



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

THIRD SECTION

**CASE OF MOLTENI AND GHISI v. ITALY**

*(Application no. 67911/01)*

JUDGMENT

STRASBOURG

28 July 2005

**FINAL**

*28/10/2005*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Molteni and Ghisi v. Italy,**

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

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Mr L. CAFLISCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr V. ZAGREBELSKY,

Mrs A. GYULUMYAN,

Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 5 July 2005,

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

## PROCEDURE

1. The case originated in an application (no. 67911/01) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Italian nationals Mrs Elena Molteni and Mr Emanuele Ghisi (“the applicants”), on 23 February 2001.

2. The applicants were represented before the Court by Mr G. Candela and Mr D. Mallia, lawyers practising in Milan. The Italian Government (“the Government”) were represented by their successive Agents, respectively Mr U. Leanza and Mr I.M. Braguglia, and by their successive co-Agents, respectively Mr V. Esposito and Mr F. Crisafulli.

3. On 18 March 2004 the Court (First Section) declared the application admissible.

4. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were respectively born in 1943 and 1972 and live in Milan.

6. E.G., the first applicant's husband and the second applicant's father, was the owner of a flat in Milan, which he had let to R.M.

7. In a registered letter of 24 June 1985, the owner informed the tenant that he intended to terminate the lease on expiry of the term on 29 December 1985 and asked him to vacate the premises by that date.

8. In a writ served on the tenant on 23 October 1985, the owner reiterated his intention to terminate the lease and summoned the tenant to appear before the Milan Magistrate.

9. By a decision of 5 December 1985, which was made enforceable on 14 December 1985, the Milan Magistrate upheld the validity of the notice to quit and ordered that the premises be vacated by 29 December 1986.

10. On 30 March 1987, the owner served notice on the tenant requiring him to vacate the premises.

11. On 17 April 1987, he informed the tenant that the order for possession would be enforced by a bailiff on 15 May 1987.

12. Between 15 May 1987 and 11 July 1996, the bailiff made thirty-one attempts to recover possession. Each attempt proved unsuccessful, as, the owner was not entitled to police assistance in enforcing the order for possession.

13. On 14 July 1996, the owner died and the applicants inherited the flat and became part of the proceedings as heirs.

14. Between 12 November 1996 and 30 November 1999, the bailiff made eleven attempts to recover possession. Each attempt proved unsuccessful, as the applicants were not entitled to police assistance in enforcing the order for possession.

15. On 14 November 2000, the tenant died and the applicants recovered possession of the flat.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The relevant domestic law and practice is described in the Court's judgment in the case of *Mascolo v. Italy* (no. 68792/01, §§ 14-44).

## THE LAW

### I. THE GOVERNMENT'S PRELIMINARY OBJECTION

17. In their observations on the merits, the Government argue that domestic remedies had not been exhausted on the grounds that the applicants had failed to seek reimbursement of damages before the national courts under Article 1591 of the Civil Code.

18. As far as the Government's arguments have to be considered as a preliminary objection, the Court observes that it was not raised, as it could have been, at the time of the admissibility. Therefore, the Court considers that the Government is estopped from raising objections to the admissibility at this stage of the procedure.

19. This objection should accordingly be dismissed (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II).

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

20. The applicants complained of their prolonged inability to recover possession of their flat, owing to the lack of police assistance. They alleged a violation of their right of property, as guaranteed by 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.”

21. The Court has previously examined a number of cases raising issues similar to those in the present case and found a violation of Article 1 of Protocol No. 1 to the Convention (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, §§ 46-75, ECHR 1999-V; *Lunari v. Italy*, no. 21463/93, §§ 34-46, 11 January 2001; *Palumbo v. Italy*, no. 15919/89, §§ 33-48, 30 November 2000).

22. The Court has examined the present case and finds that there are no facts or arguments from the Government which would lead to any different conclusion in this instance. It notes that the applicants had to wait approximately thirteen years and six months after the first attempt of the bailiff before being able to repossess the flat.

23. Consequently, there has been a violation of Article 1 of Protocol No. 1.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

24. 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. Pecuniary damage**

25. The applicants claimed 28,128,000 Italian lire (ITL) for the pecuniary damage they had sustained. They submitted this amount as the result of the difference between the market value rent of a similar flat and the rent imposed by law. For the purpose of assessing the market value rent, the applicants submitted a rent contract stipulated in 1997 for a flat similar to the one of the present application.

26. The Government contested the claim. They maintained that the applicants failed to seek reparation for the damages they suffered before the national courts under Article 1591 of the Civil Code. Yet, the Government consider that the applicants failed to adduce any reason that they were unable to make use of such a remedy. Accordingly, their claim must be rejected.

27. The Court observes that the Government have not put forward any argument regarding the possibility that appears to have been developed in the case-law of the Court of Cassation of suing the State for damages following an unjustified lack of police assistance (see *Mascolo* cited above, §§ 34-44).

28. The Court notes that the applicants can bring an action in the civil courts under Article 1591 of the Civil Code claiming compensation from their former tenant for the loss incurred as a result of the property being returned late.

29. The issue in the present case is the damage arising from the unlawful conduct of the tenant, who, irrespective of the State's cooperation in enforcing the court-ordered eviction, had a duty to return the flat to its owner. The breach of the applicant's right to peaceful enjoyment of his possessions is above all the consequence of the tenant's unlawful conduct.

30. The Court accordingly notes that Italian domestic law allows reparation to be made for the material consequences of the breach and considers that the claim for just satisfaction for pecuniary damage should be dismissed.

### **B. Non-pecuniary damage**

31. The applicants claimed ITL 35,000,000 for the non-pecuniary damage.

32. The Government contested the claim.

33. The Court considers that the applicants must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards each of them EUR 3,000 under this head.

### C. Costs and expenses

34. The applicants also claimed reimbursement of their legal costs and expenses as follows:

- ITL 1,751,847 for the costs and expenses of the enforcement proceedings;

- ITL 7,000,000 for the costs and expenses before the Court.

35. The Government contested the claims.

36. On the basis of the information in its possession and the Court's case-law, the Court considers it reasonable to award the applicants the sum of EUR 800 for the costs and expenses incurred in the domestic proceedings and the sum of EUR 2,000 for the proceedings before the Court.

37. The Court awards a total sum of EUR 2,800 (EUR 1,400 each) for legal costs and expenses.

### D. Default interest

38. The Court considers it appropriate that the default interest 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. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds*
  - (a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 3,000 (three thousand euros) for non-pecuniary damage;
    - (ii) EUR 1,400 (one thousand four hundred euros) for legal costs and expenses;
    - (iii) any tax that may be chargeable on the above amounts;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 July 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER  
Registrar

Boštjan M. ZUPANČIČ  
President