

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

FIRST SECTION

DECISION

Application no. 49199/06
Maria MESSENI NEMAGNA and Others
against Italy

The European Court of Human Rights (First Section), sitting on 7 May 2024 as a Committee composed of:

Péter Paczolay, *President*,
Gilberto Felici,
Raffaele Sabato, *judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 49199/06) 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") on 8 December 2006 by six Italian nationals, relevant details listed in the appended table, ("the applicants") who were represented by Mr A. Amenduni, a lawyer practising in Bari;

the decision to give notice of the application to the Italian Government ("the Government"), represented by their former Agent, Ms E. Spatafora, and their former Co-Agent, Ms P. Accardo;

the parties' observations;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the expropriation of the building housing the "Petruzzelli" theatre in Bari carried out by Decree-Law no. 262 of 3 October 2006 ("Decree-Law no. 262/2006"), converted with amendments into Law no. 286 of 24 November 2006 ("Law no. 286/2006").

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2. Based on agreements with the Bari municipal authority signed between 1896 and 1924, Mr. Petruzzelli, the applicants' ancestor, acquired the free occupation and surface rights[1] on a plot of public land to build and operate a theatre in the city centre of Bari. On an unspecified date, part of the building was converted into offices that Mr. Petruzzelli's heirs leased to a local association and businesses, while the other part remained designated for theatrical activities.

3. The applicants inherited three quarters of the property rights of the entire building and of the theatre's trademark.

4. On 27 October 1991 a fire caused major damage to the part of the building dedicated to theatrical activities. To ensure its reconstruction, on 21 November 2002 the owners signed an agreement with the relevant public administrations ("the 2002 agreement"). National authorities undertook to carry out at their expense – by means of a foundation that was to be created *ad hoc* – reconstruction work as described in a project previously agreed on by the owners ("the reconstruction project"). On their part, the owners undertook to hand over the possession ("*consegnare*") of the parts of the building under reconstruction to the foundation and to grant it a 40-year exclusive use of the theatre and its trademark. The 2002 agreement also set out, *inter alia*, a time-schedule of four years for the reconstruction work, the concession fee that the foundation was to pay annually to the owners when the work was completed, and an allowance that the foundation would have to pay to them in case of delay.

5. On 15 April 2003 the applicants handed over the possession of part of the building dedicated to theatrical activities to the Ministry of Culture (Superintendence for Architectural Heritage and Landscape), with the agreement that the Ministry would hand it over to the foundation when this would be set up.

6. Law no. 310 of 11 November 2003 ("Law no. 310/2003") set up the "Operatic and orchestral foundation Petruzzelli and Theatres of Bari" ("the foundation"). In section 1(6) it established that the foundation shall acquire, subject to agreement with local authorities, the exclusive use rights of the theatre, in accordance with the 2002 agreement.

7. By means of section 18(2) and (3), and section 2(105) and (106) of Decree-Law no. 262/2006, as amended by Law no. 286/2006 (hereinafter "the contested provisions"), the municipality of Bari acquired the ownership "of the entire building housing the theatre, including all instrumental equipment and appurtenances, free from all burdens, conditions and rights of

[1] The qualification of the legal situation acquired by Mr. Petruzzelli and his heirs - right of use in the context of a public concession or surface rights - has been contested in certain domestic proceedings. For the sake of clarity of exposition, and without implying the Court's adherence to either thesis, Mr. Petruzzelli and his heirs will hereafter be indicated as the "owners" of the building.

third parties". Section 2(104) of Decree-Law no. 262/2006, as amended by Law no. 286/2006, repealed section 1(6) of Law no. 310/2003.

8. On 9 February 2007 the applicants filed a request for injunction (*ricorso per decreto ingiuntivo*) with the Bari District Court, seeking the payment of the annual allowance provided for in the 2002 agreement in case of delay in the execution of reconstruction work. At the request of the applicants the President of the Bari District Court raised a question of constitutionality of the contested provisions before the Constitutional Court, which on 30 April 2008 declared them unconstitutional (judgment no. 128 of 2008). The Constitutional Court annulled the contested provisions for failure to comply with the requirements of extraordinary necessity and urgency provided for in Article 77 of the Italian Constitution, under which the executive and the parliament may respectively adopt and convert into law a decree-law.

9. Following the judgment of the Constitutional Court, the nature of the applicants' proprietary rights to the premises, the validity of the agreement of 21 November 2002 and the request for compensation of damages allegedly suffered by the applicants became the subject of several sets of proceedings between the applicants and the relevant State and local authorities.

10. In the context of these proceedings, the judgments of the Bari Court of Appeal nos. 1976 and 1977 of 18 November 2021 recognised the applicants' ownership of the building housing the theatre and ordered the Municipality of Bari and the foundation to hand it over to them. The Bari Court of Appeal also considered that the 2002 agreement was devoid of any legal effect and therefore rejected the applicants' claim aiming at obtaining compensation for its non-fulfilment. Moreover, it rejected the applicants' claims for compensation based on non-contractual liability as generic and unsubstantiated and allowed the State authorities' claims for compensation in relation to the public funds invested in the reconstruction works.

11. According to the information provided by the applicants in the latest observations received by the Court (on 3 January 2024) they challenged the judgment of the Bari Court of Appeal no. 1976 of 18 November 2021 before the Court of Cassation. These proceedings are still pending.

12. Relying on Articles 6, 13, 17 and 18 of the Convention and Article 1 of Protocol No. 1, the applicants complained that the expropriation was unlawful and disproportionate and that they had been deprived of their right of access to a court, since the contested measure had taken place by means of legislative provisions.

13. Following the judgment of the Constitutional Court the applicants adjusted their claims and complained that they had suffered pecuniary and moral damages as a result of the temporary effects of the contested provisions.

THE COURT'S ASSESSMENT

A. Preliminary issue

14. The Court firstly takes note of the information regarding the death of the first, third and sixth applicants, Ms Maria Messeni Nemagna, Ms Mariarosalba Messeni Nemagna and Ms Teresa Messeni Nemagna, and the wish of their heirs (see the appended table), to continue the proceedings in their stead, as well as of the absence of an objection to that wish on the Government's part. Therefore, and having regard to the subject matter of the complaints, the Court considers that the heirs of the abovementioned applicants have standing to continue the proceedings in their stead. However, for practical reasons, reference will still be made to the "applicants" throughout the ensuing text.

B. The complaint under Article 1 of Protocol No. 1 to the Convention

15. The Government argued that the applicants had lost their victim status because they had benefited from the remedy offered by the judgment of the Constitutional Court no. 128 of 2008. As to the damages the applicants alleged to have suffered, the Government submitted that they could be recovered in the judicial proceedings instituted by the applicants.

16. The applicants disagreed and claimed that there was no remedy under national law to obtain redress for the damages provoked by the legislator as a result of the temporary effects produced by the contested provisions.

17. The Court refers to its general principles concerning victim status set out in *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178 et seq. and § 193, ECHR 2006-V, and *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII.

18. The Court considers that the finding of the Constitutional Court in its judgment no. 128 of 2008 (see paragraph 8 above) suffices to recognise that the interference with the applicants' property rights was incompatible with the principle of lawfulness.

19. The Constitutional Court acknowledged that the deprivation of property was unlawful as the contested provisions did not comply with the requirements provided for in the Italian Constitution for adopting and converting law-decrees into law. The Court is satisfied that this amounts to an acknowledgement by the domestic courts of the infringement complained of.

20. As to redress, the Court notes that the judgment of the Constitutional Court retroactively deprived the expropriation of any legal effect and thus restored the propriety rights of the applicants as they stood before the entry into force of the contested provisions. Under these circumstances, the Court

considers that the judgment of the Constitutional Court offered in principle adequate redress for the violation.

21. As to the damages that the applicants alleged to have suffered during the period when the contested provisions were still in force (loss of lease payments from tenants of the parts of the building used as offices; reconstruction work carried out in contrast to the project agreed on by the owners in 2002, obligation to pay back the amounts invested by public authorities in renovation works), the Court agrees with the Government that these damages could and should have been claimed before the national courts on the basis of the general rules on civil obligations, including those governing breaches of contract in relation to the 2002 agreement and the lease agreements concerning the parts of the building used as offices. The documents provided by the parties show that several sets of proceedings – some of them still pending before national courts to this date – were initiated by the applicants to demand fulfilment of the 2002 agreement, compensation for the damages allegedly resulting from its non-fulfilment and for damages based on the State's non-contractual liability. Despite the applicants' allegation that the national courts were prevented from ruling on damages which occurred before the Constitutional Court' s judgment no. 128 of 2008, there is nothing in the text of the national judgments issued in the context of these sets of proceedings to suggest that their scope was temporally limited to events which occurred after the above-mentioned judgment of the Constitutional Court. For example, in judgment no. 1976 of 18 November 2021 (against which an appeal by the applicants is still pending; see paragraph 11 above), the Bari Court of Appeal considered unsubstantiated the applicants' requests for compensation allegedly deriving from the loss of possession of the theatre, having regard to the fact that the applicants had failed to prove (or even allege) that they had the financial means to carry out the reconstruction works which were necessary to use the theatre or that they had to turn down opportunities to make an income. Since the applicants lost the possession of the theatre several years before the entry into force of the contested provisions (see paragraph 5 above) and the national courts decided on the merits of their requests for compensation referring, in general, to damages allegedly deriving from loss of possession, the Court cannot agree with the applicants' allegation that the national courts were prevented from ruling on damages which occurred before the judgment of the Constitutional Court no. 128 of 2008.

22. The Court is thus not persuaded by the applicants' arguments to the effect that the restitution with retrospective effect of their property rights by the judgment of the Constitutional Court coupled with the possibility to obtain compensation for the damages allegedly suffered before the ordinary courts did not constitute adequate redress for the violation. Therefore, it considers that the applicants can no longer be considered victims of the violation complained of.

23. It follows that the Government's objection in this regard is well-founded and this complaint must be rejected as incompatible *ratione personae* pursuant to Article 35 §§ 3 and 4 of the Convention.

C. The complaint under Article 6 § 1 of the Convention

24. The Court does not consider it necessary to reach a conclusion on the question whether the applicants can still claim to be victims of a violation of Article 6 of the Convention since it finds that matter has been resolved for the following reasons.

25. After lodging the application before the Court, at the request of the applicants, the Bari District Court raised a question of constitutionality which led to the annulment with retrospective effect of the contested provisions (see paragraph 8 above). Under these circumstances, even assuming that Article 6 § 1 of the Convention would apply (*Project-Trade d.o.o. v. Croatia*, no. 1920/14, § 68, 19 November 2020), the Court observes that the action by the applicants before the ordinary courts, combined with the decision of the Bari District Court to raise a question of constitutionality before the Constitutional Court, allowed them to have their claim on the unlawfulness of the interference of their property rights determined by a tribunal (see paragraphs 18-20 above).

26. As to the damages that the applicants alleged to have suffered during the period when the contested provisions were still in force, having regard to the conclusions above regarding the admissibility of the complaint under Article 1 of Protocol No. 1 to the Convention (see paragraph 21 above), the Court agrees with the Government that, irrespective of whether the legislator could be held accountable for adopting unconstitutional legislative provisions, the applicants could and should have claimed those damages before the national courts, on the basis of the general rules on civil obligations, against the relevant public and private entities in possession of the premises.

27. Having regard to the foregoing, the Court considers that the substance of the applicants' complaint concerning access to a court has been resolved, and that the complaint has been adequately and sufficiently remedied (see, *mutatis mutandis*, *El Majjaoui & Stichting Touba Moskee v the Netherlands* (striking out) [GC], no. 25525/03, § 33, 20 December 2007).

28. Consequently, the Court finds that the matter has been resolved within the meaning of Article 37 § 1 (b) of the Convention and that respect for human rights as defined in the Convention and its Protocols does not require it to continue the examination of this part of the application under Article 37 § 1 *in fine*.

29. Accordingly, this part of the application should be struck out of the Court's list of cases.

D. Other complaints

30. The applicants also raised other complaints under various Convention provisions (see paragraph 12 above).

31. The Court considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, these complaints either do not meet the admissibility criteria set out in Articles 34 and 35 of the Convention or do not disclose any appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto.

32. It follows that this part of the application must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to strike the application out of its list of cases in so far as it concerns the complaint under Article 6 of the Convention;

Declares the remainder of the application inadmissible.

Done in English and notified in writing on 30 May 2024.

Liv Tigerstedt Deputy Registrar	Péter Paczolay President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth	Nationality	Place of residence
1.	Maria MESSENI NEMAGNA Heirs: Eugenio Vendemiale Ciro Garibaldi	1925 (deceased 2022)	Italian	Genoa
2.	Chiara MESSENI NEMAGNA	1952	Italian	Camerino
3.	Mariarosalba MESSENI NEMAGNA Heir: Eugenio Vendemiale	1956 (deceased 2018)	Italian	Bari
4.	Nunziata MESSENI NEMAGNA	1924	Italian	Bari
5.	Stefania MESSENI NEMAGNA	1957	Italian	Lecce
6.	Teresa MESSENI NEMAGNA Heirs: Elisabetta Giannattasio Marina Giannattasio	1928 (deceased 2017)	Italian	Bari