CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF GAMBERINI MONGENET v. ITALY (No. 2)

(Application no. 68707/01)

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 Gamberini Mongenet v. Italy (no. 2),

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. 68707/01) 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 three Italian nationals, Mr Roberto Gamberini Mongenet, Mr Rolando Gamberini Mongenet and Mr Rodolfo Maria Gamberini Mongenet ("the applicants"), on 22 February 2001.

2. The applicants, three brothers, were represented by the third applicant, a lawyer practising in Rome. The Italian Government ("the Government") were represented by their successive Agents, 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 1938, 1943 and 1948 and live in Rome.

6. The applicants' father was the owner of a flat in Rome, which he had let to V.D.C.

7. In a writ served on the tenant on 24 January 1984, the applicants' father informed the tenant that he intended to terminate the lease on expiry of the term and summoned him to appear before the Rome Magistrate.

8. By a decision of 17 April 1984, which was made enforceable on 2 May 1984, the Rome Magistrate upheld the validity of the notice to quit and ordered that the premises be vacated by 16 April 1985.

9. On 2 May 1984, the applicants' father served notice on the tenant requiring him to vacate the premises.

10. On 3 April 1987, he informed the tenant that the order for possession would be enforced by a bailiff on 12 May 1987.

11. Between 12 May 1987 and 29 March 2001, the bailiff made forty-six attempts to recover possession. Each attempt proved unsuccessful, as the applicants' father was not entitled to police assistance in enforcing the order for possession.

12. In the meanwhile, on 14 February 1992, the applicants' father died and the applicants inherited the flat.

13. On 18 July 1998, they became party to the eviction proceedings as heirs.

14. On an unspecified date of April 2001, the applicants recovered possession of the flat with the assistance of the police.

II. RELEVANT DOMESTIC LAW

15. 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

16. 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.

17. 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.

18. 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 AND OF ARTICLE 6 § 1 OF THE CONVENTION

19. 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."

20. The applicants also alleged a breach of Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

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 and Article 6 § 1 of 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 eleven months after the first attempt of the bailiff before being able to repossess the flat.

Consequently, there has been a violation of Article 1 of Protocol No. 1 and of Article 6 § 1 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. 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

24. The applicants sought, firstly, reparation for the pecuniary damage they had sustained. They proposed two means of calculations:

- either the difference between what the applicants could have obtained in government bonds if they could have sold the flat and the rent paid by the tenant which consisted in the sum of 108,117,000 Italian lire (ITL);

- or the difference between the market value rent – as estimated by an expert for the year 1992 – and the rent imposed by law for a period of time of one hundred eight months which consisted in the sum of ITL 110,592,000.

25. The Government contested those claims. They maintained that the applicants failed to seek reparation for the damages she 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 claims must be rejected.

26. 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).

27. Having regards to the first means of calculation proposed by the applicants, the Court finds no causal link between the violations it has found and the alleged pecuniary damage. Therefore the Court rejects it.

28. Having regards to the second means of calculation proposed by the applicants, the Court notes that they 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. The breach of Article 6 § 1 of the Convention committed by the State and found by the Court is a procedural one that occurred after such conduct on the part of the tenant.

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

31. The Court decides to make no award for pecuniary damage.

B. Non-pecuniary damage

32. The applicants claimed EUR 10,000 each for the non-pecuniary damage.

33. The Government contested the claim.

34. 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

35. The applicants also claimed EUR 3,000 for the costs and expenses before the Court.

36. The Government contested the claim.

37. 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 600 (EUR 200 for each applicant) under this head (see, *mutatis mutandis, Gamberini Mongenet v. Italy*, no. 59635/00, 6 November 2003).

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* that there has been a violation of Article 6 § 1 of the Convention;

4. *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 200 (two 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;

5. *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