



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

FIRST SECTION

CASE OF CARMELINA MICALLEF v. MALTA

(Application no. 23264/18)

JUDGMENT

Art 1 P1 • Deprivation of property • Inadequate compensation for taking of property under successive titles and its subsequent expropriation
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STRASBOURG

28 October 2021

FINAL

28/01/2022

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

In the case of Carmelina Micallef v. Malta,

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

Ksenija Turković, *President*,

Péter Paczolay,

Alena Poláčková,

Erik Wennerström,

Raffaele Sabato,

Lorraine Schembri Orland,

Ioannis Ktistakis, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 23264/18) 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 a Maltese national, Ms Carmelina Micallef (“the applicant”), on 15 May 2018;

the decision to give notice to the Maltese Government (“the Government”) of the complaint concerning Article 1 of Protocol No.1 to the Convention and to declare inadmissible the remainder of the application;

the decision to reject the unilateral declaration presented by the Government;

the parties’ observations;

Having deliberated in private on 5 October 2021,

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

INTRODUCTION

1. The case concerns the taking of property under successive titles, and eventually its expropriation. In particular, the adequacy of the compensation due on the basis of the Land Acquisition (Public Purpose) Ordinance.

THE FACTS

2. The applicant was born in 1962 and lives in Birkirkara. She is represented before the Court by Dr P. Borg Costanzi and Dr E. Borg Costanzi, lawyers practising in Valletta.

3. The Government were represented by their Agents, Dr C. Soler, State Advocate, and Dr J. Vella, Advocate at the Office of the State Advocate.

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

I. BACKGROUND TO THE CASE

5. The applicant was the owner of 94, Bull Street Cospicua (the property), which she inherited from her mother in 2009.

6. In 1949 the property had been taken by the Government under title of “possession and use” for an acquisition rent equivalent to approximately 14 euro (EUR) annually, based on the rental value of the property in 1939 and not revisable according to law. In 1966, the Government converted the taking to one under title of “public tenure” at a recognition rent equivalent to approximately EUR 20 annually (hereinafter EUR 20).

7. On 22 August 2011 the applicant was notified that by means of Government Notice No. 934, published in the Government Gazette on 13 September 2010, the property (which had already been demolished soon after the Second World War and developed by the Government into a site comprising a number of other properties) was being acquired by “absolute purchase”. She was informed that the compensation payable based on the property’s value was EUR 1, 397.87 (hereinafter EUR 1,398) according to Article 22 (11) (vi) (c) of the Land Acquisition (Public Purpose) Ordinance (“the Ordinance”, Chapter 88 of the Laws of Malta), which established that compensation had to be calculated on the basis of the recognition rent capitalised by 1.4% (see paragraph 18 below).

II. THE COMPENSATION PROCEEDINGS

8. On 9 September 2011 the applicant contested that amount before the Land Arbitration Board (LAB) considering that EUR 60,000 was more appropriate on the basis of an *ex parte* report which valued the property in 2012 at EUR 70,000.

9. In those proceedings the architects appointed to assist the LAB also valued the property at EUR 60,000 as its value in September 2010, date of taking. However, by a judgment of 14 January 2015 the LAB, sympathising with the applicant and confirming that her requests were reasonable and shared by the experts of the LAB, found that the compensation payable according to law, with which it was bound, was the amount originally offered by the Commissioner of Land, i.e. EUR 1,398.

10. On 3 February 2015 the applicant appealed. She claimed that, despite the architects’ evaluation, the LAB was bound by law to confirm the extremely low amount of compensation. Thus, it was hindered from providing her with an effective access to court. She also argued that the Court of Appeal should consider such law null and void and thus discard it. Since in her view the situation raised issues under Article 6 of the Convention and Article 1 of Protocol No. 1, she requested the Court of Appeal to refer the matter to the constitutional jurisdictions.

11. In a decree of 4 October 2016 the Court of Appeal (composed of judges X. G. and N.) considered that her request was not frivolous or vexatious and thus accepted the request to refer the issue to the constitutional jurisdictions and made the following considerations (point 6-10 of the decree): (i) was there a breach of the applicant's rights under Article 1 of Protocol No. 1? In particular what is the relevant date for the calculation of compensation? (ii) If the taking under public tenure in 1966 is a property right in itself (*dritt in re*), equivalent to the *utile dominium*, was the compensation of approximately EUR 20 adequate compensation in 1966? (iii) If the taking under public tenure is a property right in itself, equivalent to the *utile dominium*, was EUR 1,398 adequate compensation for the taking in 2010 of the residual right of *dirett dominium*, that is the right to receive approximately EUR 20 a year? iv) If, on the other hand, the taking under public tenure is not a property right in itself, with the result that the taking in 2010 was not solely a taking of residual rights, but of the entirety of the property rights, was EUR 1,398 adequate compensation for the taking under absolute purchase? v) Depending on the answer to the above questions, given that the LAB is obliged to apply the law regulating compensation, was the applicant denied access to court in the determination of her compensation?

12. As result of these considerations it set six questions to the constitutional jurisdictions concerning the applicant's rights under Article 6 of the Convention and Article 1 of Protocol No. 1. The questions concerning Article 1 of Protocol No. 1 read as follows (point 11 of the decree):

(i) Should it be deemed (a) that the property as a whole was taken in 2010 or (b) that the *pars domini* – the public tenure – was taken in 1966 and the residual right – the right to receive EUR 20 a year – was taken in 2010?

(ii) If the answer is (a) is EUR 1,398, plus interest, adequate and proportionate compensation for the taking of the property in 2010, or does it violate the right to the enjoyment of property?

(iii) If the answer is (b) was EUR 1,398, adequate and proportionate compensation, based on values in 1966, for the taking under title of public tenure, or does it violate the right to the enjoyment of property?

(iv) Also, if the answer is (b) was EUR 1,398, plus interest, adequate and proportionate compensation, based on values of 2010, for the taking of the right to receive approximately EUR 20 a year, or does it violate the right to the enjoyment of property?

III. PROCEEDINGS BEFORE THE CONSTITUTIONAL JURISDICTIONS

13. By a judgment of 4 October 2016 the first-instance constitutional jurisdiction found a violation of Article 1 of Protocol No. 1 and refrained

from dealing with the other matters referred to it in connection with the same provision. In particular, it considered that the entirety of the property was taken in 2010. Indeed the property had already been ‘expropriated’ in 1949, however the offer of compensation was only made in 2011. Thus, given the amendments to the law in 2006, compensation was due according to the value on the date of the notice to treat – in the present case the value on 22 August 2011. Given that the value then was around EUR 60,000 the compensation of EUR 1,398 was not adequate and did not achieve a fair balance, and thus was in breach of the applicant’s property rights. It found no violation of Article 6 (access to court).

14. On appeal, by a judgment of 24 November 2017 the Constitutional Court (composed of Judges S. G. and N.) reversed the first-instance judgment in part, namely in relation to Article 1 of Protocol No. 1. It considered that the Government was only taking over the residual rights of ownership following the taking under title of public tenure in 1966, thus the applicant could not be compensated for the entire value of the property. In its view by means of the Presidential declaration of 2010 all that was being transferred was the right to receive a sum of money each year. “In other words what is being taken today is not the right of enjoyment of the property – that was taken in 1966 – but the right to receive a sum of money each year which is not linked to the enjoyment of property”. Thus, the sum of EUR 1,398 (plus interest) was adequate compensation, based on values applicable in 2010, for the taking of the residual right (to earn EUR 20 per year) and no violation of the applicant’s property rights arose. It also found that the taking in 1996 under title of “public tenure” was not in breach of the applicant’s property rights.

IV. CONTINUATION OF PROCEEDINGS BEFORE THE COURT OF APPEAL

15. The case was to resume before the Court of Appeal on 4 June 2018. Before that date the applicant lodged a request under Article 734(1) (d) of the Code of Organisation and Civil Procedure for Judges G. and N. sitting on the Court of Appeal to withdraw from hearing her appeal both because they had accepted her referral request, and because they had actually decided the issue at the constitutional level.

16. On 4 June 2018 the Court of Appeal (composed of judges J. G. and N.) rejected her request. While accepting that the issue decided by the Constitutional Court had an impact on the way in which the civil appeal would be decided, they considered that the Constitutional Court had decided a constitutional issue and had not said anything about the way in which the civil appeal should be decided. It was true that the judges on the Court of Appeal were bound to follow the findings of the Constitutional Court; however, that would be the case irrespective of the judges who heard the

case. The constitutional case had been closed and the Court of Appeal had only to decide the civil issue.

17. The case was deferred to 8 October 2018, the date on which the applicant asked the Court of Appeal to adjourn the consideration of the case pending the outcome of the application lodged before this Court (following the Constitutional Court judgment). On the same day her request was accepted, and the civil case was adjourned *sine die*.

RELEVANT LEGAL FRAMEWORK

18. The relevant provisions of the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the Laws of Malta, in so far as relevant, read as follows:

Section 5

“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.”

Section 13

“(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. ...”

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 Registration 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 Registration Act within three months from the issue of the Declaration of the President.

(11) ... (b) in the case of conversion from possession and use into absolute purchase a sum arrived at by the capitalisation at the rate of one *per centum* of the annual acquisition rent due under the provisions of this Ordinance;

(c) in the case of conversion from public tenure into absolute purchase a sum arrived by the capitalisation at the rate of one point four *per centum* of the annual recognition rent due under the provisions of this Ordinance. ...”

Section 27(13)

“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.”

THE LAW

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

19. The applicant complained that the sum of EUR 1,398 was not adequate compensation for the taking by the State of her property, valued at around EUR 65,000. She relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

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

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

A. Admissibility

1. Compatibility ratione temporis

20. The Government submitted that the taking under public tenure happened in 1966, therefore before Malta ratified the Convention and

Protocol No. 1 in 1967, thus the Court had no jurisdiction to deal with such matter.

21. The applicant submitted that while the interference may have started in 1966, it was a continuing one as she was made to receive such rent every year, and it continued to date as the applicant remained uncompensated. She compared her situation to one emanating from the inadequate domestic rent laws (pre-1995) where the domestic courts had acknowledged that they constituted continuing situations (see, for example, *Raymond Cassar Torregiani et vs Attorney General et* decided by the Civil Court (First Hall) in its constitutional competence on 2 February 2015).

22. Bearing in mind the Court's findings at paragraph 51 below, the Court does not consider it necessary to address this objection.

2. Exhaustion of domestic remedies

(a) The parties' submissions

23. The Government submitted that the applicant failed to exhaust domestic remedies, since at her request, the proceedings before the Court of Appeal were suspended pending the outcome of the case before the Court. Thus, of her own will she had halted proceedings and there was to date no final decision on the amount of compensation due to her. They accepted that the suspension was in the light of the application lodged before the Court but considered that it could not be equated to a recognition that the applicant had exhausted domestic remedies.

24. The applicant submitted that the Court of Appeal was bound by the law, namely Article 22 (11) (c) of the Ordinance, as shown by the judgment of the LAB. Thus, in the absence of a violation judgment from the Court there was no possibility of her obtaining adequate compensation from the Court of Appeal, which could therefore not be considered an effective remedy. She noted moreover that the judges on the Court of Appeal were the same judges who decided her Constitutional Court case, there was therefore certainly no possibility for them to ignore their own judgment and give a different award in compensation. She noted that only after a finding of a violation by this Court, could the Court of Appeal decide in a different manner, so much so that the Court of Appeal (an organ of the State) had agreed to suspend the proceedings pending the outcome of the case before the Court. It was therefore ironic that the Government were now raising such an objection. In the light of the above, the applicant considered that she had exhausted remedies in respect of her complaint and that the application before the Court had been lodged within six months of the Constitutional Court judgment.

(b) The Court's assessment

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

26. 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 *Saliba and Others v. Malta*, no. 20287/10, § 37, 22 November 2011).

27. The Court observes that unlike the function of the constitutional jurisdictions in Malta, who are also competent to take cognisance of cases which concern an eventual violation, the role of the Court is generally to examine cases where an alleged violation has already taken place, and where the applicant has exhausted available remedies to redress that situation. In that light the Court has little sympathy with requests, such as that lodged at the national level by the applicant, to suspend the ordinary domestic proceedings (following an unfavourable outcome from the constitutional jurisdictions) pending the outcome of the case before the Court. Indeed, it cannot be excluded that, in certain cases, such a course of action would render the application before the Court inadmissible for non-exhaustion of domestic remedies, or have an impact on an applicant's victim status (see, for example, *Cane` and Others v. Malta* (dec.), no. 24788/17, 13 April 2021, § 75).

28. However, as stated above (see paragraph 25 above), the only remedies which need to be exhausted are effective remedies that have a prospect of success. In the present case the Constitutional Court has already examined the applicant's complaint *via* referral proceedings and dismissed it on the merits. It is clear, in the present case, that the Court of Appeal is now bound to follow the Constitutional Court judgment (as also admitted by the Court of Appeal, see paragraph 16 above) and apply the relevant domestic law. In consequence, there is little doubt that the Court of Appeal was not in a position to award any compensation beyond that of EUR 1,398 (plus interest), in line with domestic law, which is precisely what is being contested before this Court. It is also not irrelevant that the Court of Appeal accepted to adjourn the case *sine die* pending the outcome of these proceedings. It follows that in the circumstances of the present case the applicant cannot be blamed for having brought her application to the Court within six months from the judgment of the Constitutional Court, without awaiting the outcome of the judgment before the Court of Appeal, which had no prospects of success.

29. The Government's objection of non-exhaustion of domestic remedies, is therefore dismissed.

3. Conclusion

30. The Court notes that the 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.

B. Merits

1. The applicant's submissions

(a) The applicant

31. The applicant originally complained that the sum of EUR 1,398 (based on 1939 rental values) was not adequate compensation for the expropriation by the State of her property in 2010, when it had a mean sale value of EUR 65,000. However, in reply to the Government's arguments, she noted that she had not been paid adequate compensation even in the prior years, when the property was held under different titles.

32. The applicant contested that the ownership of the property had been transferred to the Government in 1966. At the time the Government had taken over the use of her property in exchange for a unilaterally established yearly recognition rent, but certainly had not taken over any ownership rights, or paid any other sums for any transfer. However, she noted that even on that assumption, it would be clear that she had not received adequate compensation. She had received EUR 1,046 in total as recognition rent since 1966, to which had to be added EUR 1,398 awarded by the LAB

(amounting to 50% of the value in 1966), thus totalling EUR 2,444. Those sums had been based on values applicable to property in 1939. Thus, in her view, it would in any event not constitute appropriate compensation for an expropriation of a habitable property, initiated in 1966 and concluded by absolute purchase in 2010.

33. The applicant insisted that the date of taking had to be considered to be 13 September 2010, date of the Presidential declaration stating that the property had been acquired by absolute purchase, as it was only then that ownership had been transferred.

34. The applicant disputed the Government's claim that the property had been in a bad state of repair. None of the experts or domestic courts had established so, nor had the Government brought forward any evidence to that effect. Moreover, the values attributed to it, for example EUR 2,800 in 1966, were not low, when one bore in mind that the average wage in that year had been approximately EUR 662 annually. In so far as the Government questioned the expert evaluations, the applicant submitted that the experts had been appointed by the LAB itself, and under domestic law they formed part of that decision body. Moreover, they had had all the relevant evidence and material to make their decision. It was therefore inappropriate for the Government to question the integrity and ability of the court-appointed experts, based on unsubstantiated allegations.

(b) The Government

35. The Government submitted that there had been no violation of Article 1 of Protocol No.1. They submitted that the property had been expropriated (*sic.*) under title of possession and use in 1949, and then under title of public tenure (the *pars domini*, which included the *ius utendi, fruendi* and *abutendi*) in 1966. The latter had a perpetual effect, and thus in 2010, as held by the Constitutional Court, it had been only the residual right to receive recognition rent, which had been taken away from the applicant.

36. The Government submitted that all measures undertaken since 1949 had been lawful and in line with the Ordinance. They had also pursued the public interest – an issue not disputed by the applicant.

37. The Government considered that the measures had also been proportionate. In particular, they noted that when the property had been taken over by Government, as part of a slum clearance project, it had been in a bad state of repair and had already been more than a hundred years old. According to the independent expert, in 1949 the property had been only worth EUR 1,300, and in 1966, when the Government had taken over the *pars domini*, it was worth EUR 2,800. Thus, while the Government held the land under title of public tenure, the applicant's compensation of nearly EUR 20 per year was, in the Government's view, adequate. To that would have to be added the EUR 1,398 awarded by the LAB, if the Court of Appeal were to confirm that decision. The Government also questioned the

valuations relied on by the applicant. In any event those sums could not be due since the applicant had only lost a residual right, as she had recognised during the domestic proceedings.

38. The Government further submitted that the applicant was not old, nor disabled, nor had she had nowhere else to live, thus her personal circumstances were not such that she would suffer a disproportionate burden.

2. *The Court's assessment*

(a) **General principles**

39. 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; *Beyeler v. Italy* [GC], no. 33202/96, § 98, ECHR 2000-I; *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V and *Saliba v. Malta*, no. 4251/02, § 31, 8 November 2005).

40. The Court reiterates that a taking of property can be justified only if it is shown, *inter alia*, to be “in the public interest” and “subject to the conditions provided for by law”. Any interference with property must also satisfy the requirement of proportionality. As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirement of protecting the individual’s fundamental rights, the search for such 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 v. Sweden*, 23 September 1982, §§ 69-74, Series A no. 52, and *Brumărescu v. Romania* [GC], no. 28342/95, § 78, ECHR 1999-VII).

41. 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 v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI). 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 (see *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII, and *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A). However, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances. 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 *Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, § 115, ECHR 2007-XIII, and *Broniowski*, cited above, §§ 182 and 186).

42. As to the amount of the compensation, it must normally be calculated based on the value of the property at the date on which ownership thereof was lost. Any other approach could open the door to a degree of uncertainty or even arbitrariness (see *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 103, 22 December 2009 and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 111, 25 October 2012).

(b) Application of the General principles to the present case

43. The Court has previously explained in Maltese cases before it the different titles on the basis of which the Government can take land in circumstances such as those of the present case.

44. It noted that under title of possession and use the taking, in exchange for an acquisition rent, is meant to be temporary during which time the applicants do not lose their right to sell the property and the ownership title is not transferred to third parties. Although in such circumstances a sale is improbable, the Court did not accept that such a measure amounted to a *de facto* expropriation. However, the applicants’ right of property under such a title are severely restricted: they cannot exercise the right of use in terms of physical possession. Thus, the Court has held that 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 and *Zammit and Vassallo v. Malta*, no. 43675/16, § 55, 28 May 2019).

45. Under title of public tenure the restrictions remain the same as above described, and the owner is entitled to a recognition rent. However, public tenure implies that the property is taken permanently. Consequently, applicants are not simply restricted in, or temporarily deprived of, their use and enjoyment of the property. The Court has held that in such circumstances it is possible that such interference could be equated to a *de facto* expropriation (*ibid.* § 56, and *Saliba and Others*, cited above, § 53). Nevertheless, the Court has noted that 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 (ibid. § 54).

46. In the above-mentioned cases the Court made such considerations, because in the absence of a formal expropriation, that is to say a transfer of ownership, the Court had to look behind the appearances and investigate the realities of the situation complained of (see *Saliba and Others*, cited above, § 53).

47. In cases against Malta where the property was taken under title of absolute purchase, the Court considered that the taking was one amounting to an expropriation (even though sometimes the final deed of transfer was not yet signed, as compensation had not yet been paid) and/or that there had been a deprivation of possessions (see for example, *Deguarra Caruana Gatto and Others v. Malta*, no. 14796/11, §§ 8 and 53, 9 July 2013; *Azzopardi v. Malta*, no. 28177/12, § 52, 6 November 2014, and *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited v. Malta*, nos. 75225/13 and 77311/13, § 70, 11 September 2018; see also *Gauci and Others v. Malta*, no. 57752/16, §§ 22 and 62, 8 October 2019). Admittedly, all these cases did not concern a taking under title of absolute purchase which followed, specifically, a taking under public tenure, as in this case. However, in the recent *Cane` and Others v. Malta* ((dec.) no. 24788/17, 13 April 2021) the taking under title of absolute purchase which followed a taking under title of public tenure amounted nonetheless to an expropriation, both for the domestic courts and the Court.

48. The Court further notes that there is no doubt that in terms of the Ordinance, it is the taking under title of absolute purchase which consists of the transfer of the absolute ownership (see paragraph 18 above). Thus, the Government's submissions echoing the novel approach by the Constitutional Court have no bearing on the simple fact that the applicant was deprived of the ownership of her land, by means of the declaration of 13 September 2010. The mere fact that the State had controlled the applicant's property under different titles - even on conditions which verged onto a *de facto* expropriation - prior to that date does not alter that conclusion. Had the State wanted to obtain full ownership in 1966 and pay the value of the property at the time, it could have acquired the property under title of absolute purchase at the time, or soon thereafter. It however, failed to do so.

49. Having regard to the above, the Court notes, that the circumstances of the present case concern property which was the subject of successive takings under titles of possession and use and public tenure (see *Saliba and Others*, cited above, § 67) and eventually the instantaneous expropriation (in 2010).

50. The Court reiterates that the scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the

applicant's complaint. A complaint consists of two elements: factual allegations and legal arguments. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant. It cannot, however, base its decision on facts that are not covered by the complaint. To do so would be tantamount to deciding beyond the scope of a case; in other words, to deciding on matters that have not been "referred to" it, within the meaning of Article 32 of the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018).

51. The Court observes that applicant couched her complaint both before the domestic courts and before this Court only in reference to the expropriation in 2010. Her challenge was precisely that the compensation awarded for the expropriation of her property in 2010, in line with the law, was not proportionate, and at no point had she challenged the proportionality of the rent received while the property had been taken under title of public tenure. This is also confirmed by her request for pecuniary damage before this Court (see paragraph 57 below) which concerns the value of the land in 2010 and not any loss of rent prior to that date. Thus, as per the applicant's complaint before the LAB, later the Court of Appeal, and before this Court, her complaint concerns solely the total deprivation of her possessions by means of a taking under title of absolute purchase, which amounted to an expropriation, in 2010. The situation prior to that date is therefore beyond the scope of this case, irrespective of the fact that this situation was brought into play by the domestic courts and the Government.

52. The Court notes that it has not been disputed that the taking was lawful and in the public interest. It must therefore be determined whether the compensation was proportionate. The Court observes that in accordance with the law, for the deprivation of her possessions in 2010, the applicant is due compensation of EUR 1,398 (on the basis of a calculation that has its origin in the rental value of the property in 1939). In that same year according to the court-appointed architects, the value of the property was around EUR 60,000. Their valuation was based on the footprint of the building apparently unlawfully demolished by the State (compare *Zammit and Vassallo v. Malta*, no. 43675/16, 28 May 2019) and not on the newly built structure. Thus, the compensation due to the applicant amounts to less than 2.5 % of the market value and is therefore manifestly disproportionate.

53. As mentioned above, the mere fact that the State already held the property under various titles – which moreover according to the Court's case-law could also amount to a breach of Article 1 of Protocol No. 1 (see, for example, *Zammit and Vassallo*, cited above, § 55, and *Saliba and Others*, cited above, §§ 63-67) – does not alter her right to adequate

compensation for the total deprivation of her possessions, in 2010, which till that date she still owned (contrast *Cane` and Others* (dec.), cited above, § 64, in relation to scheduling of property amounting to a control of use of property).

54. 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 applicant's right of property.

55. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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*

57. The applicant claimed 60,000 euros (EUR) reflecting the value of the property in 2010, plus interest at 8% (between the value in 1966 and that in 2010 according to law) in respect of pecuniary damage, and EUR 15,000 in non-pecuniary damage in respect of all the complaints lodged in her application (EUR 9,000 indicated for Article 1 of Protocol No. 1). She noted that if the Court did not agree to award her the non-pecuniary damage claimed “she would contend with a declaration of a violation on the basis of Maltese law as applicable in her case, including the lack of a mechanism to revise the recognition rent in 1966 on the basis of 1939 values ...”.

58. The Government reiterated that the proceedings before the domestic courts were still ongoing, it would therefore not be appropriate to award compensation. Moreover, the applicant had accepted that a declaration would suffice. In any event the Government contended that the taking occurred in 1966, when it was valued at EUR 2,800 and the applicant had obtained EUR 1,046 as total recognition rent since 1966, and may receive EUR 1,398 by the LAB which together amounted to 87% of the value in 1966. The Government also noted that part of the non-pecuniary damage claimed was in relation to complaints not communicated to the Government, and that in any event no non-pecuniary damage was warranted in the present case.

2. *The Court's assessment*

59. 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*, cited above, § 90).

60. Having found a violation of Article 1 of Protocol No. 1, it is now for the Court to award compensation noting that there is no risk that the applicant will receive pecuniary compensation twice, as the national authorities will inevitably take note of this Court's award when finalising the proceedings (see, *mutatis mutandis*, *Gauci and Others v. Malta*, no. 57752/16, § 75, 8 October 2019 and *Frendo Randon and Others v. Malta* (just satisfaction), no. 2226/10, § 15, 9 July 2013).

61. The applicant is due redress for the expropriation of her property, which conformed with the public interest requirement, but in respect of which she has not received adequate compensation. Thus, 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) (see as a recent authority *Mifsud and Others v. Malta*, no. 38770/17, § 114, 13 October 2020). Thus, the sum to be awarded to the applicant should be calculated on the basis of the value of the property at the time of the taking, that is 2010, and be converted to the current value to offset the effects of inflation, plus simple statutory interest applied to the capital progressively adjusted (*ibid.*). Since in the present case the applicant has not yet received any payment at the national level, no such deduction is necessary.

62. 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.* § 115).

63. In the light of the above the Court awards EUR 57,000 in pecuniary damage in respect of the expropriation in 2010.

64. The Court further awards the applicant EUR 8,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

65. The applicant also claimed a total of EUR 5,466.32 for the costs and expenses incurred before the domestic courts and those incurred before the Court (EUR 2,124).

66. The Government submitted that most of the invoices presented to the Court related to the domestic proceedings and therefore were still to be

decided by the Court of Appeal. They considered that in relation to proceedings before this Court the sum of EUR 1,500 would be adequate.

67. 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, as well as to the fact that the costs of the ordinary proceedings have not yet been determined by the Court of Appeal, the Court considers it reasonable to award the sum of EUR 2,124 covering costs for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

68. 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 applicant, 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 57,000 (fifty-seven thousand euros) in respect of pecuniary damage;
 - (ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 2,124 (two thousand, one hundred and twenty-four euros), plus any tax that may be chargeable to the applicant, 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 applicant's claim for just satisfaction.

CARMELINA MICALLEF v. MALTA JUDGMENT

Done in English, and notified in writing on 28 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Ksenija Turković
President