per centum* (20%) in the case of agricultural land.”

34. In so far as relevant, Section 19(1) and (5) read as follows:

“(1) When land has been acquired by a competent authority for use and possession during such time as the exigencies of the public purpose shall require, the owner may, after the lapse of ten years from the date when possession was taken by the competent authority, apply to the Board for an order that the land be purchased or acquired on public tenure or vacated within a period of one year from the date of the order, and the land shall either be vacated or acquired on public tenure or purchased upon compensation to be determined in accordance with the provisions of this Ordinance or of any Ordinance amending or substituted for this Ordinance.

(5) Public tenure shall of its nature endure in perpetuity, without prejudice to any consolidation by mutual consent or otherwise according to law of that tenure with the residual ownership of the land; and the recognition rent payable in respect thereof shall in every case be unalterable, without prejudice to the effects of any consolidation, total or partial. The residual ownership of land held on public tenure with the inherent right to receive recognition rent, shall, for all purposes of law, be deemed to be an immovable right by reason of the object to which it refers and shall be transferable according to law at the option of the owner, from time to time, of that right.”

35. Thus, while a taking under title of “possession and use” was intended for a determinate period of time, a taking under title of “public tenure” was for an indeterminate period of time, possibly forever, and the relevant recognition rent was to remain unaltered for its duration.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

36. The applicants complained that that they had suffered a *de facto* expropriation, in that their property had been demolished abusively, and that a yearly recognition rent of EUR 158.40 and an award of non-pecuniary damage of EUR 1,500 had not redressed the breach they suffered. Moreover, they had been deprived of their property and in thirty years had

not yet received any compensation while they had to disburse costs in litigation. The relied on Article 1 of Protocol No. 1, 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.”

37. The Government contested that argument.

A. Admissibility

38. The Government submitted that the applicants were no longer victims of the violation complained of given that the Constitutional Court upheld a violation of their property rights and awarded compensation. In the Government’s view given that the acquisition pursued a legitimate aim, namely, a slum clearance project, compensation needed not reflect market values thus the EUR 1,500 awarded by the Constitutional Court was sufficient redress.

39. The applicants submitted that an award consisting of solely EUR 1,500, jointly, in non-pecuniary damage could not constitute effective redress for the violations suffered, the more so given that they had not been paid any compensation since 1989.

40. The Court reiterates that an applicant is deprived of his or her status as a victim if the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress for a breach of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-193, ECHR 2006-V; *Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, no. 26771/07, § 50, 5 April 2011; and *Frendo Randon and Others v. Malta*, no. 2226/10, § 34, 22 November 2011).

41. As regards the first criterion, namely the acknowledgment of a violation of the Convention, the Court considers that the Constitutional Court’s findings have only upheld in part the applicants’ complaints and therefore their acknowledgment of the violation of Article 1 of Protocol No. 1 is only partial.

42. As to the second criterion appropriate redress in Article 1 of Protocol No. 1 cases requires an award in respect of both pecuniary damage (see *Frendo Randon and Others*, cited above, § 37, and *Azzopardi v. Malta*, no. 28177/12, § 33, 6 November 2014) as well as non-pecuniary damage, which would generally be required when an individual was deprived of, or suffered an interference with, his or her possessions contrary to the

Convention (see *Gera de Petri Testaferrata Bonici Ghaxaq*, cited above, § 53). The Court notes that, in the present case, the Constitutional Court awarded compensation of EUR 1,500. Even assuming that the award covered both heads of damage, that award was absorbed by the order for the applicants to pay costs, which according to the documents submitted, amounted to around EUR 5,000.

43. It follows that the redress provided by the Constitutional Court did not offer any relief to the applicants, who, thus, retain victim status.

44. The Government's objection is therefore dismissed.

B. Merits

1. The parties' submissions

(a) The applicants

45. The applicants submitted that their property, which had been demolished prior to the taking over by the State - as acknowledged by the Constitutional Court - constituted an unlawful deprivation of possessions. Indeed, as in the domestic proceedings, the Government on whose orders the property had been demolished had again failed to mention, even less substantiate, when the property had been demolished. In the applicant's view such an unlawful action (which amounted to a *de facto* expropriation) at a time when the Government had no authority to take such a decision, could not be sanctioned by means of the subsequent taking under title of public tenure despite its permanent nature. This was even more so given the conditions for the permanent taking, namely a paltry recognition rent paid annually.

46. Indeed, without prejudice to the above, even assuming that the demolition had been lawful, the applicants had suffered an excessive burden given that an annual recognition rent of EUR 158.40 was disproportionate to the real sale value of the property, which was calculated as being EUR 50,000 by the applicants' *ex parte* architect and EUR 45,000 by the Government's architect. Indeed the recognition rent, had it been paid retrospectively since 1991, would only have amounted to EUR 4,276 in twenty-seven years, which did not even cover the expenses incurred by the applicants in judicial fees to pursue the relevant proceedings. Nevertheless, that recognition rent was to remain unchanged without any consideration of the increase of rental prices on the market, especially in recent years. Moreover, in the initial years, the applicants could not have instituted proceeding before the LAB to establish compensation. These factors meant that there were no procedural safeguards in place.

47. Lastly, the applicants pointed out that while the taking had been for social housing, in Malta social housing was not for free. It was generally the case that social housing would be rented out for a subsidised rate or sold at a

reduced rate. Thus, it could well have been the case that the Government had made a profit from the public interest they invoked.

(b) The Government

48. Despite a question to that effect the Government made no observations concerning the demolition, save that there was no concrete evidence as to when the property was demolished, and therefore that it had been demolished prior to the taking over by the Government on 15 April 1989.

49. As to the taking under title of possession and use (1989-1991) then by public tenure (1991 to date), the Government considered that the takings were lawful in accordance with Article 5 of the Ordinance and they pursued a public interest namely the construction of social accommodation following a slum clearance project. The Government submitted that when the property was held under title of possession and use the applicants had not requested its conversion to another title in terms of law. Thus, relying on *Saliba and Others v. Malta* (no. 20287/10, § 52, 22 November 2011) they considered that this was merely a control of use of property. They accepted however, that in *Saliba and Others* (§ 53), the Court had found that the taking under public tenure “verg[ed] on what could be equated to a *de facto* expropriation”. In any event, according to the Government what was important was the reaching of a fair balance.

50. In the Government’s view the measures were proportionate to the aims pursued. They explained that the acquisition rent paid while property was held under title of possession and use was equivalent to the controlled rent payable in respect of such premises. That rent also depended on the rental value declared by the owners to the Land Valuation Office. Under title of public tenure that acquisition rent was increased by 40%. They noted that the applicants received a recognition rent (established by the LAB) of EUR 158.40 annually for a property valued by the applicant’s architect at around EUR 17,475 with an annual rental value of EUR 611. In the Government’s view given the public interest at issue, the size and state of the property at the time of the acquisition and the average income at the time, that sum was adequate in 1989. While it was true that the sum could not be revised despite the taking being permanent, the Government considered that the legitimate objectives of public interest justified such conditions and thus the applicants had not suffered an excessive burden, the more so given that they used to make no use of the property.

2. The Court’s assessment

(a) General principles

51. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the

first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98; and *Beyeler v. Italy [GC]*, no. 33202/96, § 98, ECHR 2000-I).

52. In order to determine whether there has been a deprivation of possessions within the meaning of the second rule, the Court must not confine itself to examining whether there has been dispossession or formal expropriation, it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are “practical and effective”, it has to be ascertained whether that situation amounted to a *de facto* expropriation (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, pp. 24-25, § 63, and *Vasilescu v. Romania*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1078, § 51).

53. Nevertheless, the applicable principles are similar, namely that, in addition to being lawful, a deprivation of possessions or an interference such as the control of use of property must also satisfy the requirement of proportionality (see *Saliba and Others*, cited above, § 54). As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The requisite balance will not be struck where the person concerned bears an individual and excessive burden (see *Sporrong and Lönnroth*, cited above, §§ 69-74, and *Brumărescu v. Romania [GC]*, no. 28342/95, § 78, ECHR 1999-VII).

(b) Application to the present case

(i) The demolition of the property

54. In the present case it is not disputed that the property was indeed demolished. The Court considers that such demolition amounted to a *de facto* expropriation of, at least, the building erected on the relevant land, no matter its state or condition (see, *a contrario*, *Saliba v. Malta*, no. 4251/02, § 33, 8 November 2005). The Court further notes that as held

by the Constitutional Court (see paragraph 26 above) and as transpires from the evidence and submissions before this Court, the demolition took place before the taking under title of possession and use which was ordered by means of a President's declaration of 27 October 1989, thus, at a time when the Government had simply occupied the property but had no title to it. It follows that, as held by the Constitutional Court, the demolition was unlawful (see paragraph 26 above, *in primis*). Moreover, as also held by that same court, even had it been demolished when it was under title of possession and use, the demolition would still have been unlawful, since according to law it was not possible to demolish a property under a title of possession and use, the rights attached to which were limited (see paragraph 26 above). That having been established it is unnecessary for this Court to consider whether the demolition pursued a legitimate aim, or whether the measure was proportionate. The Court notes that the applicants have not been compensated in any way for the unlawful demolition of their property.

(ii) The subsequent takings under various titles

55. From October 1989 to October 1991 the property was taken under title of possession and use. Under this title, the taking was meant to be temporary and in fact lasted for only two years during which time the applicants never lost their right to sell the property and the ownership title was never transferred to third parties. Although in the then obtaining circumstances a sale was improbable, the Court cannot accept that the measure complained of amounted to a *de facto* expropriation. However, the applicants' right of property was severely restricted: they could not exercise the right of use in terms of physical possession. Thus, this constituted a means of State control of the use of property, which should be examined under the second paragraph of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Saliba and Others*, cited above, § 52).

56. In October 1991 the property was taken under title of public tenure and the restrictions remained the same as above described. However, the Court observes that public tenure implies that the property is taken permanently. Consequently, the applicants were not simply restricted in, or temporarily deprived of, their use and enjoyment of the property. The Court has already held that in such circumstances it is possible that such interference could be equated to a *de facto* expropriation (see *Saliba and Others*, cited above, § 53).

57. Given that the applicable principles are similar the Court will, in so far as possible, assess both regimes simultaneously. It has not been disputed by the parties that these measures were carried out in accordance with the provisions of the Ordinance. The successive takings were, therefore, "lawful" within the meaning of Article 1 of Protocol No. 1. In the present case, the Court can also accept the Government's argument that the

measures were aimed at creating social housing, after a slum clearance. Thus, the measures had a legitimate aim in the general interest, as required by the second paragraph of Article 1.

58. As to the taking under possession and use, the Court notes that it is not disputed that the law provided for a 40% increase for recognition rent (applicable for the purposes of public tenure) *vis-à-vis* what had been the acquisition rent (applicable for the purposes of possession and use) (see paragraph 33 above). It follows that the applicants should have been paid approximately EUR 113 annually for the two years during which their property was taken under this title. In respect to this amount, the fact that, as argued by the Government, the rent received was in line with the rent laws applicable on the island, does not favour the Government's case. Indeed, the Court has on various occasions held that legislation regarding controlled rents in Malta was in breach of Article 1 of Protocol No. 1 (see *Ghigo v. Malta*, no. 31122/05, §§ 69-70, 26 September 2006; *Edwards v. Malta*, no. 17647/04, §§ 78-79, 24 October 2006; *Fleri Soler and Camilleri v. Malta*, no. 35349/05, §§ 79-80, ECHR 2006-X; and *Amato Gauci v. Malta*, no. 47045/06, § 62, 15 September 2009). However, in the present case, it is not necessary for the Court to decide whether, given the legitimate aim and the value of the property (the remaining land, see paragraph 27 above) at the time when it was held under title of possession and use (see paragraph 16 above), such compensation was sufficient, as the applicable acquisition rent was never determined by the LAB nor paid to the applicants.

59. As to the time during which the property was held under public tenure, against an annual recognition rent of EUR 158.40, the Court considers that having regard to the legitimate aim and the value of the property (the remaining land) in the light of the applicant's own valuations, it can accept that such a rent was reasonable in 1991 and subsequent years, but it is unlikely to be so today, three decades later. The Court reiterates that what might have been justified years ago, will not necessarily be justified today (see *Amato Gauci*, cited above, § 60, and *Saliba and Others*, cited above, § 63). It suffices for the purposes of the present case for the Court to find that since the recognition rent established for the taking under public tenure was not subject to any future increases despite developments in the property market, such compensation decades after the initial taking is disproportionate. More importantly, that recognition rent had not been paid until the Constitutional Court judgment and seems to have remained unpaid at least until the time of the introduction of the application, that is, nearly thirty years after the taking.

60. In the present case, having regard to the impossibility of the applicants ever recovering their property, which has been subject to successive regimes (possession and use and subsequently public tenure) and the amount of rent (at least over the most recent years since 2015) which

was, moreover, for decades, not paid to the applicants, the Court finds that a disproportionate and excessive burden was imposed on the applicants. The latter were required to bear most of the social and financial costs of supplying housing accommodation to third parties (see, *mutatis mutandis*, *Saliba and Others*, cited above, § 67, see also *Gera de Petri Testaferrata Bonici Ghaxaq*, cited above, § 59). It follows that the Maltese State has failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property.

(iii) *Conclusion*

61. In view of all the elements above the Court finds that there has been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

63. The applicants claimed 47,500 euros (EUR) in respect of pecuniary damage representing the average between the two valuations submitted by the experts for the unlawful deprivation of property and, in the alternative, had the Court to consider the measure lawful, they claimed EUR 33,250 in the light of the public purpose behind the deprivation. They further claimed EUR 15,000 in non-pecuniary damage.

64. The Government submitted that if the Court were to consider the taking as unlawful, the award for pecuniary damage should not exceed EUR 17,500 and that if it were to find that it was lawful, the award should not exceed EUR 8,000. However, they considered that in both cases, the Court would have to order the applicants' appearance on a deed of transfer. The Government considered that given the award made by the Constitutional Court no non-pecuniary damage was due, and without prejudice to that, any award should not exceed EUR 2,000.

65. The Court notes that the circumstances of the present case are very particular and do not fit squarely within the Court's standard practices in respect of just satisfaction under Article 1 of Protocol No. 1, which use different parameters according to specific situations (see, amongst many other authorities and situations, for example, *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, 22 December 2009, for unlawful expropriations; *Schembri and Others v. Malta* (just satisfaction),

no. 42583/06, 28 September 2010, for lawful *de facto* takings without payment of any adequate compensation; *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited v. Malta*, nos. 75225/13 and 77311/13, 11 September 2018, concerning lawful takings which overtime failed the public interest requirement; and *Saliba and Others*, cited above, concerning appropriate rent which should have been received prior to an outright purchase).

66. Indeed in the present case the Court has found that the demolition of the applicants' property had been unlawful, while the subsequent takings had been lawful and pursued a public interest, however no fair balance had been achieved in the application of those measures. The Court further observes that at the time when it was demolished (1989) the value of the property was estimated by the LAB as being EUR 2,320 and in 2011 as being EUR 10,575.36; while the applicants' architect estimated its value in 2005 as being EUR 17,500. Further, according to the valuations of the applicants, the property's annual rental value was approximately EUR 230 in 2005 and EUR 250 in 2014.

67. In the specific circumstances of the case, and bearing in mind that applicants might have by now been paid, or in any event that they are still to be paid – sum which remains payable after this judgment – approximately EUR 4,435 in rent to date, and that they will remain being paid a recognition rent of EUR 158.40 until the Government decides to take the property under title of outright purchase (i.e. transfer of full ownership), the Court considers it reasonable to award the applicants, jointly, EUR 18,000 in respect of pecuniary damage, for the violations suffered.

It further considered that the applicants should be awarded EUR 8,500, jointly, in non-pecuniary damage.

B. Costs and expenses

68. The applicants also claimed EUR 7,575.35 for the costs and expenses incurred before the domestic courts (LAB and constitutional redress proceedings) including EUR 1,600 for those incurred before the Court, according to the relevant receipts and invoices submitted to the Court.

69. The Government considered that the amount of EUR 766 claimed in respect of the LAB proceedings was not due these being extraneous to the redress proceedings. They did not contest the EUR 1,087 paid by the applicants by way of judicial expenses but contested the other amounts claimed for domestic proceedings. They further considered that EUR 1,500 was a sufficient award for costs incurred before this Court.

70. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the fact that LAB proceedings are a part of redress proceedings and the fact that the Government did not explain why they contest some of the applicants' claims which have been substantiated, the Court considers it reasonable to award the sum of EUR 7,500 covering costs under all heads.

C. Default interest

71. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 18,000 (eighteen thousand euros), in respect of pecuniary damage;
 - (ii) EUR 8,500 (eight thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 May 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helen Keller
President

ANNEX

No.	Applicants' Name	Birth date	Nationality	Place of residence
1	Anthony ZAMMIT	07/02/1947	Maltese	TARXIEN
2	Josephine Mary VASSALLO	18/03/1957	Maltese	Birkirkara
3	Carmelo ZAMMIT	01/07/1936	Maltese	BALZAN
4	Jane ZAMMIT	04/10/1934	Maltese	PAOLA
5	Maria Theresa ZAMMIT	09/11/1931	Maltese	PAOLA
6	Mary ZAMMIT	02/07/1939	Maltese	PAOLA
7	Stephen ZAMMIT	19/04/1962	Maltese	TARXIEN