



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

FIRST SECTION

CASE OF MARIA AZZOPARDI v. MALTA

(Application no. 22008/20)

JUDGMENT

Art 1 P1 • Deprivation of property • Adequate compensation for expropriation of applicant's land, pursuing a public-interest purpose, under the then Building Development Areas Act • Reasonably founded domestic decisions designating land as agricultural for compensation purposes • Existence of procedural and other safeguards • Wide margin of appreciation not overstepped • Fair balance struck between competing interests

STRASBOURG

9 June 2022

FINAL

09/09/2022

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

In the case of Maria Azzopardi v. Malta,

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

Marko Bošnjak, *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. 22008/20) 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 Maria Nicolina *Sive* Marlene Azzopardi (“the applicant”), on 28 May 2020;

the decision to give notice to the Maltese Government (“the Government”) of the application;

the parties’ observations;

Having deliberated in private on 10 May 2022,

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

INTRODUCTION

1. The case concerns a complaint under Article 1 of Protocol No. 1 in relation to the Building Development Areas Act (‘BDAA’), enacted in 1983 and repealed in 1988, by which the applicant’s land was expropriated.

THE FACTS

2. The applicant was born in 1943 and lives in Żebbuġ. The applicant was represented by Dr S. Grech and Dr I. Refalo, 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 may be summarised as follows.

I. BACKGROUND

5. The applicant owned a large tract of land known as Tal-Andar in the limits of Qormi (hereinafter “the land”), Malta, measuring approximately 3,193 square metres. The land had originally belonged to the applicant’s mother who passed away on 19 December 1975 and left its usufruct to her husband, and its bare ownership to her daughter, the applicant.

6. In virtue of a Resolution of the House of Representatives approved by Parliament on 4 July 1983 and issued in terms of the Building Development Areas Act (Act 1 of 1983) (hereinafter “BDAA”), the land was declared a Building Development Area. Consequently, the owners lost possession of the property. On 14 January 1985 the applicant’s father was notified of this by means of a judicial letter.

7. Once the authorities took possession of the applicant’s land, the property was divided into several plots and sold to third parties. At least twenty-five privately owned residential homes still stand on the land today. According to the applicant, those third parties acquired the property at cheap prices but were today the owners of very valuable homes and were able to alienate them or use them as collateral property. At the time, the applicant being already an owner of other property within which she resided, she was unable to benefit from Section 12 of the BDAA (see paragraph 25 below) which provided that the original owner could acquire one of the building plots located on the land, but only if he or she was going to establish his or her residence there.

8. In 1992 the applicant’s father filed proceedings before the Land Arbitration Board (hereinafter ‘LAB’) (case 4/1992) to seek compensation for the taking of the said land, and the applicant later joined in the suit. The applicant’s father passed away in the course of the proceedings and the case continued in the applicant’s name alone.

9. By a decision of 19 December 2013, the LAB fixed the compensation due for the taking at 4,000 euros (EUR), after considering that, in terms of Section 6 of the BDAA (see paragraph 57 below), land declared to be a Building Development Area was to be considered agricultural land for the purposes of the compensation due for the taking.

II. CONSTITUTIONAL REDRESS PROCEEDINGS

10. In 2016, considering that this amount was not fair compensation, the applicant instituted constitutional redress proceedings, claiming that she was a victim of a violation of Article 1 of Protocol No. 1 to the Convention. She contended that the Government had taken a large tract of land precisely to build thereon a large number of houses, which constituted valuable assets owned by third parties, at the expense of the original owners who had been paid meagre amounts (EUR 4,000 in case of the applicant). In particular, the applicant considered that it was unfair for compensation to be determined on the basis of its agricultural designation when the land had specifically been taken for the purpose of development and not for agricultural purposes. Moreover, the applicant complained that the provisions of the BDAA were themselves in violation of Article 1 of Protocol No. 1 because, in terms of that provision, once land had been declared a Building Development Area,

for the purposes of compensation no consideration was given to the nature of the land, its designated use, or its potential.

11. When considered as a building site the applicant's land was worth EUR 163,000 in 1985 and its value increased to EUR 2,283,400 by 2014, according to a valuation prepared by the applicant's architect.

A. First instance

12. By a judgment of the 12 June 2018 the Civil Court, (First Hall), in its constitutional competence found no violation of Article 1 of Protocol No. 1.

13. The court rejected the Government's plea of non-exhaustion of ordinary remedies, considering that, given the limits of the law, it was unlikely that an appeal against the LAB decision under Section 5 (3) of the BDAA would have remedied the applicant's complaint, thus she had not been required to exhaust such a remedy.

14. On the merits, the court noted that the first-instance judgment of *Ġuża Debono et vs the Onor. Prime Minister et* of 7 May 1990 (see paragraph 28 below), relied on by the applicant, had been revoked. It then referred to the judgment of the Constitutional Court of 27 February 2009 in the names of *Joseph Bartolo vs the Onor. Prime Minister* (see paragraph 29 below) which had established that Section 6 of the BDAA had not breached the right to fair compensation. Like in the present case, the claimant had not contested the public interest behind the measure.

15. Relying on domestic case-law, the court noted that when assessing compensation of rural land or wasteland, the value to be taken had to be that which the owner would have obtained had he or she sold the land voluntarily. Thus, one had to consider the value on the basis of the actual use being made of the land, but also give consideration to other factors which might impinge on its value, such as whether it had potential for development. However, such an assessment had to refer to the situation in which the land was when it was expropriated, and not today's; nor could one consider the use which the Government had wanted to make of it, or the value of property in the vicinity. The claimant's land would have remained rural land had it not been for the BDAA which expropriated it. It therefore had no potential.

16. According to the court, the BDAA took account of building potential in so far as it provided [Section 7] that where persons had, before the enactment of the BDAA, acquired land in good faith, with the aim of development, and thus had paid a higher price for it than that which would be established under the [Land Acquisition (Public Purpose)] Ordinance (hereinafter 'the Ordinance'); then it was that higher price which could be paid. Moreover, according to the Ordinance, developable (*fabrikkabli*) land could not be included in an area for development. This meant that the applicant's land had no potential for development as otherwise it could not be expropriated under the BDAA in terms of its Section 3 (4).

17. The value to be attributed to it had to be based on its real nature at the time of the expropriation and in accordance with the denomination (*kwalita`*) attributed to it by the BDAA. Had it been otherwise expropriated owners would acquire advantage according to the public purpose behind the expropriation. What the applicant should have sought was fair compensation for the type of land she owned, not to make good money. Her having obtained EUR 4,000, i.e. the fair value of the land before it was expropriated, she had not suffered any economic losses and thus there could be no breach of her property rights.

B. Appeal

18. The applicant appealed, noting, *inter alia*, that there was no social purpose behind the measure which was not intended to benefit third parties in need; that had the BDAA not been enacted there had been no restriction on the development of her land, which moreover was close to a developed area, and thus it could not be said that it had no potential. Indeed, the relevant parliamentary debates had shown that the areas to be considered Building Development Areas, were to be areas where there was a demand for development. She further noted that Section 7 of the BDAA only provided comfort to persons who had purchased property shortly before the enactment of the BDAA, and not those who had done so much before, despite the land having the same potential.

19. By a judgment of 29 November 2019 the Constitutional Court rejected her appeal and confirmed the decision of the lower court.

20. In relation to the claim that there had been no social purpose behind the measure, the Constitutional Court found that the applicant had not submitted any evidence concerning the value or conditions of sale of the plots to third parties, enabling the court to decide the matter.

21. As to fair compensation, the Constitutional Court confirmed that compensation of EUR 4,000 had put the applicant in the situation she had been prior to the expropriation, and thus it had to be considered fair compensation. It also noted that the applicant had not submitted any proof that the land could have obtained a higher value due to the demand for building in the area, save for the parliamentary debates which could not serve as proof of the real potential of the area. While it was true that before the enactment of the BDAA it was in the Minister's discretion to allow the development of any land, there was nevertheless a clear line between what was developable land or agricultural land. In the present the case, before the expropriation, the land had been agricultural (a matter not disputed by the applicant) and had had no other potential. Indeed, while the applicant could have applied to the Minister to obtain building permission prior to the BDAA, she had had no guarantee that she would have obtained such permit. Thus, its only potential arose consequent to the expropriation.

22. The fact that the land at issue had gained value over the years in favour of third parties did not in itself breach the applicant's property rights, once she had obtained fair compensation. Further, in the Constitutional Court's view, no third party would have purchased that land at a higher price without a guarantee that they could have developed it.

23. While the applicant had also argued that the award, she had received, had become meaningless given that thirty years had passed since the expropriation, that delay had been related to issues which were not the subject of these proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

24. Prior to the BDAA it was entirely within the competent Minister's discretion whether to grant a building permit to an individual, as per Article 16(1) of the Code of Police Laws in force at that time.

25. With the institution of the BDAA it became possible to build only in areas which Parliament by resolution identified as Building Development Areas, and all prior regulatory projects were repealed. The relevant provisions of the BDAA, which was repealed in 1988, read as follows:

Section 3

“(1) The Minister may from time to time declare any land in Malta to be a Building Development Area and shall define such land in such manner as he may deem fit.

(2) Before making such declaration the Minister shall prepare a project which shall include such plans and such descriptive matter as may be necessary to show all the land that he intends to include in a Building Development Area.

(3) As soon as may be after the preparation of the Project a copy thereof shall be deposited in the Office of the Department of Works and shall be open for public inspection during normal office hours of the Department for a period of at least six weeks, and the Director of Works shall cause a notice to be published in the Gazette and in at least two local daily newspapers, indicating the days and hours on and during which the Project shall be open to public inspection.

(4) No land considered to be a building site in accordance with section 4 of this Act or section 17 of the [Land Acquisition (Public Purpose)] Ordinance and no land which has not been included in a Project deposited in the Department of Works in accordance with the provisions of subsection (3) of this section and open for public inspection for the period therein indicated, shall be included in a Building Development Area.

(5) Where any land has been declared to be a Building Development Area as is provided in subsection (1) of this section and the Minister has prepared a project in accordance with the provisions of subsection (2) of this section, and the procedure laid down in subsection (3) of this section has been followed and the period therein indicated has elapsed, the Minister shall cause the declaration to be placed before the House for consideration by it.”

Section 4

“(1) Land shall be deemed to be a building site for the purpose of this Act if it has a frontage on an existing street and is situated within a built-up area or, subject to paragraph 2 of this section within a distance of not more than 100 yards (91.44 metres) of a built-up area, measured along the axis of the street.

(2) In determining whether land is a building site by reason of the fact that it is situated within a distance of not more than 100 yards (91.44 metres) of a built-up area regard shall be had to the probable immediate expansion of the built -up area in the direction of the land in question.”

Section 5

“(1) Saving the provisions of section 7 and 8 of this Act, with effect from the date of the publication of the resolution referred to in section 3 of this Act, all land within a Building Development Area shall, by virtue of this Act and without the necessity of any other formality required by law be deemed for all intents and purposes of this, and of any other law, to be land acquired for a public purpose by absolute purchase in full ownership, free and unencumbered from any charge, hypothec or privilege under the provisions of the [Land Acquisition (Public Purpose)] Ordinance, and there-upon all the provisions of the Ordinance which are not incompatible with this Act shall continue to apply to such land in the same manner and under the same conditions as if the land had been acquired for a public purpose by absolute purchase under the Ordinance.

(...)

(3) Any person having a right over or an interest in the land to which this section applies, shall be entitled to have access to the Land Arbitration Board and to the Civil Court First Hall for the purpose of determining his right over or interest in such land, the amount of any compensation to which he may be entitled and for the purpose of obtaining payment of that compensation; and all the provisions of law relating to proceedings before the Land Arbitration Board and the Civil Court First Hall in matters of acquisition of land for a public purpose shall, *mutatis mutandis*, apply to proceedings taken by such person before the Land Arbitration Board or the Civil Court First Hall under this Act, as the case may be; and the said Land Arbitration Board and the Civil Court First Hall shall be vested with jurisdiction in such matters:

Provided that a right of appeal to the Court of Appeal from any decision of the Land Arbitration Board and the Civil Court First Hall shall vest in such person; and all the provisions of law relating to proceedings for appeals from decisions of the Civil Court First Hall, shall apply to proceedings taken by such person in an appeal under this Act and the said Court of Appeal shall be vested with jurisdiction in such matters.”

Section 6

“Any land shall be valued for the purpose of determining the compensation payable in accordance with section 5 of this Act as rural land or wasteland.”

Section 7

“(1) Notwithstanding any other provision of this Act where a person having a right over or an interest in any land included in a Project referred to in section 3 of this Act, proves by documentary evidence that such land had been acquired *bona fide* by him prior to the fourteenth day of February, 1983, at a price higher than the compensation otherwise payable in accordance with the [Land Acquisition (Public Purpose)]

MARIA AZZOPARDI v. MALTA JUDGMENT

Ordinance, the Minister shall cause such documentary evidence to be placed before the House together with the declaration referred to in section 3 for consideration by it, and the House may in the resolution adopting or approving such declaration either:

(a) include such land within the Building Development Area, in which case such higher price shall be payable as compensation to such person; or

(b) include such land with the Building Development Area and declare that the provisions of section 5 of this Act shall not apply to it;

or (c) exclude such land from the Building Development Area.

(...)”

Section 8

“The provisions of section 5 of this Act shall not apply to:

(a) an existing building (other than a building occupying land of an area of less than eighteen square metres) whether complete or in the process of construction if, in the latter case, a permit for its construction is on the date of the declaration of the land as a Building Development Area, still in force in accordance with the provisions of any regulations made under the Code; or

(b) land in relation to which a permit for the construction of a building is still in force, on the date of the declaration of the land as a Building Development Area, in accordance with the provisions of any regulations made under the Code; or

(c) land in use as a quarry.”

Section 9

“As soon as may be after the publication of the resolution of the House referred to in subsection 7 of section 3 of this Act and in any case not later than three months from such publication, the Commissioner shall cause to be registered at the Land Registry, the acquisition of such land by the Government, and for all purposes of the Land Registration Act, 1981, all land comprised in a Building Development Area shall be deemed to be an area declared as a registration area.”

Section 10

“As soon as may be after the publication of the resolution of the House referred to in subsection (7) of section 3 of this Act, the Commissioner shall file a copy of such resolution (together with particulars sufficient for the purpose of identifying the land) in the Registry of the Land Arbitration Board, and shall cause a copy thereof to be served through such Board in the manner prescribed by the Code of Organisation and Civil Procedure on every person, having a right over or an interest in the land to which the resolution refers, of whose existence and identity the Commissioner is aware.”

Section 12

“(1) Where the Minister by order published in the Gazette declares that land acquired by the Government under the provisions of section 5 of this Act shall be disposed of for development such disposal shall be made either in favour of the Housing Authority as is provided in the Housing Authority Act, 1976, or shall be made by sale and in the manner provided for in the Disposal of Government Land Act, 1976, and such disposal shall not be made unless in respect of such land a Building Development Plan has been

made by the Minister and such Building Development Plan has been approved by resolution of the House:

Provided that subsection (2) of section 3 of the Disposal of Government Land Act, 1976 shall not apply to a resolution approving a policy applicable to land referred to in this section:

Provided further that as far as may be, in any policy made in accordance with the Disposal of Government Land Act 1976 providing for the disposal of such land, provision shall be made that in any sale made in pursuance of this section, preference shall be given to the owners of the land immediately prior to its declaration as a Building Development Area, for the acquisition of a plot of land on which to build a dwelling house to be occupied by such owner.

(...)

(3) The price for which land in a Building Development Area shall be sold in accordance with subsection (1) of this section shall be fixed by the Minister; however as far as may be the price shall be fixed by the equitable apportionment of the cost of the acquisition of the land in the Building Development Area to which shall be added any compensation payable to the tenants thereof, increased by eight per centum for every year or part thereof during which such land is retained by Government, between the various plots offered for sale as aforesaid.

(4) For the purposes of this section, "owner" in relation to land held in emphyteusis or sub-emphyteusis means the person holding the utile dominium or sub-utile dominium of such land and includes any person deriving title from the owner *causa mortis*."

Section 13

"Notwithstanding the grant of any permit or authority under any other law, with effect from the coming into force of this Act, no person may erect a new building on any land in Malta which is not declared to be a Building Development Area in accordance with section 3 of this Act."

Section 19

"All planning schemes made in accordance with the Code before the coming into force of this Act are revoked. (...)"

26. Section 14 of the Act enlisted a number of situations where the Minister, acting in accordance with a policy approved by a resolution of the House of Representatives could authorise the erection of buildings outside the Building Development Area.

27. In so far as relevant Section 27 (1) of the Ordinance, Chapter 88 of the Laws of Malta, reads as follows:

"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 (...)"

II. DOMESTIC PRACTICE

A. Ġuża Debono et vs the Onor. Prime Minister et

28. The first-instance judgment of the Civil Court (First Hall) in its constitutional competence of 7 May 1990 found that, while the expropriation was in the public interest, the criteria established by the BDAA for awarding compensation were in breach of owners' property rights, in so far as they did not take into consideration that the property had been expropriated for the purposes of development, as opposed to use as agricultural land or environmental conservation. They thus denied the expropriated owners the real value of their land. However, by a judgment of 13 April 1992 the Constitutional Court, on appeal, overturned the first-instance judgment considering that the claims were premature given that the claimant had not yet instituted proceedings before the LAB. The first-instance judgment was therefore revoked.

B. Joseph Bartolo vs the Onor. Prime Minister

29. The claimant had instituted constitutional redress proceedings arguing that the amount awarded by the LAB for the taking of his land under the BDAA did not constitute adequate compensation since the land had been valued as rural or waste land while it had been used for building purposes. The claimant had been awarded approximately EUR 11,000 in accordance with Section 7 of the BDDA which stated that where the land had been acquired *bona fide* prior to 14 February 1983, at a price higher than the value of the land, the compensation payable was to be determined according to such higher price.

30. On 28 June 2007 the Civil Court (First Hall) in its constitutional competence dismissed the claim holding that, at the time of expropriation, the land was not a building site and would not have fetched a higher amount on the market than the price at which it was acquired. While it was true that the land gained value as a result of the BDAA, the claimant had no right to a "windfall" profit, but only a right to compensation for the value it had prior to the taking, which was in fact awarded to him.

31. On appeal, by a judgment of 27 February 2009, the Constitutional Court confirmed the first-instance judgment. It held that the law provided clear, objective and just criteria for the assessment of compensation creating a fair balance of proportionality vis-à-vis owners of property expropriated in the public interest. The public interest behind such measure had not been

contested by the claimant. It further noted that the claimant's land would have remained rural land had it not been for the act which expropriated it, it therefore had no potential. Moreover, the sum awarded for the land was equal to that which he had paid for it including an extra building notwithstanding that the latter had not been expropriated.

C. Emanuel Borg vs the Attorney General and the Lands Commissioner (today Lands Authority)

32. In similar circumstances, by a judgment of 23 November 2017, confirmed on appeal on 13 July 2018 by the Constitutional Court, the claimant's complaints under Article 1 of Protocol No.1, were rejected on the lines of the Bartolo judgment mentioned above. The courts noted that while (unlike in Bartolo) Section 7 did not apply in the claimant's case (which was to be considered under Section 6 of the BDAA), he nonetheless could not make a windfall profit from the expropriation. It confirmed that the potential of land had to have a bearing in calculating compensation. However, it considered that the "potential" had to be considered as stood before the measure complained of, not after. Section 27 (1) (b) of the [Land Acquisition (Public Purpose)] Ordinance provided that future potential must be taken into account and indeed that provision could establish just compensation, thus neither domestic law, nor the expropriation at issue were in violation of Article 1 of Protocol No. 1. It noted that the claimant had also failed to prove the value of the land in 1983 so to show that it had not been equivalent to that awarded to him by the LAB (EUR 2,376).

THE LAW

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

33. The applicant complained under Article 1 of Protocol No. 1 that the compensation liquidated by the domestic courts for the taking of her land, according to law, was not commensurate to its value. The law had therefore failed to ensure a fair balance in the circumstances. The provision 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

34. The Court notes that the application 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 parties' submissions

(a) The applicant

35. The applicant considered that the parliamentary debates leading to the adoption of the BDAA had shed light on how the BDAA had been intended to operate as well as on its general effect. She considered that the Government's intention at the time had been to stop private speculation in the property market. Developers had been buying land and building it up, then selling the property to private individuals as residential homes. By means of the BDAA, the Government had acquired the land itself and sold it to the end user; the latter however had acquired the land from the Government at prices based on the agricultural value of the land, whereas he or she would have bought the same plot from the developer at market values based on the prices which building land would fetch. According to the applicant, it was evident from the parliamentary debates that with or without the BDAA the affected lands would have been developed in any case. The only difference was that instead of the transaction taking place through the private sector it had been the Government who ran the deal through.

36. In her view, the debates also showed that there had been a demand for more houses and that Building Development Areas would only be announced where there was a demand for building. In this connection, she noted that her land had been located in an area which had been cited specifically in the debates as being a location where there had been a very high demand for development.

37. The applicant submitted that the domestic courts had failed to consider the vast reach of the BDAA and its real import (she pointed to its Section 13 and 14, see paragraph 25 above). In her view, the domestic court's reasoning had been flawed because when reading the BDAA as a whole it was evident that it had not captured only land which would otherwise have been incapable of development. The BDAA had abolished all building schemes and the nature of the land before the BDAA became largely irrelevant unless it was already built upon. At the same time, it had laid down a new definition of 'building site', which had not coincided with the previous situation – where anyone could have applied for a building permit which could be issued by the Minister. Thus, the fact that the BDAA had provided that building sites were excluded from Building Development Areas had not guaranteed that land which previously could have had real potential for development would not

end up within a Building Development Area. It was thus flawed to use the new definition to assess whether the compensation rules laid down by the BDAA were fair. Further, the Government's arguments concerning the definition of building site in Section 4 of the BDAA were irrelevant as despite that definition, the parliamentary debates made it clear that BDAA was aimed to capture land where development was imminent.

38. As to the law, the applicant submitted that the BDAA had failed to take into account the scope behind the expropriation and therefore to maintain the requisite balance between the demands of the general interest and the individual burden placed on the expropriated owner. She considered that it was unfair that land had been expropriated specifically in order to be developed but that the compensation offered had been based on agricultural values. She distinguished the situation from one where Government would take virgin land for the formation of roads, or for the execution of some national project. Rather, the land at issue had been taken from one private individual to be given to another private individual at a beneficial price.

39. As a result, she questioned the public interest behind the measure, because there had been no social considerations behind it and it had not been intended to cater for the needs of people in the lower economic strata of society. In fact, anyone could apply to purchase a plot from the Government, without having to meet any requirements for eligibility related to their financial situation (as shown by the criteria referred to by the Government, see paragraph 44 below). As also acknowledged by the Government, not only could people choose the plot but, if more than one person chose the same plot, lots would be drawn to decide who would get it, and no social considerations related to the need of these parties would come to play. Nor could it be said that the BDAA was intended to bring about fairness in land dealings across the country because it did just the opposite. Indeed, prices of already built-up land remained the same, but persons acquiring property falling under the BDAA, for development, paid prices based on agricultural designations. The latter could then resell it constructed at market prices at a profit. In this connection, she noted that there had been no restrictions on the resale of the property, i.e. anyone acquiring the plot at the cheap prices of agricultural land could then re-sell it at the market rates of residential areas. Thus, while the Government claimed that the aim of the law was to avoid speculation it nonetheless left the door open for the purchasers to make profits to the detriment of the expropriated owner, who was the only person suffering at the hands of the new system. In this connection she also noted that the Government had provided a safety mechanism [Section 7] only for persons who had just purchased property, which was caught up in a Building Development Area, but not for those who owned it for much longer.

40. The applicant considered that the absence of an aim which was in the public interest should also have had a bearing on the award of compensation for the expropriation.

41. In conclusion, in the applicant's view, the legal presumption that had been created by the BDAA (as to the agricultural designation of the land) had not reflected the reality of the situation and it had labelled property without giving any regard to its individual characteristics. Relying on the Court's case-law, she submitted that presumptions that were too inflexible and which did not take into account the realities of diverse situations were in themselves odious and not conducive to the determination of fair compensation. In the present case, the criteria laid down in the BDAA for establishing the compensation due had been inadequate to establish a fair compensation as they had failed to include 'all the relevant factors' for establishing such compensation and the national authorities had thus 'failed to strike a fair balance between the interests involved'. This was evident on the facts of the case where the applicant was paid EUR 4,000 for land which today hosts twenty-five privately owned residential homes, while according to her *ex parte* expert, had it been estimated in light of its development potential it would have been valued at EUR 163,000. Lastly, the applicant relied on the domestic court's reasoning in the case of *Ġuża Debono* (see paragraph 28 above).

(b) The Government

42. The Government submitted that the applicant had been deprived of her possessions lawfully and in line with a procedure prescribed by law (Sections 3, 5, 9 and 10 of the BDAA). Contrary to that alleged by the applicant, Section 6 of the BDAA did not create a legal presumption but was rather a natural consequence of the law itself and had to be read and understood within the context of the entire Act. In particular Section 3(4) of the BDAA had provided that no land which was deemed to be a building site could be included in a Building Development Area (and the definition of building site took account of the probable immediate expansion of a built-up area (Section 4)) and Section 8 explicitly excluded existing buildings or land on which a permit had already been issued. Thus, only rural or waste land could be the subject of a BDAA declaration. As a result, compensation had to be made on the basis of that designation, as no other type of land could be expropriated by this means.

43. The primary purpose of the law was to empower the Government, with the oversight of the House of Representatives, to expropriate land which could then be redistributed to persons who wished to establish their residential home on a plot within that land. As shown by the parliamentary debates, the law had been intended to curb harmful property speculation in order to ensure that persons in all strata of society were in a position to purchase land at a reasonable price in order to build and live in their own home. In that light, the Government's choice of intervening legislatively had not exceeded its wide margin of appreciation in implementing social and economic policies, as well as town planning policies, and, in line with its

case-law, the Court should respect the legislature's judgment unless it was found to be manifestly unreasonable.

44. In relation to who could benefit of this scheme and under what conditions, the Government submitted that any person wishing to purchase a plot of land for this purpose could apply, provided that such person was eighteen years of age; a citizen of Malta; a permanent resident of Malta; and had not previously applied and been allocated another plot of land by the Government. Applicants could only file one application in a locality. If a particular plot received interest from more than one applicant, the person to whom such plot would be sold would be chosen by lot. The previous owner of the land had preference over all other applicants. Once an applicant was selected, he or she would have been required to deposit 50 Maltese Lira (MTL) (approximately EUR 115) within two weeks and would subsequently be required to appear on and sign a final deed of transfer. The purchase price was determined in accordance with Article 12(3) of the BDAA. All costs and expenses relative to the deed of transfer were payable by the buyer.

45. As part of the conditions of the sale, the buyer would have been required to apply, within no later than two months from the date of the deed of transfer, for permission to develop the plot of land into a residential home. The buyer would also have been required to begin works of construction, duly covered by a permit, within no later than six months from the date of the deed of transfer. Furthermore, within no later than three years from the date of the deed of transfer, the buyer would have had to show that he had carried out construction works worth no less than MTL 4,000 (approximately EUR 9,317). If a buyer failed to carry out such construction works within the said time-limit, he or she would have been fined weekly, while he or she remained in default. The buyer would have also been required to contribute to the costs of the construction of roads and the costs relative to the establishment and provision of water, electricity and other basic services to the residential homes.

46. The Government submitted, that even if the lots had not been reserved for the neediest sectors of society it did not mean that the measure did not pursue public interest motivations. Indeed, property speculation has the effect of creating greater disparities between the rich and the poor, allowing for the centralisation of land and property in the hands of the few at the expense of the majority. The Government was concerned by that property speculation, at the time, and had acted to avoid the negative effects that such speculation could have had on society as a whole.

47. In the applicant's case the measure had been proportionate. The Government submitted that prior to the coming into force of the BDAA, the land at issue in the present case was considered agricultural land at law, and the applicant had not brought any evidence to the contrary. In reality, the applicant had brought no evidence: (1) that her land was legally within a development zone according to planning laws, or (2) that her land was

covered by a permit for development, or (3) that she had submitted a planning development application, or (4) that she had any intention of developing the land herself, or (5) that she had any intention of selling it to someone who could have developed that land. Indeed, the Constitutional Court had considered that the applicant accepted that the land had been agricultural at the time and found that it had had no potential were it not for the expropriation under the BDAA. The Government considered that, as to the situation prior to the enactment of the BDAA, the applicant had confused a physical possibility to develop the land, with a legal right to so do.

48. To the extent that the applicant argued that she should have been compensated on the basis of the future use of the land, the Government considered that such an approach would be wholly unfair on owners of expropriated land because there would be no clarity and foreseeability as to how land would be valued. It could also lead to incongruous results as would be the case if the Government expropriated developable land to make a green area.

49. In the present case, the applicant had been awarded EUR 4,000 on the basis of the value of the land at the time, as determined by the independent LAB experts, with no deduction in respect of public interest considerations. Thus, she had been adequately compensated. In this connection the Government also submitted an *ex parte* report which had valued the property at EUR 2,964, therefore in the region of the independent expert's valuation. The Government considered that the selling prices of surrounding property decades later could have no bearing on the compensation which had to be paid at the time of the expropriation.

50. In so far as the applicant referred to other provisions of the BDAA which had no bearing on her situation, the Government submitted that the Court had to concentrate on the present case, and not allow for an *actio popularis*.

51. In any event, they considered that the law had contained a series of guarantees to ensure that the application of the law was not arbitrary. It entrusted the fixing of the compensation due to the applicant to an independent and impartial board, which would determine the value of the property, and the compensation due, through its two independent technical members. Section 7 also created an exception for persons who had purchased the land in good faith before the coming into force of the BDAA and who had paid a higher purchase price than that which would be offered under its Section 6.

2. The Court's assessment

(a) General principles

52. 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).

53. While deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest”, the compulsory transfer of property from one individual to another may, depending on the circumstances, constitute a legitimate means of promoting the public interest (see *James and Others v. the United Kingdom*, 21 February 1986, § 40, Series A no. 98, and *Gauci and Others v. Malta*, no. 57752/16, § 64, 8 October 2019). Moreover, the taking of property effected in pursuance of legitimate social, economic or other policies may be in “in the public interest”, even if the community at large has no direct use or enjoyment of the property taken (ibid.).

54. 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 v. Poland* [GC], no. 31443/96, §§ 182 and 186, ECHR 2004-V).

55. For example, provided always that the aforesaid fair balance is preserved, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property. A decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society

may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one. It would be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to nationalise, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review in such cases is limited to ascertaining whether the decisions regarding compensation fell outside the State's wide margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation (see *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 121-122, Series A no. 102, and *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 52, ECHR 2000-I). Similarly, in an area as complex and difficult as that of the development of the country, the Contracting States should enjoy a wide margin of appreciation in order to implement their planning policy (see *Scagliarini and Others v. Italy* (dec.), no. 56499/07, 3 March 2015). Nevertheless, the Court cannot fail to exercise its power of review and must determine whether the requisite balance was maintained in a manner consonant with an applicant's right of property (see *Abdilla v. Malta* (dec.), no. 38244/03, 3 November 2005, and the case-law cited therein).

56. 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 above principles to the present case

57. The Court notes first and foremost that in the present case the applicant did not complain about the delay in paying her compensation or that the compensation paid had not taken account of the passage of time (see *Abdilla*, cited above, and, *a contrario*, for example, *Scerri v. Malta*, no. 36318/18, § 49, 7 July 2020). Her complaint concerns specifically the fact that compensation was calculated on the basis of the agricultural designation of the land, which she considered had put her at a disadvantage for no specific social purpose.

58. The Court further notes that the applicant has not contested that the deprivation of her possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1, in the form of an expropriation, was in accordance with the law.

59. As to whether there had been any public interest behind the measure the Court observes as follows. Given the explanations by the parties, the

enactment of the BDAA – providing for a *sui generis* form of expropriation, different to that that provided in the Ordinance – can be considered as being, to some extent, comparable to nationalisation procedures and relevant general principles (see paragraph 55 above) apply equally to these circumstances. In this case, the measures taken were in relation to the building development industry at a time when there had been a demand for housing in general and where no proper planning legislation had been in place.

60. Indeed, the applicant did not claim that there had been no public interest behind the measure as such, but solely that it had not pursued a social purpose, in so far as it had not been aimed at providing housing for persons in the lower economic strata of society (see paragraphs 18 and 39 above). However, the Court considers that the notion of public interest is not limited to securing housing for individuals in need of social welfare. In this connection the Court notes that, while the elimination of social injustice in the housing sector (see *James and Others*, cited above, § 45) is clearly in the public interest; the nationalisation of specific industries (see *Lithgow and Others*, cited above, §§ 9 and 109); the adoption of land and city development plans (see *Sporrong and Lönnroth*, cited above, § 69, and *Cooperativa Parco Cuma v. Italy*, 27 February 1992, § 94, Series A no. 231-E); and securing land in connection with the implementation of the local land development plan (see *Skibiński v. Poland*, no. 52589/99, § 86, 14 November 2006), are, *inter alia*, all purposes which have been found by the Court to fall within the notion of public interest within the meaning of the invoked provision. Furthermore, the Court has considered that a subsequent privatisation of the expropriated property does not render the measure devoid of public interest (see, for example, *Frendo Randon and Others v. Malta*, no. 2226/10, § 60, 22 November 2011). Similarly, the fact that the property or part thereof is transferred to a third party does not detract from the public interest given that the State has a wide margin of appreciation when implementing economic policies (see, for example, *Gauci and Others v. Malta*, no. 57752/16, § 65, 8 October 2019). With that in mind, the Court finds that the expropriation of the applicant's land under the BDAA pursued a public interest purpose, namely the provision of residential homes in the context of the State's economic and planning policies. Moreover, as argued by the Government, the State's intervention was intended to curb harmful property speculation (see paragraph 43 above) which the Court does not consider to be unreasonable.

61. As to compensation, the applicant has not argued that she (or rather her mother) purchased the land at a price higher than that which she could have obtained with the applicable compensatory regime, it follows that Section 7 of the BDAA is not at play in her case. What is at issue is whether the payment in line with the property's designation as agricultural land according to Section 6 of the BDAA provided her with adequate compensation for the deprivation of property she had suffered.

62. The Court reiterates that compensation, must normally be calculated based on the value of the property at the date on which ownership thereof was lost (see *Guiso-Gallisay*, cited above, § 103). Such value is intrinsically linked to the categorisation or designation of the nature of the land at that time, and not on the basis of its later designation, attributed to it by State action (see, by implication, *Scerri*, cited above, § 50). Indeed, awarding compensation depending on the nature of the project undertaken by the authorities, something which is not necessarily related to the land's potential, could lead to disparities in treatment of persons (see, *mutatis mutandis*, *Guiso-Gallisay*, cited above, § 103).

63. As to the designation of the property in the present case at the time when it was expropriated, the Court does not find that reliance can be placed solely on the applicant's view that the land had potential for development. Indeed, the Court notes that, land realistically prone for development at the date of its enactment was excluded from the scope of BDAA under its Section 3 (4). However, the applicant's land did not fall under that category. Similarly, land which had already obtained a building permit was also excluded under Section 8 of the BDAA, but again this was not the applicant's case. Further, as noted by the Constitutional Court (see paragraph 21 above) the fact that, before it was expropriated, no specific type of development had yet been determined for the land, did not entail any assurance as to its development (see also, *mutatis mutandis*, *Trimeg v. Malta* (dec.), no. 64792/10, § 28, 27 September 2011). Nor was there any guarantee that the applicant would have been able to sell at prices of developable land, in the absence of such assurance (see paragraph 22 above). Thus, in the Court's view, with reference to the above and the considerations set out by the Government (see paragraph 47 above), the applicant had no concrete legitimate expectation to obtain compensation on the basis of the land being valued as developable. It follows that the legislature's as well as the domestic courts' decisions to consider such land as being agricultural for the purposes of compensation, were not without reasonable foundation (see, *a contrario*, *Z.A.N.T.E. – Marathonisi A.E. v. Greece*, no. 14216/03, § 55, 6 December 2007). The Court finds it pertinent to note, in this connection, that the domestic court's reasoned findings had been consistent on the matter and that the domestic first-instance judgment relied on by the applicant had been revoked by the Constitutional Court as early as 1992 (see paragraph 28 above).

64. Having established the above, the Court notes that the applicant has not complained that EUR 4,000 was not an adequate valuation of the land, as being agricultural, in 1983.

65. The Court also attaches weight to the existence of procedural and other safeguards which ensured that the operation of the system and its impact on the applicant were neither arbitrary nor unforeseeable. It notes that the BDAA provided for certain safeguards in itself (see for example, Section 7

which ensured that expropriated owners, who had paid higher prices for the purchase of their land in good faith, would not incur losses as a result of the expropriation). Of particular relevance, under its Section 12, expropriated owners who wished to live on the expropriated land could have purchased an expropriated plot for their own residence. In the present case, the applicant had not been eligible to such a peremptory right only because she already owned her residence elsewhere. Given that at the time there was a need for residential homes and not for secondary residences, the choice of the legislator to limit this peremptory right to expropriated owners opting to take up their primary residence there, struck a fair balance between the competing interests at play, and ensured that expropriated owners who were also in need of a home could get one. The applicant was not in such a situation.

66. Lastly, while the applicant argued that the “new owners” made profits either by onwards sales, or simply by continuing to own residences which today had a considerable value, the Court notes that those owners purchased the land from the State and proceeded to construct it and maintain it. Conversely, the applicant or, rather, her predecessors at the time, had never shown any interest in developing the land allowing the applicant to make the profits she is now asserting. Moreover, the Court cannot ignore that such argumentation is being put forward with the benefit of hindsight. As the Court has previously stated in the Maltese property context, applicant’s or their ancestors could not, in the 1970s and 80s, have foreseen the extent of inflation in property prices in the decades that followed (see, for example, *Zammit and Attard Cassar v. Malta*, no. 1046/12, § 50, 30 July 2015, and *Cassar v. Malta*, no. 50570/13, § 48, 30 January 2018, concerning decisions taken in 1971 and 1988 respectively). The same considerations can equally apply to the State authorities, and in this connection the Court observes that the BDAA was enacted in 1983 and repealed in 1988.

67. In conclusion, it is certain that the BDAA could have benefited from further safeguards, such as, for example, the application of a means-test on prospective buyers or restrictive conditions for resale to ensure that occasional third-party purchasers did not benefit from windfall profits in the stead of the original owners. However, in the absence of any complaint relating to delayed payment (see paragraph 57 above), the Court has no reason to consider that, as a result of the law and its application, the applicant in the present case – who has received full compensation for the value of her land according to its designation at the time of taking (see, *a contrario*, *Vistiņš and Perepjolkins*, cited above, § 130) – has suffered an excessive burden.

68. Having regard to the foregoing, the Court considers that the respondent State did not go beyond its margin of appreciation and, the impugned measure did not fail to strike a “fair balance” between the applicant’s interests and the general interest of the community at large.

69. It follows that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No.1 to the Convention;

Done in English, and notified in writing on 9 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Registrar

Marko Bošnjak
President