

In the case of Zubani v. Italy¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. Bernhardt, *President*,
Mr F. Matscher,
Mr R. Macdonald,
Mr C. Russo,
Mr A. Spielmann,
Mr N. Valticos,
Sir John Freeland,
Mr A.B. Baka,
Mr U. Lohmus,

and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 23 February and 25 June 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 29 May 1995, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 14025/88) lodged with the Commission under Article 25 by four Italian nationals, Mrs Maddalena, Mrs Letizia, Mrs Angela and Mr Aldo Zubani, on 26 January 1988. The applicants were initially designated as "A.Z. and Others", but they subsequently consented to the disclosure of their identity.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 1 of Protocol No. 1 to the Convention.

Notes by the Registrar

1. The case is numbered 43/1995/549/635. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 31). The lawyer was given leave by the President of the Chamber to use the Italian language (Rule 28 § 3).

3. The Chamber to be constituted included *ex officio* Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 8 June 1995, in the presence of the Registrar, the President of the Court drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr A. Spielmann, Mr N. Valticos, Mr F. Bigi, Sir John Freeland, Mr A.B. Baka and Mr U. Lohmus (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently, Mr F. Matscher, substitute judge, replaced Mr Bigi, who had died (Rule 22 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Italian Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 20 December 1995. The applicants filed their reply on 23 January 1996.

5. On 29 January 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 February 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr G. Raimondi, *magistrato*, on secondment to the
Diplomatic Legal Service, Ministry
of Foreign Affairs,

co-Agent;

(b) *for the Commission*

Mr S. Trechsel,

Delegate;

(c) *for the applicants*

Mr A. Picotti, *avvocato*,

Counsel.

The Court heard addresses by the above-mentioned representatives and their replies to its questions.

AS TO THE FACTS

I. Circumstances of the case

7. The applicants, three sisters and a brother, own a farmhouse and adjoining land, which they use for agricultural purposes.

8. On 21 August 1979, as part of the implementation of the general development plan adopted pursuant to Law no. 167/62, the Municipality of Brescia ("the Municipality") issued an order, under an expedited procedure, for the possession of the applicants' land, which was located in a zone intended for the construction of low-cost and social housing ("*edilizia economica e popolare*").

9. On 16 July 1980 the Municipality took physical possession of the land, aided by the police. On 6 October 1981 the Lombardy Regional Council issued an expropriation order.

10. From the outset the applicants challenged the lawfulness of the measures taken by the authorities; they brought several actions in the administrative courts and in the ordinary civil courts.

A. Action for possession in the ordinary civil courts

11. On 1 October 1980 they applied to the Brescia Magistrate's Court (*pretore*) seeking the restitution of their land on the ground that the order for possession under the expedited procedure of 21 August 1979 had been executed after the expiry of the statutory time-limit (three months).

By an interim decision of 10 January 1981, the Magistrate's Court found for the applicants. The Municipality did not comply with the decision.

On 16 March 1983 the Magistrate's Court reversed its earlier interim decision because in the meantime the expropriation order of 6 October 1981 (see paragraph 9 above) had legalised the occupation of the land. It ruled nevertheless that the taking of possession of the land on 16 July 1980 had been unlawful and amounted to an act of theft. It ordered the Municipality to pay compensation for the damage sustained by the applicants on this account.

12. The Municipality contested its liability to pay compensation and, on 13 June 1983, appealed to the Brescia District Court, which, on 18 December 1985, upheld the impugned decision. The text of the judgment was deposited in the registry on 13 June 1986.

13. In the meantime, on 16 April 1981, the two cooperatives responsible for carrying out the building work (see paragraph 18 below) had brought an action against the applicants seeking compensation for the damage deriving from the delay to the property development scheme caused by the proceedings brought by the applicants.

B. Proceedings on the merits in the administrative courts

14. By a writ served on 12 November 1979, the applicants instituted proceedings in the Lombardy Regional Administrative Court ("the RAC") seeking judicial review of the expedited order for possession of 21 August 1979.

On 22 July 1980 they filed a new action contesting the occupation of the land and on 6 January 1982, in the same court, they challenged the expropriation order of 6 October 1981.

15. Following the joinder of these different proceedings, the RAC quashed, on 15 June 1984, the various administrative measures - including the expropriation order -, but found that it lacked jurisdiction to rule on the lawfulness of the taking of possession of the applicants' land on 16 July 1980; it took the view that this question was a matter for the ordinary courts. The text of its decision was deposited in the registry on 30 July 1984.

16. The Municipality appealed to the *Consiglio di Stato*, which, in a judgment of 21 November 1985, deposited in the registry on 17 January 1986, upheld the RAC's decision.

C. Enforcement proceedings

1. In the administrative courts

17. As the Municipality failed to comply with the latter decision, the applicants instituted proceedings in the *Consiglio di Stato*.

18. On 10 June 1986 the *Consiglio di Stato* found that it lacked jurisdiction and remitted the case to the Lombardy RAC.

On 16 July 1986 the applicants applied to the RAC, which, on 24 October 1986, found partly in their favour, holding in substance that the annulment by the *Consiglio di Stato* of the contested expropriation measures had the effect of imposing a duty on the Municipality to return immediately the part of the land that it had occupied on which no buildings had been erected, namely 12,000 square metres. It accordingly ordered that the land in question be returned

to the applicants within thirty days. In respect of the remaining parcels of land, on which residential accommodation had been built in the meantime, the RAC held that it had no jurisdiction to order enforcement, because even before the annulment of the expropriation, the Municipality had transferred the land in question to two building cooperatives. As a result physical possession of the property had passed to the members of the two cooperatives. As the latter were private citizens, neither the Municipality nor the RAC was empowered to make any order whatsoever in regard to enforcement. It referred the applicants to the ordinary courts.

This decision was deposited in the registry on 31 October 1986; it was not complied with.

2. In the ordinary courts

19. On 29 July 1986 the applicants served notice on the Municipality calling on it to comply with the decision of the Lombardy RAC of 15 June 1984, upheld by the *Consiglio di Stato* on 21 November 1985.

20. By a writ served on 5 August 1986, the Municipality brought proceedings against the applicants in the Brescia District Court seeking a declaration that the applicants' notice to comply was invalid or inoperative because the judgment in question did not constitute a proper basis for initiating enforcement proceedings.

The applicants filed a cross-action seeking, in addition to the restitution of their land, an order from the District Court for the demolition of the buildings constructed on part of it and the erection of a fence. They also claimed compensation for the damage sustained.

21. At the hearing on 26 March 1987 judgment was reserved. On 2 April 1987 the District Court declared the notice served on the Municipality invalid on the ground that although the RAC judgment had quashed the measures adopted in connection with the expropriation, it was not automatically enforceable. At the same time the court partly allowed the applicants' cross-action in so far as it related to compensation for damage and the restitution of the land.

22. By a writ served on 12 June 1987, the Municipality appealed.

On 19 October 1988 judgment was reserved. On 9 November 1988 the Brescia Court of Appeal partly set aside the impugned decision pursuant to Law no. 458 of 27 October 1988 ("the 1988 Law" - the so-called "*Legge Zubani*"). This law, which came into force on 3 November 1988, gave legislative force to a principle laid down by the Court of Cassation (in plenary session) in its judgment no. 1464 of 16 February 1983, namely that property on which public work had been carried out making it impossible to restore it to its owner was to be the subject of compulsory transfer to the public authorities. In such circumstances the person concerned was entitled to full compensation.

Thus the appeal court dismissed the applicants' claim for the restitution of the land. However, it confirmed their right to compensation for the damage sustained. The text of its judgment was deposited in the registry on 15 November 1988.

23. At a date that has not been specified, the applicants appealed on points of law, challenging, among other things, the retrospective application of the 1988 Law. On 18 September 1989 the Court of Cassation adjourned the hearing to a later date.

24. In a judgment of 6 November 1989, deposited in the registry on 3 April 1990, the Court of Cassation dismissed the appeal on the ground that the appeal court had correctly applied the 1988 Law in the case before it because the applicants had not yet obtained a final decision ordering the Municipality to return the land which had been built on.

25. In addition, on 15 November 1989, in connection with the proceedings instituted by the cooperatives in 1981 (see paragraph 13 above) the Brescia District Court raised, on the applicants' motion, an objection based on the unconstitutional nature of section 3 of the 1988 Law. This objection was dismissed by the Constitutional Court on 12 July 1990 (judgment no. 384 - see paragraph 35 below).

On 28 November the District Court dismissed the plaintiffs' claims and held that the Municipality should compensate the applicants for the damage sustained, but that this issue should be the subject of separate proceedings.

26. On 4 and 5 March 1993 the applicants issued a writ against the cooperatives and the Municipality in the District Court for a decision fixing the amount to be reimbursed to them.

27. On 26 April 1995 the District Court, finding that the Municipality alone was liable for the occupation and the resulting damage, awarded the applicants 599,605,830 Italian lire less the 100,000,000 lire (reassessed at 139,650,600 to take account of monetary depreciation) paid by the defendant as an advance in 1988. They were also awarded 22,300,000 lire for lawyers' fees and expenses. The judgment was deposited in the registry on 2 August 1995. It was declared enforceable on 11 October and was served on the Municipality on 13 October.

28. On 29 September 1995 the Brescia Municipal Council decided that the sums in question should be paid to the applicants. The first sum plus statutory interest up to the probable date of payment (31 October 1995) totalled 1,015,255,000 lire.

29. On 20 October 1995 the applicants served a notice to comply on the Municipality, which, on the following 29 November paid them 751,164,000 lire.

30. On 17 January 1996, they issued a writ under Article 543 of the Code of Civil Procedure requiring the Municipality and its bank to appear on 26 March 1996 before the enforcement judge so that he could order the attachment of funds belonging to the Municipality with a view to securing payment of the outstanding amount. On 18 January 1996 a bailiff attached 250,000,000 lire.

II. Relevant domestic law

A. Legislative provisions

31. Section 20, paragraph 1, of Law no. 865 of 22 October 1971 provides:

"The occupation of land under the expedited procedure with a view to its expropriation shall be authorised by the Prefect. Such an order shall lapse if possession of the land is not taken within three months of the date on which it was issued."

32. Section 3 of Law no. 458 of 27 October 1988 states:

"Any person who owns land which is used for the construction of public buildings or social housing shall be entitled to compensation for damage sustained where the expropriation has been declared unlawful by a court decision which has become final, but such person may not claim restitution of his property.

Further, such a person is entitled, in addition to compensation for damage, to sums payable in respect of monetary depreciation and to any other sums mentioned in Article 1224 § 2 of the Civil Code, such amounts being calculated from the date of the unlawful taking of possession."

33. Article 1224 § 2 of the Civil Code provides:

"Any creditor who establishes that he has suffered greater loss is entitled to be compensated therefor. There is no such entitlement in cases where it has been agreed that interest would be paid in case of delay."

34. Article 543 of the Code of Civil Procedure is worded as follows:

"The attachment of a debtor's funds held by third parties ... shall be effected by a writ served in person on the third party and the debtor ..."

B. Case-law

35. Interpreting section 3 of the 1988 Law, the Constitutional Court held in its judgment (no. 384) of 12 July 1990:

"In the impugned provision, the legislature has given preference, as between the owner's interest in obtaining restitution of his unlawfully-expropriated land, and the public interest - in this case the allocation of such land for building public, low cost or subsidised housing - to this latter interest."

PROCEEDINGS BEFORE THE COMMISSION

36. The applicants applied to the Commission on 26 January 1988. Relying on Articles 6 § 1 and 8 of the Convention, and Article 1 of Protocol No. 1, they complained of the following: (1) the length of the proceedings in the ordinary civil and administrative courts; (2) violation of their right to respect for their home; and (3) violation of their right to the peaceful enjoyment of their possessions.

37. On 6 December 1993 the Commission declared the application (no. 14025/88) admissible as regards the third complaint and inadmissible for the rest. In its report of 21 February 1995 (Article 31), it expressed the unanimous opinion that there had been a violation of Article 1 of Protocol No. 1. The full text of the Commission's opinion is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

38. In their memorial the Government, by way of primary submission, asked the Court to dismiss the complaint for failure to comply with the six-month time-limit or failure to exhaust domestic remedies (Article 26 of the Convention). In the alternative, they requested the Court to find that there had been no violation of Article 1 of Protocol No. 1.

1. *Note by the Registrar.* For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* - 1996), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The lateness of the application

39. The Government contended primarily that by introducing their application on 26 February 1988, the applicants had failed to comply with the six-month time-limit laid down in Article 26 of the Convention. The transfer of the ownership of the land in question had occurred not on the entry into force of the 1988 Law (see paragraph 22 above), but in 1981, when the cooperatives had erected the buildings. The Government cited the Court of Cassation's judgment no. 1464 of 26 February 1983 (*Il Foro italiano*, 1983, I, col. 626), according to which, even if an expropriation was unlawful, ownership passed to the public authorities where the land "had been transformed in such a way as to establish irreversibly its character as public [interest] property".

40. The Court notes in the first place that the Zubanis' application to the Commission was lodged before the entry into force of the 1988 Law.

It then observes that, as was pointed out by the Delegate of the Commission and counsel for the applicants, the case-law cited by the Government, however important it may be, refers solely to expropriation and not to the expedited procedure for taking possession. In addition it cannot be regarded as constituting binding precedent and indeed on 2 April 1987 the Brescia District Court ordered the immediate restitution of the land.

The objection must therefore be dismissed as unfounded.

B. Failure to exhaust domestic remedies

41. In the alternative, the Government argued that the domestic remedies had not been exhausted inasmuch as the Zubanis had still not applied to the civil courts for the compensation provided for in the relevant Law.

42. According to the Commission, the applicants were under a duty to exhaust only remedies that were effective and in this instance the length of the proceedings deprived the avenue indicated by the Government of its effectiveness.

43. The Court notes that on 28 November 1991, in the proceedings brought by the cooperatives against the applicants, the latter obtained a ruling ordering the Municipality to pay compensation for the damage sustained (see paragraph 25 above). Subsequently, the Zubanis applied to the District Court, on 4 and 5 March 1993, nine months before the Commission's decision on the admissibility of the application (6 December 1993), and on 26 April 1995 the District Court fixed the sum to which they were entitled by way of compensation (see paragraphs 26 and 27 above). In short, the applicants did exhaust their domestic remedies and the objection must accordingly be dismissed.

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

44. The applicants complained that their right to peaceful enjoyment of their possessions had been breached by the authorities' unlawful occupation of their land. They relied on Article 1 of Protocol No. 1, which provides:

"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."

45. The Court observes that in the view of both the Government and the Commission the interference in issue was a deprivation of property within the meaning of the second sentence of Article 1, was provided for in section 3 of the 1988 Law (see paragraph 32 above) and pursued a public-interest aim, namely the construction of housing for a category of disadvantaged persons.

46. The only outstanding issue is therefore whether a fair balance was struck between the demands of the general interest of the community and the requirements of the individual's fundamental rights (see, among other authorities, the *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, p. 26, § 69).

47. The Government maintained that, in enacting the 1988 Law, the Italian legislature had struck an appropriate balance between the relevant interests by making the provision that the "victims" of unlawful expropriation should be entitled to full compensation. Indeed the applicants' objection that section 3 of the Law was unconstitutional had been dismissed on 12 July 1990 on that ground (see paragraphs 25 and 35 above). The Commission's argument that the authorities would be encouraged to commit abuses if they knew in advance that any unlawful act would be legalised retrospectively was based on a rather superficial understanding of the expropriation procedures. An official responsible for an unlawful administrative act could be called upon to reimburse the State for the damage that his conduct had caused.

The Government also drew attention to the size of the amount awarded to the applicants in relation to the total surface occupied by the buildings erected by the cooperatives (1,015,255,000 lire for only 8,670 square metres). Moreover, the applicants had not claimed compensation for the loss of their land until May 1993.

In conclusion, the Government submitted that the Italian State had not overstepped the margin of appreciation left to it under the second paragraph of Article 1 of Protocol No. 1.

48. The applicants complained of the theft of which they had been the victims on 16 July 1980 and the Municipality's refusal to comply with the decisions of the administrative and the civil courts ordering it either to return the disputed land or to pay compensation. They also criticised the

Municipality's attempt to apply to the dispute between them, a dispute that had lasted more than sixteen years, Law no. 549 of 28 December 1995 ("the 1995 Law"), which authorised a 40% reduction of the compensation awarded for unlawful expropriations. The legislature's action in this respect was in blatant conflict with the spirit of the 1988 Law and the interpretation of section 3 given by the Constitutional Court in 1990.

49. The Court shares the view of the Delegate of the Commission that the legislature might reasonably choose to give preference to the interests of the community in cases of unlawful expropriation or occupation of land. Full compensation for the damage sustained by the proprietors concerned constitutes sufficient reparation as the authorities are required to pay an additional sum corresponding to monetary depreciation since the day of the unlawful action. Nevertheless the Law in question did not enter into force until 1988, when the litigation concerning the applicants' property had already lasted eight years (see paragraph 11 above) and although the Municipality had initially, on 29 September 1995, agreed to pay to the persons concerned the sums awarded by the Brescia District Court, it now appears reluctant to pay the whole amount. Furthermore, and even though this is not a circumstance that is directly material, the minutes of the session of Brescia Municipal Council held on that date indicate that the proposal to ask the Audit Court to determine the administrative responsibility for the loss incurred for the municipal budget was rejected by twenty-four votes to six, with one abstention.

As regards finally the remaining argument of the respondent Government, the Court considers that the size of the sum awarded by the Brescia District Court cannot be decisive in this case in view of the length of the proceedings instituted by the Zubanis.

The Court confines itself to noting that, although the sum of 1,015,255,000 lire may appear enormous in relation to the surface area actually occupied by the buildings, an additional factor to be borne in mind was that a new road was laid through the applicant's property -21,960 square metres which they used to raise livestock - and this rendered access to the plots returned to them difficult.

50. Having regard to all these considerations, the Court finds that a "fair balance" between protecting the right of property and "the demands of the general interest" has not been struck. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

51. Under Article 50 of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

52. The applicants claimed several thousand million Italian lire for the damage sustained and for their lawyers' fees and expenses. They maintained that it was impossible for them to recover possession of their property and complained of the attempts by the Municipality to use Law no. 549 (see paragraph 48 above) to evade full payment of the sums awarded by the Brescia District Court on 26 April 1995 (see paragraph 30 above).

53. As regards the pecuniary and non-pecuniary damage and the costs and expenses incurred in the domestic courts and before the Convention institutions, the Court considers, like the Delegate of the Commission, that the question of the application of Article 50 of the Convention is not ready for decision, as the participants in the proceedings have not provided accurate information in this respect.

Accordingly, it is necessary to reserve the question and to fix the further procedure, due regard being had to the possibility of an agreement between the respondent State and the applicants (Rule 56 §§ 1 and 4 of Rules of Court B).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds* that the question of the application of Article 50 of the Convention in respect of pecuniary and non-pecuniary damage and the costs and expenses incurred in the national courts and before the Convention institutions is not ready for decision; and

consequently,

(a) *reserves* the said question;

(b) *invites* the Government and the applicants to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;

(c) *reserves* the further procedure and *delegates* to the President the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 August 1996.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar