

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

FOURTH SECTION

DECISION

Application no. 67557/10
Giljan FARRUGIA and John FARRUGIA
against Malta

The European Court of Human Rights (Fourth Section), sitting on 6 March 2012 as a Chamber composed of:

Lech Garlicki, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 3 November 2010,

THE FACTS

1. The applicants, Mr Giljan Farrugia and Mr John Farrugia are Maltese nationals who were born in 1963 and 1957 respectively and live in St Julian's. Their application was lodged on 3 November 2010. They were represented before the Court by Dr P.J. Galea, a lawyer practising in Valletta.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The Background of the Case

3. The applicants are full-time farmers and farm a considerable area of land which is partly owned and partly held on agricultural lease by them following the death of their father. Prior to their father's death the applicants also farmed the said land. This land included 205 square metres which had been earmarked for the building of a road. This parcel of land will hereinafter be referred to as land X.

4. On 20 January 1997 the applicants' late father received a letter from the Ministry of Public Works and Construction asking whether he had come to an agreement over land X with company M who had been attempting to take control of the land. He was informed that failure to reply within a month would lead to expropriation proceedings being commenced.

5. Having failed to reach an agreement for the purchase of land X from the applicants, on 11 August 1997 Company M asked the Government to expropriate the said land, it constituting the only access to its property. At around the same time Company M applied for a permit to build 75 apartments and 170 garages on its property.

6. By a declaration published in the Government Gazette of 31 July 1998, under the Land Acquisition (Public Purposes) Ordinance ("LAPPO"), Chapter 88 of the Laws of Malta, it was stated that land X was being expropriated for a public purpose.

2. Constitutional redress proceedings

7. On 30 March 1999 the applicants and their father (hereinafter the applicants) instituted constitutional redress proceedings before the Civil Court (First Hall) in its constitutional jurisdiction. They invoked Articles 3, in that their land constituted their only means of making a living, 6 and 8 of the Convention and 1 of Protocol No. 1 since no compulsory taking of land could occur without the payment of adequate compensation and particularly because the taking at issue had been effected solely in the interests of third parties and was not therefore in the public interest. The applicants contended that the proposed street would divide their farm and cultivated land in a way that reduced their very productive land and would make cultivation very different with respect to irrigation and manuring. The existing water reservoirs and livestock would be separated from the cultivated fields, a circumstance which would be disastrous for their livelihood. They noted that they had been cultivating and breeding animals on the said land for forty years, long before the arrival of the present developer. Moreover, they had not been informed of the expropriation until work on the construction of the road was commenced.

8. The following witness testimony was heard: The architect of the Works Department submitted that the Code of Police Laws provided that when a person wanted to develop land the developer had to ensure road

access to such land and when this was not possible because the owners would not sell the land, there existed a legal process by which the developer could ask the Commissioner of Lands to expropriate the said land. The land would then be expropriated by the Government and the developer would pay for the said land. An official of the Lands Department submitted that land X had been expropriated in the public interest. Various requests had been made for its expropriation but eventually Company M had signed a deed of obligation. The Government had then expropriated the land. However, the applicants had not accepted the compensation offered to them and it was then deposited in an interest-bearing account. Another official of the Lands Department submitted that the taking had been in the public interest as the land had already been earmarked for the building of a road. He added that although a request had been made by a third party, once expropriated the land remained the property of the Government.

9. By a judgment of 7 October 2009 the court rejected all the complaints. Noting the lack of pleadings on the matter, it held that the expropriation could not be considered as inhuman or degrading treatment under Article 3 and that Article 8 could not apply since the case did not concern the expropriation of a home. Nor did any issue arise under Article 6 as the provision did not provide for a judicial process before the initiation of an expropriation. As to Article 1 of Protocol No. 1 in respect of which proper pleadings had been filed, the court noted that there had been an interference with the applicants' property rights (partly a deprivation in so far as they owned part of the land, and for the rest a control of use in so far as they held part of the land on agricultural lease). The interference had been in accordance with the law, namely the LAPPO, and the applicants had been offered compensation which they had not accepted. The court established that the applicants could not have been unaware of the expropriation, the details having been published in the Government Gazette. Moreover, land X had been earmarked for the development of a road since 1988. A representative had been on site to estimate the value of the land and had informed the applicants that it was being expropriated. As to the public interest, it considered that Article 2 of the LAPPO did not exclude that an expropriation could also serve the interests of third parties. Thus, while it was true that the expropriation in the present case had been triggered by a third party's request, since the land had originally been earmarked as a road it could not be said that the taking had not been in the public interest. As to the proportionality of the measure, the court considered that, bearing in mind that land X constituted less than one eighth of the applicants' entire property, and that the applicants only owned a quarter of the land the rest being held on lease, the applicants would not be made to bear an excessive burden. There had therefore been no violation of the said provision.

10. On 22 October the applicants appealed to the Constitutional Court. By a judgment of 30 July 2010 the Constitutional Court rejected their

claims. The court noted that although in their initial application various issues were pleaded, also in relation to the expropriation, the applicants' appeal had focused on the lack of a public interest. The court held that, as in the cases regarding expropriations for the purposes of the Freeport project, a hospital and a national theatre, and although development of the land was to be carried out by a private third party who would benefit financially from the project, this did not diminish the public interest involved, which in the present case consisted in providing access to a housing complex. Indeed, the Government had a duty to deal with town planning and in consequence the taking in the present case, although to the advantage of third parties, had been made in pursuance of legitimate social and economic policies, namely to create housing for the general public served by adequate roads.

3. Pending the above proceedings

11. Other lawsuits were instituted by the applicants or their late parents, but none were successful. Details of these lawsuits have not been submitted.

12. On 24 August 2005 a new declaration was published in respect of the same land. A new set of constitutional proceedings was instituted in this respect. These proceedings are still pending.

B. Relevant domestic law

13. Article 2 of the LAPPO, in so far as relevant, reads as follows:

> ""public purpose" means any purpose connected with exclusive government use or general public use, or connected with or ancillary to the public interest or utility (whether the land is for use by the Government or otherwise) or with or to town-planning or reconstruction or the generation of employment, the furtherance of tourism, the promotion of culture, the preservation of the national or historical identity, or the economic well-being of the State or any purpose connected with the defence of Malta or connected with or ancillary to naval, military or air operations; and includes any other purpose specified as public by any enactment; and for the purposes of this definition, where the purpose for the exercise of any right under this Ordinance is connected with the utilisation of any land or any right in connection or in relation therewith for any purpose connected with the supply, storage or distribution of fuel or other sources of energy, or in connection with the provision of any utility or municipal services or infrastructural project shall be deemed to be connected with or ancillary to the public interest or utility;"

COMPLAINTS

14. The applicants complained under Article 1 of Protocol No. 1 to the Convention that the expropriation had not been effected in the public interest, but solely in the interest of third parties.

15. The applicants complained that the expropriation of land X, which formed parts of the fields they cultivated and was therefore vital to their livelihood, constituted a violation of Article 3.

16. The applicants complained that their rights under Article 6 had been breached as they had been precluded from having a fair hearing in the determination of their civil rights and obligations.

17. The applicants also considered that their rights under Article 8 had been breached as they lived next to land X which formed part of the land they cultivated and on which their livelihood depended.

THE LAW

I. THE COMPLAINT UNDER ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

18. The applicants complained under Article 1 of Protocol No. 1 to the Convention that the expropriation had not been effected in the public interest, but solely in the interest of third parties. The land had been turned into a tiny dead-end lane which served solely as a means of access to a property which could be better developed and include more flats if such access was given. It was unfair for individuals or companies to buy land at low prices on the basis that there was no access to the property and then expect the Government to expropriate other land to allow such access, to the detriment of others. While it was true that the land had been earmarked as a road, the project had lain dormant until the third party requested the expropriation of the land. Moreover, the applicants contended that they had suffered a disproportionate burden since their livelihood depended on the land they farmed and the expropriation of part of it had reduced the area on which they cultivated crops and had detrimental effects on the cattle, which produced less milk. They considered that even if the expropriation had been in the public interest they still had a right to adequate compensation; however, this had not been forthcoming. They considered that lodging new proceedings for compensation would not have been successful in view of the Constitutional Court's findings.

Article 1 of Protocol No. 1 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."

19. The Court reiterates that Article 1 of Protocol No. 1 guarantees, in substance, the right to property and comprises three distinct rules (see, for example, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52). The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. However, the rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They must be construed in the light of the general principle laid down in the first rule (see, for example, *Air Canada v. the United Kingdom*, 5 May 1995, §§ 29-30, Series A no. 316-A).

20. The taking of property within this second rule 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". Moreover, any interference with property rights 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 requirements of the protection of the individual's fundamental rights, the search for such a 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*, cited above, §§ 69-74, and *Brumărescu v. Romania* [GC], no. 28342/95, § 78, ECHR 1999-VII). The Court also reiterates that in the area of land development and town planning the Contracting States should enjoy a wide margin of appreciation in order to implement their town and country planning policies. Nevertheless, in the exercise of its power of review the Court must determine whether the requisite balance was maintained in a manner consonant with the applicants' right of property (see *Abdilla v. Malta* (dec.), no 38244/03, 3 November 2005). Compensation terms under the relevant legislation are material to the assessment as to whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, 30 June 2005). In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference (see *The Holy Monasteries v. Greece,* 9 December 1994, § 71, Series A no. 301-A). Similarly, by awarding compensation reflecting values applicable decades before and deferring the payment of such for decades without taking into account this delay, renders that compensation inadequate

and, consequently, upsets the balance between the protection of the right to property and the requirements of the general interest (see *Schembri and Others v. Malta*, no. 42583/06, § 44, 10 November 2009).

21. The Court will assume the lawfulness of the interference which was confirmed by the domestic courts and of which the applicants have not complained.

22. The Court reiterates that any interference with the enjoyment of a right or freedom recognised by the Convention must pursue a legitimate aim (see *Beyeler v. Italy* [GC], no. 33202/96, § 111, ECHR 2000-I). The Court notes that, 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 for promoting the public interest. In this regard, the taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest", even if the community at large has no direct use or enjoyment of the property taken (see *James and Others v. the United Kingdom*, 21 February 1986, §§ 40 and 45, Series A no. 98, and *J. Lautier Company Ltd v. Malta* (dec.), no. 37448/06, 2 December 2008). While the Court finds that the system of expropriation initiated at the request of third parties in Maltese domestic law is novel, the Court does not consider it unreasonable for the authorities to take into account the interests of third parties (see, *mutatis mutandis*, *Abdilla* (dec.), cited above) when adopting such measures. The Court, like the domestic courts, considers that the construction of a road which would give access to a housing complex, even though private, may be considered as being in the public interest. This is even more so in the present case, since the land had already been scheduled for the development of a road even before the application of the third party. The Court accordingly finds that the interference with the applicants' property right was "in the public interest".

23. This having been said, the Court must also look at the proportionality of the measure in order to determine whether there has been a violation of the said provision. As mentioned above, compensation terms are material to the assessment of whether the contested measure respects the requisite fair balance. In the present case, in respect of the issue of compensation, the Court notes that to date no compensation has yet been paid. However, it also notes that the applicants have not kept themselves informed about the situation which pertains to this part of their complaint. Nor have they informed the Court of the amount of compensation which has been offered to them; nor have they made any submissions as to the maximum amount of compensation which could be payable to them according to law. Moreover, the issue of compensation which appears to have been referred to in the first-instance constitutional redress proceedings and which, unfortunately, was given little weight, if any, by the domestic

courts, was not repeated in the appeal application. The Court reiterates that complaints intended to be made subsequently at the international level should have been aired before the appropriate domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Schembri and Others*, cited above, § 49). The Court notes that in the present case the Constitutional Court considered that the applicants' appeal was solely related to the public interest requirement. Thus, through their own fault, the applicants did not provide the Maltese courts with the opportunity which is in principle intended to be afforded to a Contracting State by Article 35 of the Convention, namely the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it (ibid., § 49). It follows that the applicants failed to properly exhaust domestic remedies in this respect, with the consequence that the Court is precluded from determining the question whether the compensation offered was sufficient to preserve a fair balance between the demands of the general interest and the requirements of the protection of the applicants' rights (see *Lautier* (dec.), cited above). Moreover, the applicants have not substantiated their argument that a new set of constitutional court proceedings would not be effective.

24. It follows that the complaint must be rejected as inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention.

II. OTHER COMPLAINTS

25. The applicants further complained under Articles 3, 6 and 8 of the Convention (see paragraphs 15-17 above).

26. The Court notes that the Constitutional Court did not determine these complaints and it is unclear whether the applicants had in fact appealed against the Civil Court's judgment in this respect. However, the Court notes that even assuming that these complaints are not inadmissible for non-exhaustion of domestic remedies, they would in any event be inadmissible for the following reasons.

27. The Court considers that the situation complained of would not cause the applicants suffering or humiliation of such intensity as to constitute "inhuman" or "degrading" treatment within the meaning of Article 3.

28. The Court notes that the applicants have not indicated in what way they are victims of the alleged violation of Article 6. Moreover, no arguments were submitted by them in this respect during the constitutional redress proceedings. In these circumstances, the Court considers that the complaint under Article 6 is unsubstantiated.

29. Lastly, the Court notes that the applicants' complaint under Article 8 is essentially the same as that under Article 1 of Protocol No. 1 and does not raise any separate issue. Moreover, the applicants have not sufficiently

demonstrated the adverse impact of the expropriation on their private life or, in particular, on their possibility to earn a living from farming their land (see, *mutatis mutandis*, *Johtti Sapmelaccat Ry and Others v. Finland* (dec.), no. 42969/98, 18 January 2005). Nor have they shown that the property in question could be considered their "home" within the meaning of this provision (see *Leveau and Fillon v. France* (dec.), nos. 63512/00 and 63513/00, 6 September 2005, and *Khamidov v. Russia*, no. 72118/01, § 131, 15 November 2007).

30. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President