



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

THIRD SECTION

**CASE OF MIFSUD AND OTHERS v. MALTA**

*(Application no. 38770/17)*

JUDGMENT  
*(Merits)*

Art 1 P1 • Peaceful enjoyment of possessions • De facto expropriation • No compensation received in over forty years • Disproportionate burden  
Art 1 P1 • Deprivation of property • No reasonable foundation for domestic court findings that expropriation in the public interest • Principle of good governance in the context of property rights • Manifestly unreasonable sums of compensation • Excessive burden

STRASBOURG

13 October 2020

**FINAL**

**13/01/2021**

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



**In the case of Mifsud and Others v. Malta,**

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

Paul Lemmens, *President*,

Alena Poláčková,

María Elósegui,

Gilberto Felici,

Erik Wennerström,

Lorraine Schembri Orland,

Ana Maria Guerra Martins, *judges*,

and Olga Chernishova, *Deputy Section Registrar*,

Having regard to:

the application (no. 38770/17) 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 twenty-one Maltese nationals, three British nationals and five Australian nationals (see Annex for details) (“the applicants”), on 23 May 2017;

the decision to give notice to the Maltese Government (“the Government”) of the complaints concerning Article 1 of Protocol No. 1 to the Convention;

the choice of the Government of the United Kingdom not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

the parties’ observations;

Having deliberated in private on 22 September 2020,

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

## INTRODUCTION

1. The case concerns the taking and, in connection with certain parts of the land, the eventual expropriation of the applicants’ land, which was originally used for a gas collection plant that was later dismantled, and in respect of which issues have arisen in relation to the public interest and the compensation. It raises various complaints under Article 1 of Protocol No. 1.

## THE FACTS

2. The applicants’ details are set out in the Annex. The applicants were represented by Dr T. Abela, Dr I. Refalo, Dr S. Grech and Dr M. Refalo, lawyers practising in Valletta.

3. The Government were represented by their Agent, Dr P. Grech, Attorney General.

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

## I. BACKGROUND TO THE CASE

5. The applicants are the owners of land in Qajjenza, Birzebbugia, Malta.

6. By means of a Presidential Declaration of 16 August 1978, published in the Government Gazette on 25 August 1978, the Government expropriated a parcel of land measuring 5,349 sq.m. owned by the applicants (or their predecessors) (hereinafter 'Land A'). This expropriation was intended for the site to serve as an extension of the LPG filling plant or gas bottling plant (hereinafter referred to as 'the plant') operated by Enemalta Corporation - a Government owned entity having a monopoly over the energy provision service in Malta - whose successor is now Enemalta plc.

7. By means of another Presidential Declaration of 16 May 1984, published in the Government Gazette of 25 of May 1984, the Government expropriated another parcel of land, owned by the applicants (or their predecessors), measuring 3,985 sq.m. (hereinafter 'Land B') adjacent to Land A. This land was intended to provide a buffer zone for the plant.

8. The Government offered 713.75 Maltese lira (MTL) for Land A and MTL 610 for Land B, by way of compensation. The applicants did not accept this amount and therefore proceedings were initiated before the Land Arbitration Board (LAB) for it to determine the compensation due.

9. By means of two judgments of 22 January 1990 the LAB established the compensation for Land A at MTL 952 (approximately 2,218 euros (EUR)) and for Land B at MTL 800 (approximately EUR 1,863) both being considered as agricultural land. The LAB ordered that the final deeds of transfer be concluded.

10. Nevertheless, while such judgments became final, no such deed was ever concluded and the Government never acquired the land or paid the price determined by the LAB, despite the authorities having started to use the land since its *de facto* taking. Under Maltese law, at the time, until the price established is actually paid and the deed of transfer formally published, the expropriation is not considered to have been finalised.

11. Eventually, the Government announced that the plant in Qajjenza would be phased out and another plant set up in a completely different zone. Given that the applicants' land had not been formally transferred to the Government and that the expropriation had not been concluded, and in the light of Government's intention to dismantle the plant in Qajjenza, the applicants took the view that there was no longer any public purpose to be served by the 1978 and 1984 expropriations.

12. Accordingly, on 1 December 2006 the applicants wrote to the Commissioner of Land, through their lawyer, requesting the land to be returned to them. This letter having remained unanswered, the applicants filed a judicial letter on 27 November 2008 requesting compensation for the occupation of their property during all those years, as well as the return of the property.

13. As no action was taken in this regard, another letter was sent on 28 July 2009 reiterating the same requests. No reply ensued and no compensation was paid.

14. Following a notification to the applicants to this effect, received on 18 April 2012, by means of a Presidential Declaration published in the Government Gazette of 6 June 2012, the Government expropriated two small parcels of the applicants' land in Qajjenza, namely a parcel measuring 509 sq.m., and a parcel measuring 139 sq.m., both of which formed part of the larger tract of land (B) which was the subject of the original expropriations. The taking was made in pursuance of Section 22 (8) of the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the Laws of Malta, following the 2002 amendments (see Relevant domestic law), in the light of which ownership of the land was transferred to the State on the day of the declaration. According to the facts set out in the domestic judgments the smaller of those parcels was still being used as a sub-station which served residential and commercial buildings in the area, and on the part measuring 509 sq.m. there was some kind of installation of the plant (*kien hemm xi installazzjoni tal-impjant tal-Enemalta*).

15. When "re-expropriating" these two parcels of land in 2012, the Government offered EUR 205 for the parcel measuring 509 sq.m., and EUR 58.50 for the parcel measuring 139 sq.m. These values were based on the figures given in 1990 by the LAB which in turn had based itself on the value of the land at the time of the 1978 and 1984 expropriations respectively. According to the Government other considerations also came into play.

16. The applicants did not accept these amounts by way of compensation. In particular they considered that the two small parcels taken in 2012 had greatly reduced the value of the remaining land given that those parcels cut right across the applicants' land so that a wedge was taken out of its middle, leaving smaller, irregular, parcels on either side of the expropriated parcels. Thus, the one large and continuous parcel of land owned by the applicants was disrupted. Therefore, in the applicants' view, it was as though the entire area had been *de facto* expropriated.

17. According to the applicants architect's (C.C.) valuations commissioned by the applicants in 2009, Land A was valued at EUR 4,400,000 (this land was valued as being within the development scheme and as used for industrial purposes) whereas Land B was valued at EUR 970,000 (this land was valued as being partly – a small portion –

within the development zone); the loss of rent covering the period from the date of taking to August 2009 was calculated as amounting to EUR 2,140,000 for Land A and EUR 437,000 for Land B.

18. The plant stopped being in operation in July 2012 and was officially decommissioned in 2013 and dismantled in September 2013.

## II. CONSTITUTIONAL REDRESS PROCEEDINGS

### A. First-instance

19. The applicants filed constitutional redress proceedings on 20 March 2013 asking the court to declare that their right to the peaceful enjoyment of their property had been violated since the taking of all their land was not in the public interest and the compensation offered to them was disproportionate, given the damage suffered, as it did not reflect the market value of the property. The applicants requested the court to grant all those remedies it deemed necessary and effective in order to redress the violation, and among those remedies the applicants specifically asked the court to annul the judgments given by the LAB on 22 January 1990; to liquidate the proper compensation due to the applicants; or to order the return of the property to the applicants.

20. During the course of these proceedings, M.F., a representative of the Commissioner of Lands (hereinafter CoL) testified, on 27 June 2014, that the technical experts showed “them” which areas they were referring to but that Enemalta had not informed “them” of any specific reason as to why they needed the land which was to be the subject of the 2012 declaration. She also confirmed that when the CoL had filed the cases before the LAB (in 1984), to her understanding, in the CoL’s view, the defendants in those cases were the owners of the land or their successor in title. D.A. a representative of Enemalta plc (the user of the land) testified, on 18 October 2013, that he was not aware of the use to be made of the parcel measuring 509 sq.m. which was again expropriated in 2012; he testified that he was only told that Enemalta would proceed to purchase the land, and every time he asked about it he was told that no definitive decision had been taken. J.C., an ex-employee of Enemalta plc (before being succeeded by D.A.), testified on 22 November 2013 that until 2010, when he left his employment, no decision had yet been taken as to what would be the future of the site, and he did not know whether a decision had been taken as to its use at that point (2013).

21. Pending these proceedings the Government also brought forward a valuation of the properties in question dated June 2014 which took into consideration the locality, size, state and potential in line with local plans as well as other factors likely to affect its value. According to that report, by the Government’s architect (M.S.), the parcel measuring 509 sq.m. (valued

at EUR 205 in the 2012 notice to treat) was worth EUR 14,000 when valued as agricultural land; the parcel measuring 139 sq.m. (valued at EUR 58.50 in the 2012 notice to treat) was worth EUR 4,000 when valued as agricultural land; the remaining parcel measuring 3,337 sq.m. (i.e. Land B, less the two parcels measuring 139 and 509 sq.m.) was worth EUR 97,000 when valued as agricultural land; a parcel measuring 5,213 sq.m. was valued at EUR 140,000 taken as land used for an LPG filling plant; and a parcel measuring 137 sq.m. was valued at EUR 4,000 when valued as barren land. The two latter parcels formed Land A, which was the subject of the declaration of 1978. The report also stated that all the land was being considered as agricultural in terms of law, both on the date when they were taken and on the date of the report (2014). It further specified that on the part measuring 509 sq.m. and the part measuring 5,213 sq.m. (most of Land A) there was part of the complex that had previously been used for the gas plant (*hemm parti mill-kumplex li kien jintuza bħala impjant tal-gass*).

22. According to an architect's (J.S.) valuation prepared on 21 July 2009 for Enemalta plc the total value of land measuring 6,873 sq.m., where part of the Qajjenza plant was located (which measurement excludes the buffer zone), would be worth EUR 900,000 if all the equipment of the plant were to be removed from the site.

23. According to an architect's (M.S.) valuation prepared in October 2008, and according to the testimony of the same architect, the total value of the land (measuring 21,828 sq.m.) originally occupied by the plant (excluding the buffer zone) was EUR 16,830,500. The estimate was based on the potential use of the site and similar land value, as sold at the time. According to his report the area which was marked as a white area was within the boundary for development (building scheme) with two policies directly effecting it, the first concerning the relocation of the plant and the second the use of the land thereafter, which was to be predominantly residential.

24. By a judgment of 29 April 2016 the Civil Court (First Hall) in its constitutional competence, found that the applicants had shown that they were the owners of the land, and that the plant had been dismantled and Enemalta, who was operating from elsewhere, did not know what to do with its site in Qajjenza. It considered that it had to examine separately the expropriations of 1973 and 1984 on the one hand and those of 2012 on the other hand, as they had been taken under different laws.

25. It held that the takings in 1978 and 1984 (excluding the two small parcels which were the subject of the 2012 re-expropriations) were in breach of Article 1 of Protocol No. 1 to the Convention because no public purpose subsisted once the plant had been dismantled and the authorities never actually expropriated the land (since they had not paid the applicants, nor signed the relevant deed). Thus, the decisions of the LAB had been superseded by the fact that this property was no longer needed. It therefore

declared the 1978 and 1984 expropriations (except insofar as they affected those parcels of land re-expropriated in 2012) without effect (but not null) and it ordered the return of the land to the applicants.

26. The position was not the same for the two parcels of land expropriated in 2012 under Section 22 (8) of the Ordinance which were being used by Enemalta “for its purposes” (*għall-iskopijiet tagħha*) and which therefore had to be transferred to the Government. The court noted that the public interest behind this expropriation had not been contested within the 21-day limit stipulated in law (Section 6 (2) of the Ordinance). Moreover, the smaller of those parcels was still being used as a sub-station which served residential and commercial buildings in the area, thus these two parcels of land were to be transferred to the Government without prejudice to the applicants’ rights to contest the compensation offered.

27. It rejected the Government’s objection of non-exhaustion of ordinary remedies which had referred to an application for retrial and an application for fixing a time-limit for the performance of an obligation which were not relevant to the present case.

28. The court also held that the delay in finalising the 1978 and 1984 expropriations had resulted in a breach of the applicants’ rights under Article 6 of the Convention.

29. It ordered the Government to pay EUR 15,000 to the applicants by way of compensation for the violation of their rights. No costs were to be paid by the applicants.

## **B. Appeal**

30. Both the Government and the applicants appealed. In particular the applicants complained about the low award of compensation in view of the amount of years during which the deprivation persisted; and that the expropriation of the smaller parcel of land in 2012, measuring 509 sq.m., had not pursued any public interest, and thus should have also been released together with the rest of the property, as its taking solely served to diminish the value of their entire property. It had also not been correct to find that they could not complain about the latter because they had failed to do so under Section 6 (2) of the Ordinance, since the latter did not provide that the time-limit was to run from the date of notification.

31. By a judgment of 25 November 2016 the Constitutional Court held that it was not open to the first court to find a breach of Section 6 as the applicants had not complained about that and therefore it revoked that part of the first-instance judgment. It confirmed the remainder.

32. In relation to the upheld violation concerning the larger area of land, in so far as relevant, in dismissing the appeal plea by the Commissioner of Land to the effect that the first court had been wrong in finding that no public interest existed once the plant had been dismantled (in relation to

Lands A and B), the Constitutional Court reiterated its case-law to the effect that public interest had to persist until the finalisation of the procedure of expropriation. Once it had been established that the land had been taken for the purposes of the gas plant, which was no longer there, it was for the Commissioner of Land to prove that there was still some other public interest. No such proof had been submitted.

33. In connection with the same tract of land, it also noted, *inter alia*, that the establishment of compensation by the LAB did not necessarily satisfy the proportionality requirement. Moreover, the LAB's order to proceed to transfer the property was not followed and the deed was never signed, with the result that the applicants were still without compensation thirty four years after the taking. Those facts together with the uncertainty within which the applicants found themselves led to a violation of their property rights.

34. As to the award of compensation of EUR 15,000, which it considered as non-pecuniary damage, and which it confirmed, the Constitutional Court noted that one had to take into consideration the uncertainty in which the applicants had been left over a prolonged period of time, the size of the land and the years during which they had been deprived of it; and also, the fact that the takings of 1978 and 1984 had originally been in the public interest, that the land had been agricultural, as well as the fact that it was now being returned to them. It also noted that in their original application the applicants had requested compensation for the taking or the return of the land. It followed that since the land was returned to them no pecuniary damage was due.

35. As to the two smaller portions of land, only one of which had been the subject of the applicants' appeal, the Constitutional Court held that on the relevant date, in 2012 (since these lands were expropriated under a different law), these were still occupied by Enemalta, in particular on the land measuring 509 sq.m. there was "part of the complex which was previously used as the gas plant" (based on the report of an architect M.S. see paragraph 21 above) and the applicants had not substantiated any abuse by the authorities. The first-court's decision had therefore been correct. The first-instance court was also correct to find that the applicants had failed to make use of the procedure under Section 6 (2) of the Ordinance, despite being notified two months before the Presidential Declaration of 2012, as admitted in the testimony of T.G. The applicants had thus, at the time, failed to make use of a legitimate remedy to claim that there had been no public interest in accordance with Section 6 (2) of the Ordinance – a choice for which they were responsible.

36. The Constitutional Court apportioned costs as follows: costs of first-instance were to remain as they had been decided; 4/5 of the costs of the CoL's appeal were to be borne by the latter and 1/5 by the applicants; costs of the appeal of the applicants were to be borne entirely by them; and 3/4 of

the costs of the cross appeal of Enemalta plc were to be borne by the latter and 1/4 by the applicants.

### III. INFORMATION RELATED TO ENEMALTA

37. On 6 May 1987 Enemalta Corporation (the predecessor in title of Enemalta plc) purchased from Laylay Company Limited a parcel of land measuring 46,201 sq.m. for the sum of MTL 105,878 (approximately EUR 246,629) the price being established at a rate of MTL 2,576.12 for every 1,124 sq.m. This land was in close vicinity to the land belonging to the applicants.

### IV. THE SITUATION AFTER THE CONSTITUTIONAL COURT JUDGMENT

38. The land belonging to the applicants was completely abandoned and in a state of dereliction; however all traces of the gas tanks had been removed. Another parcel of land belonging exclusively to Enemalta plc, which is adjacent to the applicants' land, was also abandoned; only a few dilapidated structures remained and the area was not being used in any manner. No equipment belonging to the original plant remained.

39. The plant in the new location had been in operation since July 2013 and was being run by a private company (Liquigas) - not Enemalta plc.

40. According to the applicants, until the time of the lodging of the application, despite the Constitutional Court judgment, the applicants had not obtained repossession of their land as they had not been granted access to the land which was still sealed off.

41. An architect's (P.B.) valuation, carried out on behalf of the applicants, assessed the value of the applicants' land in 2017 reflecting the loss for the applicants resulting from the 2012 re-expropriations (according to which the expropriation of the triangular parcel of land measuring 509 sq.m. in 2012 adversely affected the remainder of the applicants' land) in the amount of EUR 1,153,500, based particularly on a projection for development of built up plots on Land A which was within a development zone (according to the Local Plans of 1995). According to the same valuation, the accumulated rental yield from 1978 to 2017 for the land which had been the subject of the 1978 expropriation was EUR 3,476,942 which with a conservative rate of interest of 2.5% amounted to a total loss of EUR 4,248,223.

42. According to the Government on 6 July 2018 part of Lands A and B (excluding the properties measuring 509 sq.m and 139 sq.m.) was returned to the applicants. In this connection they submitted a copy of a letter from the Board of Governors of the Lands Authority to the Chairman of the Lands Authority confirming that on 6 July 2018 the former had decided to

release the property, as well as a declaration, by the Lands Authority, of 7 August 2018, issued in the Government Gazette concerning the release of the land.

## RELEVANT LEGAL FRAMEWORK

### I. THE LAND ACQUISITION (PUBLIC PURPOSES) ORDINANCE

43. Following amendments in 2002, Sections 6 and 22 (8) of the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the laws of Malta, in so far as relevant, read as follows:

#### **Section 2**

““agricultural or rural land" does not include the domestic garden of a house or building or any other land within the precincts of a house or building nor a building site nor waste land but includes farmhouses, buildings intended mainly for the keeping of store cattle or other domestic animals, and other structures of a kindred nature;”

#### **Section 6**

“(2) Any person who has an interest in land, in respect of which a declaration of the President as is referred to in subarticle (1) is made, may contest the public purpose of the said declaration before the Land Arbitration Board by means of an application to be filed in the registry of the said Board within twenty-one days from the publication of the said declaration and the provisions of the Code of Organization and Civil Procedure applicable to the hearing of causes before the Civil Court, First Hall, including the provisions regarding appeals from such decisions, shall, *mutatis mutandis*, apply to the determination of the said application:

Provided that the filing of an application in terms of this subarticle shall not hinder the continuance of the expropriation proceedings or the doing of anything that may be done in respect of the land as provided in this Ordinance during the time when the application is still not determined, without prejudice to the right of the applicant to seek compensation in the event that the declaration of the President is found to be without public purpose.”

#### **Section 17**

“Any land which is not a building site shall be valued for the purpose of determining the compensation payable in the case of compulsory acquisition as rural land or as wasteland, as the case may be:

Provided that in determining such compensation, consideration shall be given to the value of any structures existing thereon and whether such structures are covered by a permit according to law.”

#### **Section 18**

“(1) Land, other than a historical building, shall be deemed to be a building site if it falls within the limits of a building scheme or as indicated and approved for

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development in a Structure Plan or subsidiary plan which has been adopted for the time being in force under any law relating to planning.

(2) In determining the compensation due for a building site, consideration shall be given to the use or development that can be made thereof or thereon in accordance with the provisions of subarticle (1).”

### Section 18A

“Notwithstanding the provisions of this or any other law, the value of any land -

(a) still in the course of acquisition on the 1st January 2005;

(b) in respect of which a declaration under article 3 was issued before the 5th March 2003, and

(c) in respect of which a notice to treat was not issued before the 1st January 2005 under the provisions of this Ordinance as in force before the date mentioned in this paragraph,

shall, saving any interests due until payment is made under article 12(3), be its value as on the 1st January 2005.”

### Section 22

“(8) Upon the making of a Declaration by the President in accordance with this Ordinance that any land is to be acquired by the absolute purchase thereof, the absolute ownership of the land to which the declaration refers shall be deemed to be a registration area for the purposes of the Land Registry Act and the absolute ownership thereof shall by virtue of this Ordinance and without any further assurance or formality be transferred to and be acquired by the competent authority free and unencumbered from any charge, hypothec or privilege and with all the appurtenances thereof, and the competent authority shall cause such land to be registered in the Land Registry in its name in accordance with the Land Registry Act within three months from the issue of the Declaration of the President.”

### Section 27

“(1) Without prejudice to any special provision contained in this Ordinance, in assessing compensation the Board shall act in accordance with the following rules:

(a) no allowance shall be made on account of the acquisition being compulsory;

(b) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize:

Provided that -

(i) the value of the land shall be the value as at the time when the President’s Declaration was served, without regard to any improvements or works made or constructed thereafter on the said land and where the land was in the possession of the competent authority immediately prior to the service of the President’s Declaration no regard shall be had, in assessing the value of the land, to any improvements or works made or constructed by the competent authority while in possession of the land;

(ii) where a part only of the land belonging to any person is taken under this Ordinance, any enhancement of the value of the residue of the land by reason of the proximity of any improvements or works made or constructed by the competent

authority within eighteen months before the publication of the President's Declaration, or to be made or constructed by the competent authority within eighteen months after the publication of the President's Declaration shall be taken into consideration;

(iii) the damage, if any, sustained by the owner by reason of the severance of the land from other land belonging to such owner or other injurious effect upon such other land by reason of the exercise of the powers conferred by this Ordinance, shall be taken into consideration;

(iv) where damage has been sustained by reason of any works done in or upon the land, regard shall be had to any increase in the value of the land by reason of any improved drainage and any other advantage derived from any such works; ..."

## II. THE GOVERNMENT LANDS ACT

44. Section 43 of the Government Lands Act, Chapter 573 of the Laws of Malta, of 25 April 2017, reads as follows:

"The Chairperson of the Board of Governors of the Lands Authority may at any time revoke any Declaration issued under this Act or before by means of a notice in the Gazette and at least once in two daily or Sunday local newspapers, provided that any revocation shall be registered with the Land Registry and the Public Registry."

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

45. The applicants complained that part of their property (measuring 509 sq.m.) had been expropriated without there being a public interest and they had not been compensated adequately for the 2012 expropriation. The applicants also complained that no compensation had been received for the occupation of the other land which had been given back to them. They thus considered that they remained victims of the violation despite the Constitutional Court judgment in their favour. They 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."

**A. The taking from 1978 and 1984 respectively, until 2012, of Land A and most of Land B (excluding the properties measuring 509 sq.m. and 139 sq.m.)**

*1. The parties' submissions*

46. The Government submitted that the applicants were no longer victims of the violation as the domestic courts had upheld the violation and ordered the return of the property, which was subsequently released on 6 July 2018. They noted that according to Section 43 of the Government Lands Act (see Relevant domestic law above) there was no obligation to notify the owners other than by publication in the Government Gazette and newspapers. The Government further pointed out that the applicants had asked the domestic courts for compensation or alternatively for the return of the property, and the domestic courts having determined that there was no longer any public interest for the taking of that land, had awarded the latter form of redress, together with an award of EUR 15,000 in non-pecuniary damage.

47. The applicants complained that they had not been compensated for the use from 1978 and 1984 respectively, until 2012, of most of Land A and B (excluding the properties measuring 509 sq.m. and 139 sq.m.). Moreover, that property had not been effectively released (until the date of lodging the application with the Court) despite the order to that effect by the Constitutional Court which upheld a violation of Article 1 of Protocol No. 1. In their submissions they further challenged the Government's contention that the property was returned to them in 2018, that is, two years after the Constitutional Court judgment, which itself was not a timely reaction. They noted that they had not been informed of any decision to release the property or of any announcement in the Government Gazette, and that as at the date of submissions (6 November 2019) the land was still sealed off and the boundary walls erected by the authorities had not been dismantled, thus the applicants still did not have access to it. In consequence the applicants considered that they were owed compensation for this ulterior period after 2013 during which the land was held on to despite no use being made of it.

48. In particular the applicants considered that their claims to the domestic court did not rule out the possibility of obtaining both the return of the property and compensation for its use until then, as they concerned two different scenarios, depending on whether the domestic court considered there was or not a public interest. Moreover, they had requested the court to give any effective and appropriate remedy. Thus, in the applicants' view the fact that they made no specific reference to compensation for loss of use did not mean that they were not entitled to it.

## 2. *The Court's assessment*

49. 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, §§ 178-93, ECHR 2006-V; and *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited v. Malta*, nos. 75225/13 and 77311/13, § 55, 11 September 2018).

50. As regards the first condition, namely the acknowledgment of a violation of the Convention, the Court considers that the Constitutional Court's findings (see paragraphs 31-33 above) amounted to an acknowledgment that there had been a breach of Article 1 of Protocol No. 1.

51. With regard to the second condition, namely appropriate and sufficient redress, the Court must ascertain whether the measures taken by the authorities in the particular circumstances of the instant case afforded the applicants appropriate redress in such a way as to deprive them of victim status (*ibid.* § 57). The Court notes that the Constitutional Court awarded the applicants EUR 15,000 in respect of non-pecuniary damage (from which they had to pay part judicial costs which in the present case were reasonably justified). Moreover, the Constitutional Court ordered the release of the property, namely Land A and the most part of Land B (excluding the properties measuring 509 sq.m. and 139 sq.m.) as requested by the applicants. In the present circumstances and in the light of the documents in the Court's possession, the Court shares the interpretation of the constitutional jurisdictions that the applicants' request to release the property was their main request and only alternatively would compensation be required for the use of such land. Indeed, no conditions had been put in relation to this latter alternative. It follows that on the basis of their request, the Constitutional Court awarded adequate redress for the upheld violation and the Constitutional Court's judgment offered sufficient relief to the applicants.

52. In so far as the applicants argued that the property had not been released, the Court notes that the Government have substantiated their claim that the property has in fact been released albeit with a significant delay of more than eighteen months. While the applicants had not been served with a notice of release, regrettably the law in force at the time of the release did not require such a notification, nor has it been shown that this was a requirement in the law applicable at the time that the release was ordered by the Constitutional Court. Lastly, in so far as the applicants argue that access is still sealed off as the boundary walls are still in place, the Court observes that, as noted by the applicants, these are only boundary walls and no other installations remain. Moreover, from the aerial photographs submitted by the applicants the boundary walls are in place in only limited parts of the property subject to the return order. Lastly, the applicants being the owners

in law, there seems to be no obstacle in them taking any measures necessary to access the land including availing themselves of any ordinary remedies in this respect.

53. Bearing in mind the above, the Court considers that the second criterion has also been met and the applicants are not continuing to suffer the consequences of the breach upheld by the domestic courts and therefore they have lost victim status in respect of this part of the application.

54. This part of the application is therefore incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

**B. The taking lasting from 1978 and 1984 respectively, until 2012, of the applicants' properties measuring 509 sq.m. and 139 sq.m.**

*1. The parties' submissions*

55. The applicants complained in particular that no compensation has ever been awarded in respect of the use of this portion of land for the period until 2012, nor had its return been ordered. They further considered that since the use of the land was for industrial purposes, it should not be valued as agricultural land for the purposes of compensation. In reply to the Government's allegations, they submitted that all the domestic proceedings had shown that they had title to the property and that they had not been paid over the years for other reasons.

56. The Government referred overall to the general principles relating to the invoked provision and made submissions concerning the taking of Lands A and B but made no specific submissions related to these two parcels of land save that they were covered by the expropriations of 1978 and 1984 and the respective decisions of the LAB delivered in 1990, which had not been executed because, according to the Government, the applicants had resisted providing proof of title.

*2. The Court's assessment*

57. The Court notes that the domestic courts did not deal with this aspect of the complaint despite the fact that the applicants raised their complaint concerning all the property (see paragraph 19 above), thus the applicants remain victims in this respect. The Court further notes that the Government have not made any relevant submissions in respect of this part of the complaint. The Court finds that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

58. The Court observes that the aim of the presidential declarations of 1978 and 1984 was clearly to deprive the applicants of their property. In

practice while the Government took possession of the property, they did not finalise the deeds of transfer despite an order to so do by the LAB in 1990. It was only in 2012, following a new declaration under different legislative provisions, that the transfer took place. In that light, it is possible to consider that the interference over the period 1990-2012 went beyond State control of the use of property, verging on what could be equated to a *de facto* expropriation.

59. It is not necessary for the Court to decide whether the interference falls under Article 1 of Protocol No. 1, first paragraph, second sentence (deprivation of possessions), or under Article 1 of Protocol No. 1, second paragraph (control of the use of property). Indeed, the applicable principles are similar for both types of interferences: 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, with respect to a deprivation of possessions, *Scordino*, cited above, §§ 81 and 93; *Kozacıoğlu v. Turkey* [GC], no. 2334/03, §§ 51, 52 and 63, 19 February 2009; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 94, 25 October 2012; and with respect to the control of the use of property *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 163, 164 and 167, ECHR 2006-VIII, and *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 292-93, 28 June 2018). 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 *Brumărescu v. Romania* [GC], no. 28342/95, § 78, ECHR 1999-VII; *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010; *G.I.E.M. S.R.L. and Others*, cited above, §§ 293 and 300; and *Saliba and Others v. Malta*, no. 20287/10, §§ 54-55, 22 November 2011).

60. It is not disputed that the taking of these parcels of land in 1978 and 1984 respectively was lawful; the Court will therefore not elaborate on the matter. Further, the Court can accept that the taking of this part of the property was in the public interest which persisted until the plant was in place. It remains to be determined whether the requisite fair balance was reached and in particular whether the applicants suffered an excessive burden.

61. The Court notes that there appears to be no doubt that the applicants received no compensation whatsoever for the Government's use of this land from 1978/1984 to the date of the transfer of property to the Government in 2012. The mere fact that these two parcels had been considered as part of Land B in the determination of compensation in the LAB decisions delivered in 1990 is of no relevance. Indeed the Court notes that – as stated by the Constitutional Court – these LAB decisions were superseded, and

they were never executed. It follows that the applicants did not receive any compensation to date, in over forty years, and thus they were made to bear a disproportionate burden.

62. Accordingly there has been a violation of Article 1 of Protocol No. 1 in this respect.

**C. The deprivation, in 2012, of the applicants' properties measuring 509 sq.m. and 139 sq.m. respectively**

*1. The scope of the complaint*

63. The Court notes that, despite certain statements in their submissions after communication of the application to the respondent Government, it is clear from the application submitted to the Court, as well as from the proceedings before the domestic courts, that the applicants' complaint concerning a lack of public interest relates solely to the parcel of land measuring 509 sq.m. However, the applicants' complaint concerning compensation refers to both parcels of land.

*2. The parties' submissions*

**(a) The applicants**

64. The applicants complained that there had been no public interest behind the taking of the property measuring 509 sq.m. which had not been used since 2012, and that the amount of compensation awarded for the expropriation of both parcels of land had been inadequate. They were thus made to suffer a disproportionate burden. They noted that the Constitutional Court had considered that the public purpose behind the 2012 expropriation consisted in housing Enemalta's gas plant but had ignored the fact that Enemalta had abandoned the site at around the same time. The applicants considered, in particular, that once the plant had been transferred in 2013 there was no valid reason to continue to hold on to the land. They considered that the Government had kept hold of it merely to reduce the value of the adjacent property and reduce the compensation due to the applicants.

65. As to the remedy under Section 6 (2) of the Ordinance, the applicants submitted that, according to a first-instance judgment by the constitutional jurisdiction in the case of *Mark Refalo on behalf of Cane` brothers vs. the Director of Land and the Attorney General*, that remedy was in breach of the Convention as the relevant time-limit started to run from the publication in the Government Gazette and not the notification of the owners. In that case, on appeal, the Constitutional Court on 30 September 2016 did not decide the matter considering it was premature, and eventually by a judgment of 28 June 2019 the Court of Appeal (Civil) found that the twenty-one day period within which to lodge such a claim was to

run from the day when various criteria were fulfilled, namely, publication of the notice of expropriation in the Government Gazette, as well as in two newspapers and on the notice board of the local council responsible for the locality where the land is situated; and registration of all the details with the LAB and notification to all the persons having an interest in the land. The applicants submitted that as the plant was only transferred in 2013, they could not have raised the issue within twenty-one days of the publication in the Government Gazette.

66. As to the Government's contention that the applicants could still contest the compensation offered before the LAB, the applicants noted that the Court had previously awarded compensation in cases where the applicants had been awaiting compensation for a long number of years.

67. On the matter of compensation, they submitted firstly that the offers made were based on values which were even lower than those established by the Government's own architect (see paragraph 21 above). More importantly, the applicants noted that the announcement in the Government Gazette of 6 June 2012 had specifically indicated the sums of EUR 58.50 and EUR 205 "as valued by decision dated 22 January 1990 by the LAB" and in fact such sums reflected the price offered in 1990 adjusted to the size of the land. However, the value of the land on the date of expropriation was much higher.

68. The applicants submitted that the land measuring 139 sq.m. occupied a substation even before 2012, thus it could certainly not be considered as agricultural land – their architect's report had also established that it was on developable land, since it was within a developable boundary and just a few metres away from a zone falling under a scheme. As to the portion of land measuring 509 sq.m., the applicants noted that the return of the property would be the appropriate remedy since no use was being made of it, but if not, compensation had to take account of the fact that this triangular piece of land stretched along the entire frontage of the applicants' remaining land (which was meant to be returned) which was situated in a developable area as of 1995, hampering its development and causing a devaluation of the entire site. Thus, compensation had to take account of that loss, which according to an architects' report amounted to EUR 1,508,000.

#### **(b) The Government**

69. The Government submitted that the expropriation was lawful, and that under domestic law no proof of a public purpose was required. They considered that a declaration of the President of Malta was in itself adequate evidence of a public interest. In any event, the public interest behind an expropriation could be challenged by lodging proceedings before the LAB within twenty-one days of the President's Declaration - a remedy which the domestic courts had considered effective and of which the applicants did not avail themselves without substantiating the reasons for such a failure. In any

event, the Government noted that the Constitutional Court had held that such a public interest did exist. In the Government's view, the 2012 expropriations were grounded on the expropriations of Lands A and B many years earlier to assist the Enemalta. While some of that land was no longer needed, this was not the case with the parcels of land at issue which were therefore expropriated in 2012 and were being used, as noted by the first-instance court (see paragraph 26 above). Thus, the public interest requirement was satisfied in 2012 and surely continued to be so until the operations of the plant ceased, the area was decontaminated and the infrastructure dismantled.

70. The Government submitted that the compensation offered had also been adequate, and in their view it had not only been based on the value of the land in 1990, since the architect had also taken account of "the locality, size, contours, state and potential, in terms of the plans and boundaries of the development zone as officially published by the Malta Environment and Planning authority, as well as the value of other similar property in the vicinity, as well as other matters which may affect the value of the property." The Government also considered that the valuations relied on by the applicants were flawed and were based on the assumption that the land was developable. However, the applicants did not have a right to full compensation given the public interest at issue, and compensation had to be calculated based on the value of the property at the date on which ownership thereof was lost, i.e. 2012 when it was considered as agricultural land. The Government further referred to the valuations made by their architect (see paragraph 21 above) and was of the view that the compensation for these two parcels should not exceed EUR 18,000. They further considered that procedural safeguards had been available to the applicants as they could still contest the amount of compensation offered before the LAB, and they had also availed themselves of constitutional redress proceedings. Moreover, the applicants were not vulnerable, they were not of old age nor had they been disabled for a number of years. Thus, in the Government's view they did not suffer an excessive burden.

### *3. Admissibility*

71. The Court notes that the Government did not specifically raise an objection to the effect that the complaint is inadmissible for non-exhaustion of domestic remedies. However, the Court considers that the reference in their submissions on the merits to the fact that the applicants failed to undertake the remedy under Section 6 (2) of the Ordinance in relation to the public interest requirement and that before the LAB in relation to the amount of compensation, amount in substance to such an objection.

**(a) General principles**

72. The Court reiterates that according to Article 35 § 1 of the Convention it may deal with an issue only 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). Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000 XI).

73. 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. Nevertheless, the obligation to exhaust domestic remedies only requires that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Mifsud v. France* (dec.), [GC], no. 57220/00, ECHR 2002 VIII).

74. The Court would emphasise that the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that this rule is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996 IV, and *Sammut and Visa Investments Ltd v. Malta* (dec.), no. 27023/03, 28 June 2005).

75. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 77, 25 March 2014, and *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010).

**(b) Application to the present case**

*(i) In respect of the public interest requirement*

76. The Government submitted that the applicants had not undertaken the remedy under Section 6 (2) of the Ordinance to contest the public interest behind the 2012 expropriation.

77. In the present case various considerations come into play. Without prejudice to the evolving interpretation of the applicable time-limit provided under Section 6 (2) of the Ordinance - which was subject to challenges within the domestic judicial system which delivered decisions various years after 2012 (the date relevant to the present case) - the Court notes that the wording of the law in 2012 referred to the time-limit running from the publication in the Government Gazette. In the present case such publication occurred on 6 June 2012 and the applicants were notified of the expropriation even prior to that date, specifically on 18 April 2012, as also confirmed by the Constitutional Court. At the time the applicants failed to institute the relevant proceedings within that time-limit and no relevant justification was given for that omission.

78. However, the Court also notes that apart from their claim that there was no public interest in 2012, the applicants also argued that there was even less public interest behind the expropriation shortly after 2012, i.e. once the plant was decommissioned and dismantled.

79. In particular the Court notes that the Presidential declaration was published in April 2012 and the plant stopped being operational just two months later, in July 2012. It was officially decommissioned and then dismantled in September 2013 at which point the applicants considered there had been absolutely no public purpose behind the taking. In these circumstances the Court cannot see how, at that point, the remedy under Section 6 (2) of the Ordinance whose time-limit expired before these occurrences came to be, could be considered effective in the specific circumstances of the present case. In particular, while a remedy to contest the public interest would not need to be available *ad infinitum*, in circumstances such as those of the present case, where the use, or lack thereof, of the expropriated property was subject to change in a very short time after the declaration of expropriation, the only remedy available to the applicants in the Maltese domestic system was the institution of constitutional redress proceedings.

80. Indeed, the applicants did raise the issue of the lack of public interest behind the expropriation of the parcel measuring 509 sq.m. both before the Civil Court (First Hall) in its constitutional competence and before the Constitutional Court, on appeal. Both courts noted that the applicants had not made use of the remedy under Section 6 (2), nevertheless they did not reject the complaint on procedural grounds or refuse to make findings in respect of the public interest, on the contrary, the domestic courts

pronounced themselves on the matter (as admitted by the Government, see paragraph 69 above) and thus can be said to have in practice examined the merits of the applicants' complaint (see, *mutatis mutandis*, *Micallef v. Malta* [GC], no. 17056/06, § 57, ECHR 2009, and *Saliba and Others*, cited above, § 29).

81. It follows from all of the above that the non-exhaustion of the ordinary remedy relied on by the Government cannot be held against the applicants. In the circumstances of the present case, the Court considers that in raising their plea before the domestic courts with constitutional jurisdiction, the applicants made normal use of the remedies which were accessible to them and which related, in substance, to the facts complained of at the European level (*ibid.*)).

82. It follows that this part of the application cannot be rejected for non-exhaustion of domestic remedies and that the Government's objection should be dismissed.

(ii) *In respect of compensation*

83. The Government submitted that the applicants had not undertaken proceedings before the LAB to contest the amount of compensation offered for the 2012 expropriations. They admitted however that the applicants had availed themselves of constitutional redress proceedings in this regard (see paragraph 70 above).

84. The Court notes that, unlike the position in other cases (see for example, *Azzopardi v. Malta*, no. 28177/12, § 57, 6 November 2014, and *Frendo Randon and Others v. Malta*, no. 2226/10, § 73, 22 November 2011), at the time of the present case, domestic law allowed the applicants to bring proceedings before the LAB to contest the amount of compensation awarded. It follows that such a remedy was accessible to the applicants.

85. However, the Government failed to indicate any improvement on the situation concerning proceedings before the LAB, with which the Court has taken issue various times. In particular the Court has repeatedly found a problem concerning the duration of such proceedings (see, for example, *Bezzina Wettinger and Others v. Malta*, no. 15091/06, § 93, 8 April 2008, and *Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, no. 26771/07, § 43, 5 April 2011). In addition, in the more recent *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited* (cited above, §§ 106-07) the Court also took note of the domestic findings in relation to the composition of the LAB which did not fulfil the independence and impartiality requirements, when finding that the remedies proposed by the Government concerning compensation in relation to expropriations, did not constitute effective remedies available to the applicants in theory and in practice at the relevant time. In that light, the Court considers that the Government have not satisfied the burden of proof and convinced the Court that the remedy

offered by the LAB was an effective one, in theory and in practice at the relevant time.

86. The Court further notes that in their application before the first-instance constitutional jurisdiction, the applicants had clearly complained about the compensation for the entirety of the land. However, that court having opted to divide the examination of the case between the early expropriations and those of 2012, it failed to examine the complaint concerning the adequacy of the compensation of the 2012 expropriations “without prejudice to the applicants’ rights to contest the compensation offered” (see paragraph 26 above). It is unclear whether the applicants challenged this, but in any event the Government have not raised a non-exhaustion objection in this regard, quite the opposite (see paragraph 70 above).

87. In this connection, the Court notes that the normal practice of the Convention organs where a case has been communicated to the respondent Government has been not to declare the application inadmissible for failure to exhaust domestic remedies unless this matter has been raised by the Government in their observations (see, for example, *Dobrev v. Bulgaria*, no. 55389/00, § 113, 10 August 2006, and *Y v. Latvia*, no. 61183/08, § 40, 21 October 2014, and the case-law cited therein). Furthermore, under Rule 55 of the Rules of Court, any plea of inadmissibility must have been raised by the respondent Contracting Party – in so far as the nature of the objection and the circumstances so allowed – in its written or oral observations on the admissibility of the application (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X, and *Skudayeva v. Russia*, no. 24014/07, § 27, 5 March 2019). This rule relates to a specific plea of, for instance, non-exhaustion, including the reasons given for the plea. It is not, therefore, sufficient for the Government to have pleaded non-exhaustion on different grounds within the prescribed time-limit (see *Mooren v. Germany* [GC], no. 11364/03, § 58, 9 July 2009). The Court cannot discern any exceptional circumstances which could have released the Government from the obligation to raise such a plea in their observations (see, *mutatis mutandis*, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 53, 15 December 2016).

88. This part of the complaint therefore cannot be rejected by the Court on the ground that domestic remedies have not been exhausted and the Government’s objection concerning proceedings before the LAB must be dismissed for the reasons set out at paragraph 85 above.

### (c) Conclusion

89. The Court notes that the entirety of the complaint concerning the 2012 expropriations is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

#### 4. Merits

##### (a) General principles

90. The Court refers to the applicable general principles set out in paragraph 59 above. It reiterates that because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than the international judge to appreciate what is “in the public interest”. Furthermore, the notion of “public interest” is necessarily extensive (see *Jahn and Others v. Germany* [GC], nos. 46720/99 and 2 others, § 91, ECHR 2005-VI). Nevertheless, in the exercise of its power of review the Court must determine whether the requisite balance was maintained in a manner consonant with the individual’s right of property (see *Abdilla v. Malta* (dec.), no 38244/03, 3 November 2005).

91. Compensation terms under the relevant legislation are material to the assessment of whether or not the contested measure respects the requisite fair balance and, in particular, whether it imposes a disproportionate burden on the individuals (see *Jahn and Others*, cited above, § 94). In this connection, the taking of property without payment of an amount proportionate to its value will normally constitute a disproportionate interference, whilst a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances. However, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances (see *Scordino*, cited above, § 95; *Kozacioğlu* cited above, § 64; and *Vistiņš and Perepjolkins*, cited above, § 110). Legitimate objectives in the “public interest”, such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may warrant reimbursement of less than the full market value (see *Scordino*, cited above, §§ 96-97; *Kozacioğlu* cited above, § 64; *Vistiņš and Perepjolkins*, cited above § 112; and *Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 68).

##### (b) Application to the present case

92. The Court notes that the lawfulness of the measure is not in dispute between the parties, and that the public interest behind the expropriation of the parcel of land measuring 139 sq.m., which remains being used as a sub-station, is beyond the scope of the instant case (see paragraph 63 above).

93. The Court further considers that there is no doubt that the expropriation of land for the purposes of a gas plant can in principle be considered as a taking in the public interest. However, there is nothing in the case-file indicating what specific use was made of the parcel of land measuring 509 sq.m. neither in 2012 and even less shortly after its expropriation and the decommissioning of the plant. The applicants submitted that no use of it was made since 2012. The Court notes that

despite a specific question to this effect to the Government, no details have been provided, as to its intended use, or its actual use in 2012 or thereafter. Rather, the Government opted to rely *ad verbatim* on the findings of the constitutional jurisdictions and also appear to admit that no use of it was made after the plant was decommissioned (see paragraph 69 *in fine* above).

94. As to the domestic courts findings, the Court observes that the first-instance constitutional jurisdiction held that the land (in general) expropriated in 2012 was being used by Enemalta “for its purposes” (*għall-iskopijiet tagħha*) (see paragraph 26 above) and in particular in respect of the parcel measuring 509 sq.m. that “there was some kind of installation of the plant” (*kien hemm xi installazzjoni tal-impjant tal-Enemalta*) (see paragraph 14 above). According to the Constitutional Court - which considered 2012 as the relevant time for the assessment - on the land measuring 509 sq.m., there was “part of the complex which used to be used as the gas plant” “*hemm parti mill-kumpless li kien jintuza bħala impjant tal-gass*” (based on the report of an architect M.S. see paragraph 35 above), adding that the applicants had not substantiated any abuse by the authorities. The Court cannot but note the vagueness of these findings and the assumption that it was for the applicants to prove the public interest, thus, reversing the applicable burden of proof (see paragraph 32 above).

95. Furthermore, the Court notes that the report of M.S. - which was the only basis for the Constitutional Court’s findings - solely stated, in relation to that part of the land measuring 509 sq.m. that it “used to be used as the gas plant”. However, the report does not state what use was being made of that land in 2014 when the report was drawn up, or in 2013 after the plant had been decommissioned, nor its use in 2012 when it was expropriated. Furthermore, the same terminology was used by M.S. to describe Land A (see paragraph 21 above) which, as the Constitutional Court itself confirmed, was to be returned to the applicants for lack of public interest. No explanation has been given for this different conclusion in relation to this part of the land. It thus appears that the Constitutional Court made findings which were manifestly incongruous.

96. In particular the Court notes that during the domestic proceedings, none of the witnesses brought forward was aware of the use to be made or being made of the land measuring 509 sq.m. (see paragraph 20) and the defendants failed to present any material evidence or relevant witness capable of attesting the public interest behind the measure. Thus, the Constitutional Court had no basis on which to ground its finding. The Court is disconcerted by the circumstances of the present case which led to an expropriation of property being endorsed without anyone being able to assert the reasons behind such an expropriation.

97. Lastly, the Court notes that from the photographic evidence (dated 2019) submitted to the Court by the applicants, on this parcel of land -

which falls within the confines of what used to be the plant (which has now been dismantled) - there is nothing save for a boundary wall.

98. In light of the above, the Court considers that the decision of the domestic courts that the land was being used in 2012 and therefore that the expropriation was in the public interest must be considered to have no reasonable foundation.

99. Moreover, during the proceedings before this Court the Government have not come up with an explanation, even less a shred of evidence, as to any use being made of this parcel of land in 2012 or thereafter. The Court points out that the land consists of a long stretch of land, with the applicants' remaining property on each side of it.

100. Thus, the Court considers that it has not been shown that there was any public interest in 2012 when the expropriation took place, in relation to the parcel of land measuring 509 sq.m. Moreover, even had such public interest existed at the time, it did not persist for more than a few months after the taking - a consideration which could not have been ignored by the domestic authorities at the time of the expropriation and thereafter. In this connection it is noted that the new plant in another location was already operational in 2013 (see paragraph 39 above).

101. The Court further notes that despite this situation glaring in the face of the authorities over the years and particularly during seven years of judicial proceedings, no action has been taken by the State to correct the situation and revoke the declaration. In this connection the Court reiterates that, in the context of property rights, particular importance must be attached to the principle of good governance. When a mistake is discovered the authorities have a duty to act in good time and in an appropriate and consistent manner (see, *mutatis mutandis*, *Moskal v. Poland*, no. 10373/05, § 72, 15 September 2009, and *Zhidov and Others v. Russia*, nos. 54490/10 and 3 others, § 98, 16 October 2018).

102. As regards compensation, the Court notes that the applicants were offered EUR 205 for the parcel measuring 509 sq.m., and EUR 58.50 for the parcel measuring 139 sq.m., which sums are manifestly unreasonable for a taking which occurred in 2012 i.e. the relevant date for assessing compensation. In this connection the Court notes that even the valuation prepared by the Government's own architect (which estimated the respective properties as being agricultural land in 2014), valued the land as nearly seventy times the amount offered (i.e. at EUR 14,000 and EUR 4,000 respectively, see paragraph 20 above). It follows that a fair balance has not been reached and the applicants were made to suffer an excessive burden.

103. Accordingly, the Court finds that there has been a violation of Article 1 of Protocol No. 1 in respect of the expropriation, in 2012, of the applicants' land measuring 509 sq.m. and 139 sq.m.

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

104. The applicants also complained under Article 13 in conjunction with Article 1 of Protocol No. 1 that the Constitutional Court had not been effective given the limited redress it awarded them.

105. The Court notes that the situation in the present case is not one arising from a “structural” issue resulting from a repetitive practice where the Constitutional Court gives inadequate redress (see, *a contrario*, *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, §§ 96-109, in relation to expropriations). In the present case, as noted above, the Constitutional Court gave adequate redress and deprived the applicants of their victim status in relation to the use from 1978 and 1984 respectively, until 2012 of the majority of their land.

106. As to the parts of their complaint which were rejected by the Constitutional Court, it is recalled that the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII) and the mere fact that an applicant’s claim fails is not in itself sufficient to render the remedy ineffective (see *Amann v. Switzerland*, [GC], no. 27798/95 §§ 88-89, ECHR 2002-II). It follows that in the present case, despite the unfavourable outcome in relation to some of the applicants’ claims, no reasons have been brought to the Court’s attention allowing it to consider that the applicants did not have an effective remedy at their disposal.

107. It follows that the complaint must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention as manifestly ill-founded.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

108. 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

#### 1. *The parties’ submissions*

109. The applicants requested the return of the property measuring 509 sq.m. and reserved their right to claim damage for the use of that property if returned. The applicants also claimed 6,861,428 euros (EUR) in respect of pecuniary damage and EUR 50,000, jointly, in non-pecuniary damage. The claim for pecuniary damage included EUR 47,500 for the parcel of land measuring 139 sq.m. which according to their architect was

within a “developable boundary” a few metres from a built up “scheme”, EUR 1,508,000 in respect of the land measuring 509 sq.m., if it were not to be returned to the applicants, bearing in mind the effects of this taking on the adjacent land, namely the difference in value between the entirety of the land and that same land if this parcel continues to be retained by the Government (see paragraph 68 above), and EUR 5,305,298 for the loss of use of Lands A and B from 1978 and 1984 respectively, to date. All the valuations are based on an architect’s report submitted to the Court. The legal representatives indicated their firm’s bank account to receive payment of all the sums awarded by the Court.

110. The Government noted that most of the land was given back to the applicants and for the remaining two parcels, they insisted that the applicants had not proved that the land was not agricultural land at the time of taking, thus compensation should not exceed EUR 18,000 (see paragraph 70 above). They further considered that the domestic courts had already awarded EUR 15,000 in non-pecuniary damage and thus they had already adequately redressed the applicants and that in any event any award made by the Court should not exceed EUR 2,000, jointly.

## 2. *The Court’s assessment*

111. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96 § 32, ECHR 2000-XI, and *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows for *restitutio in integrum* it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, however, national law does not allow - or allows only partial - reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (*ibid.*).

112. The Court notes that in line with the upheld violations, the applicants are due just satisfaction solely in connection with:

- i) the use of the two smaller parcels of land until 2012,
- ii) the expropriation of the two smaller parcels of land in 2012,

but not for the losses in relation to the use of Lands A and B which complaint was declared inadmissible (see paragraph 54 above).

113. As to the use of the two smaller parcels of land until 2012, the applicants having couched their claim for the entirety of the land in line with their complaint, the Court is not in a position to determine the relevant sum in respect of solely the two smaller parcels of land at this stage. In these circumstances, the Court considers that the question of just satisfaction in relation to the two smaller parcels of land is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the respondent Government and the applicants (Rule 75 § 1 of the Rules of Court).

114. As to the redress in respect of the land measuring 139 sq.m., the expropriation of which conformed with the public interest requirement, but in respect of which the applicants have not received adequate compensation, the Court considers that the compensation should be based on the lines of *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, § 18, 28 September 2010). Thus, the sum to be awarded to the applicants should be calculated on the basis of the value of the land at the time of the taking, and be converted to the current value to offset the effects of inflation, plus simple statutory interest applied to the capital progressively adjusted (see, for example, *Curmi v. Malta* (just satisfaction), no. 2243/10, § 16, 9 July 2013). Since in the present case the applicants have not yet received any payment at the national level, no such deduction is necessary.

115. The applicants considered the value of this land in 2012 to be EUR 47,500, (as developable land) and the Government estimated the value as EUR 4,000 (as agricultural land). The Court notes that, on the one hand, despite the odd terminology used by the applicants' architect, the plans attached to his evaluation appear to show that (unlike Land A) the land measuring 139 sq.m. is in an Outside Development Zone (ODZ). On the other hand, the valuation of the Government's architect refers to the confines of the development zone without specifying whether the land was within it or not. Be that as it may, bearing in mind the undisputed fact that even before 2012 a building was and remains erected on such land, which hosts the sub-station, and bearing in mind the definition of agricultural land (see Relevant domestic law above), the Court cannot but consider that the land was in fact a building site in 2012 and compensation should be calculated accordingly for the purposes of the expropriation. However, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for reimbursement of less than the full market value (*ibid.* § 15).

116. In the light of the above the Court awards EUR 40,000 in respect of the expropriation in 2012 of the land measuring 139 sq.m.

117. As to the redress in respect of the land measuring 509 sq.m., the expropriation of which did not pursue any public interest and in respect of which the applicants obtained no compensation: the Court notes that the restitution of the property is not impossible given that no use has been made of it, and that the adjacent properties (Lands A and B) have also been returned. Also, the applicants have requested its return (see, *a contrario*, *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 120).

118. The Court considers that, in the circumstances of the case, the return of the land measuring 509 sq.m. would be the most appropriate redress and would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (see, for example, *mutatis mutandis*, *Ana Ionescu and Others v. Romania*, nos. 19788/03 and 18 others, § 38, 26 February 2019).

119. Failing such restitution by the respondent State, the latter would have to pay the applicants, in respect of pecuniary damage, an amount corresponding to the current value of the land (see *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 122), to which may be added relevant losses as a result of the devaluation of the remainder of the applicants' land.

120. In this connection, the Court observes that the applicants' architect estimated the losses, in terms of the financial set back on the remaining land, at EUR 1,508,000 and this calculation has not been contested by the Government at this stage.

121. As to the value of the land, the Court observes that, on the one hand, the Government valued the parcel of land measuring 509 sq.m. at EUR 14,000 as agricultural land, in 2014, without specifying whether it was or not within a development zone. On the other hand, the applicants' valuation does not refer to the value of this parcel of land nor to its classification but seems to consider it as falling within the development zone. In such circumstances, on the basis of the material in its possession, the Court is not able to determine the value of the land today.

122. The Court considers that the question of just satisfaction in relation to the expropriation of the parcel of land measuring 509 sq.m. is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the respondent Government and the applicants (Rule 75 § 1 of the Rules of Court).

123. As to non-pecuniary damage, the sum awarded by the Constitutional Court concerned violations different to the ones upheld by this Court. Considering that the applicants must have experienced frustration and stress having regard to the nature of the further breaches found by this judgment, the Court awards the applicants EUR 10,000,

jointly, in respect of non-pecuniary damage, plus any tax that may be chargeable.

124. As requested, the amount awarded is to be paid directly into the bank account designated by the applicants' representatives (see, for example, *Denisov v. Ukraine* [GC], no. 76639/11, § 148, 25 September 2018 and the Practice Directions to the Rules of Court concerning just satisfaction claims, under the heading payment information).

## **B. Costs and expenses**

125. The applicants also claimed EUR 13,778.99 for the costs and expenses incurred before the domestic courts and those incurred before the Court. Part of the costs relative to domestic proceedings arise out of the taxed bill of costs submitted, while others are supplementary fees to their lawyers substantiated by the relevant invoices. The legal representatives indicated their firm's bank account to receive payment of all the sums awarded by the Court.

126. The Government did not contest the amount relative to the payment of the costs of Enemalta, nor the lawyers' fees as calculated in accordance with the taxed bill of costs, and they considered that costs of proceedings before this Court should not exceed EUR 2,500.

127. 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 were 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, the Court considers it reasonable to award the sum of EUR 10,000 covering costs under all heads, plus any tax that may be chargeable to the applicants.

128. As requested, the amount awarded is to be paid directly into the bank account designated by the applicants' representatives.

## **C. Default interest**

129. 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 complaints concerning the two parcels of land measuring 509 sq.m. and 139 sq.m. admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the taking lasting from 1978 and 1984 respectively, until 2012, of the applicants' land measuring 509 sq.m. and 139 sq.m.;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the expropriation, in 2012, of the applicants' land measuring 509 sq.m. and 139 sq.m.;
4. *Holds* that, as far as the awards resulting from the violations found in the present case concerning i) the taking lasting from 1978 and 1984 respectively until 2012 of the applicants' land measuring 509 sq.m. and 139 sq.m. and ii) the expropriation of the parcel of land measuring 509 sq.m. are concerned, the question of the application of Article 41 is not ready for decision and accordingly,
  - (i) *reserves* the said question;
  - (ii) *invites* the Government and the applicants to submit, within three months from the date on which this judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
  - (iii) *reserves* the further procedure and delegates to the President of the Section the power to fix the same if need be;
5. *Holds*
  - (a) that the respondent State is to pay the applicants, within three months from the date when the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 40,000 (forty thousand euros), jointly, plus any tax that may be chargeable, in respect of pecuniary damage in relation to the parcel of land measuring 139 sq.m.;
    - (ii) EUR 10,000 (ten thousand euros), jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (iii) EUR 10,000 (ten thousand euros), jointly, 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.

MIFSUD AND OTHERS v. MALTA (MERITS) JUDGMENT

Done in English, and notified in writing on 13 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova  
Deputy Registrar

Paul Lemmens  
President

**APPENDIX**  
**List of applicants**

| <b>No.</b> | <b>Firstname<br/>LASTNAME</b> | <b>Birth<br/>year</b> | <b>Nationality</b> | <b>Place of residence</b>    |
|------------|-------------------------------|-----------------------|--------------------|------------------------------|
| <b>1.</b>  | Paul MIFSUD                   | 1948                  | Maltese            | Żabbar, Malta                |
| <b>2.</b>  | Rebecca<br>AINSBURY           | 1976                  | British            | Cumbria, United<br>Kingdom   |
| <b>3.</b>  | Paul ALEXANDER                | 1941                  | Australian         | Cowandilla,<br>Australia     |
| <b>4.</b>  | Bernarda BALZAN               | 1933                  | Maltese            | Żejtun, Malta                |
| <b>5.</b>  | Carmen<br>BUTTIGIEG           | 1941                  | Maltese            | Żejtun, Malta                |
| <b>6.</b>  | Daniela COOMBE                | 1979                  | British            | Cumbria, United<br>Kingdom   |
| <b>7.</b>  | Mary DAVIES                   | 1950                  | Maltese            | Peverell, United<br>Kingdom  |
| <b>8.</b>  | Lourdes<br>FARUGGIA           | 1944                  | Australian         | Glenelg, Australia           |
| <b>9.</b>  | Mary FELICE                   | 1952                  | Maltese            | St Albans, United<br>Kingdom |
| <b>10.</b> | Catherine FSADNI              | 1943                  | Maltese            | Żejtun, Malta                |
| <b>11.</b> | Angela GAUCI                  | 1945                  | Maltese            | Gżira, Malta                 |
| <b>12.</b> | Anthony GAUCI                 | 1946                  | Maltese            | Żejtun, Malta                |
| <b>13.</b> | Charmaine GAUCI               | 1976                  | Maltese            | Żejtun, Malta                |
| <b>14.</b> | Paul GAUCI                    | 1985                  | Maltese            | Gżira, Malta                 |
| <b>15.</b> | Saviour GAUCI                 | 1948                  | Maltese            | Żejtun, Malta                |
| <b>16.</b> | Maria MATHEWS                 | 1961                  | Australian         | Highbury, United<br>Kingdom  |
| <b>17.</b> | Alfred MIFSUD                 | 1938                  | Maltese            | Żejtun, Malta                |
| <b>18.</b> | Carmel MIFSUD                 | 1949                  | Maltese            | Luqa, Malta                  |
| <b>19.</b> | George MIFSUD                 | 1955                  | Australian         | Baulkham Hills,<br>Australia |
| <b>20.</b> | Paoline MIFSUD                | 1961                  | Maltese            | Peverell, United<br>Kingdom  |
| <b>21.</b> | Vivienne MIFSUD               | 1944                  | Maltese            | Żebbug, Malta                |
| <b>22.</b> | Marcia Martha<br>SCIBERRAS    | 1946                  | Australian         | Grange, Australia            |

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| No. | Firstname<br>LASTNAME | Birth<br>year | Nationality | Place of residence       |
|-----|-----------------------|---------------|-------------|--------------------------|
| 23. | Victoria STAINER      | 1954          | Maltese     | Melksham, United Kingdom |
| 24. | Catherine VELLA       | 1941          | Maltese     | Żejtun, Malta            |
| 25. | Joseph VELLA          | 1963          | Maltese     | Solihull, United Kingdom |
| 26. | Paul VELLA            | 1938          | Maltese     | Żejtun, Malta            |
| 27. | Renato VELLA          | 1981          | Maltese     | Żejtun, Malta            |
| 28. | Vincent VELLA         | 1941          | Maltese     | Gozo, Malta              |
| 29. | Melanie WHILE         | 1975          | British     | Cumbria, United Kingdom  |