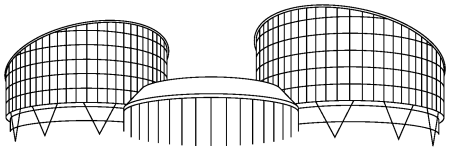

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MONTANARO GAUCI AND OTHERS v. MALTA

(Application no. 31454/12)

JUDGMENT
(Merits)

STRASBOURG

30 August 2016

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 Montanaro Gauci and Others v. Malta,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 5 July 2016,

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

PROCEDURE

1. The case originated in an application (no. 31454/12) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Maltese nationals (see details in appendix) ("the applicants"), on 22 May 2012.

2. The applicants were represented by Dr D. Camilleri, a lawyer practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicants alleged in particular that they had suffered a breach of Article 1 of Protocol No. 1 to the Convention as a result of the requisitioning of their property.

4. On 22 January 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

5. The applicants are owners of a house at 4, Wagon Street, Rabat, Malta, which they inherited from their late father in 1997. It is a corner house with an area of around 82 square metres.

6. The applicants alleged that on an unspecified date in 1987 a certain C.C. broke into the house and started to live there, with his family, without legal title. Their allegation was not proved before the domestic courts.

7. The applicants' late father had instituted judicial proceedings to have C.C. evicted. According to the applicants, C.C. attempted to validate his position by soliciting the authorities to take action.

8. A few days before the general elections, on 14 April 1987, the Maltese Government issued a requisition order (no. 1031) under the Housing Act, Chapter 125 of the Laws of Malta, in respect of the property. The authorities assigned the property to C.C. Thus, as from 30 April 1987 C.C. had legal title to the house.

9. Following various complaints by the former owner, on 2 June 1987 the property was derequisitioned.

10. The applicants' late father again instituted judicial proceedings for the eviction of C.C., who no longer had title to the property.

11. That case was withdrawn due to a clerical mistake in the name of the complainant. Once the mistake had been corrected, the proceedings were recommenced in September 1987. Meanwhile, a request for an injunction (*mandat ta' inibizzjoni*) to prohibit C.C. from making structural changes to the property and from entering the property was upheld in part, namely in relation to the works.

12. On 8 June 1988, pending a judgment by the ordinary court concerning the eviction, the Maltese Government again requisitioned the property, under an order carrying the same reference as the first requisition (no. 1031), and assigned it to C.C.

13. In consequence, following the State's action, the Court of Magistrates (in its civil jurisdiction), by means of a judgment of 18 January 1991, dismissed the claim lodged by the applicant's predecessor. It held that since the property had again been requisitioned and thus was now administered by the Housing Authority which had assigned it to C.C., it could no longer take cognisance of the claims put forward by the complainant. However, it ordered the successful defendant to pay the costs of the proceedings.

14. The rent fixed by the authorities amounted to approximately 35 euros (EUR) annually. Amendments introduced by means of Act X of 2009 increased the rent payable on requisitioned property to a maximum of EUR 185 annually, which may be increased every three years.

15. The applicants refused to receive such rent or to recognise C.C. as a tenant, in order to avoid prejudicing their case. According to the Government, the tenant deposited the rent in court; however, according to the applicants, from a search of the relevant court registry, no such schedules of deposit had ever been filed.

16. According to a valuation of January 2011 by the applicants' *ex parte* expert, the sale value of the property was EUR 230,000 and given its

location it had commercial potential. The estimate was, however, based on the premise that the expert had only seen the property from the outside and had relied on the applicants' descriptions. A Government expert (who acceded to the property) valued it at a sale price of EUR 153,000.

17. The impugned restrictions did not apply to leases entered into after 1 June 1995.

B. Constitutional redress proceedings

18. On 15 September 2008 the applicants instituted constitutional redress proceedings. They lodged an action against the Director of Social Housing. The Housing Authority and C.C. were later joined to the proceedings. The applicants complained that the requisition order had breached their rights under Article 1 of Protocol No. 1 to the Convention. They asked the court to award them adequate compensation reflecting a reasonable rent from 8 June 1988 to the date of judgment and any losses incurred as a result of their inability to develop the property. They further asked the court to order the release of the property free and unencumbered or, if that were not possible, to establish fair conditions in respect of the property and a fair rent for the future. Lastly, they asked the court to give any other orders or directions to ensure that their fundamental rights were respected.

19. By a judgment of 9 December 2010 the Civil Court (First Hall) in its constitutional jurisdiction found in favour of the applicants. With reference to the preliminary pleas raised, it considered that it had not been necessary also to notify the Attorney General – such a requirement had been intended to ensure that a representative of a Government department would not fail to appear, a risk eliminated if the Attorney General, who had to provide lawyers for the department's defence, was notified. In the present case there had been no such risk and therefore the failure to notify him had not brought about the nullity of the claim. The applicants had been suffering a continuing violation from 1988 since they remained dispossessed of their property and therefore had a legal interest in bringing the action. Furthermore, the applicants had no other remedies available to them. Indeed, their action to have C.C. evicted had been dismissed because of their inability to pursue such an action once the property had been requisitioned and no other remedy could have offered the applicants compensation for the breach of their property rights.

20. On the merits of the case, the Civil Court (First Hall) found a violation of the applicants' rights under Article 1 of Protocol No. 1 to the Convention in so far as the applicants had been affected by the measure for numerous years during which they had been owed only EUR 35 annually. The court also expressed doubts as to the public interest of the measure. This was in line with the findings of the European Court of Human Rights

in similar circumstances, in the cases of *Ghigo v. Malta* (no. 31122/05, 26 September 2006) and *Fleri Soler and Camilleri v. Malta* (no. 35349/05, ECHR 2006-X). It awarded the applicants the sum of EUR 8,000 in compensation based on equity (*arbitrio boni viri*) and ordered the return of the property free and unencumbered to the applicants within three months. The court considered that it had the power and the duty to take such action under Article 4 (2) of the European Convention Act (see relevant domestic law), in order to bring an end to the consequences of the violation suffered by the applicants. The situation would persist in the absence of legislative intervention. Costs were to be paid by the defendants.

21. The defendants appealed both in respect of the preliminary pleas and on the merits. The Attorney General also appealed on the same lines, thus joining the proceedings at the appeal stage as a third party on the basis of his interest in the case (*appell ta' terz*). The applicants appealed only in respect of the award of compensation, which they considered to be too little given the value of the property at issue.

22. According to the applicants, before the Constitutional Court they orally invited the President of the Constitutional Court to withdraw from hearing the case (on the basis of Article 734 of the Code of Organisation and Civil Procedure). At the time when the proceedings were instituted, he had been the Attorney General and therefore the senior legal officer responsible for the defence of the two co-defendants in the applicants' case. He had also been the legal officer advising the Government on the drafting and introduction of Act X of 2009. However, according to the applicants, the President of the Constitutional Court refused to withdraw. The Government noted that this was not mentioned in the court record.

23. By a judgment of 25 November 2011 the Constitutional Court upheld the first-instance judgment in relation to the preliminary pleas and merits, but varied the redress awarded.

24. The Constitutional Court noted, *inter alia*, that any available ordinary remedies such as judicial review proceedings or proceedings before the Rent Regulation Board were not appropriate in such circumstances. As to the merits, it considered that the measure of control of use had been lawful and pursued a legitimate aim in the public interest, namely social accommodation for C.C. who, as it transpired, had obtained legal title to the property by means of the requisition and, thus, could not be considered a squatter. Despite the lack of a rental valuation of the property, it was clear that even for a small house, a rent of EUR 3 a month (EUR 35 annually until 2010) was extremely low and could not be considered as fair. This situation had lasted for more than twenty-two years. In consequence, the applicants had suffered a disproportionate burden as the proportionality requirement had not been fulfilled.

25. As to redress, the Constitutional Court increased the compensation to EUR 14,000, but revoked the part of the judgment ordering the release of

the property. It considered that since the requisition had been lawful and in the public interest, it was for the court to redress the lack of a fair balance but it was not required to annul the requisition order. Referring to domestic case-law, it held as follows:

> "... while this [constitutional] court has a wide latitude in giving any order it may consider relevant in order for it to safeguard Articles 33 to 45 of the Constitution and human rights and fundamental freedoms as defined in the Convention, such latitude was not unlimited and was circumscribed by the judicial system of the country which did not allow this court [of constitutional jurisdiction] to amend national laws, nor could it make mandatory an action which according to domestic law was discretionary, nor could it order the Housing Authority to pay rent or compensation of a higher value than that provided for by the relevant law. Compensation, if any, which may be paid by this court [of constitutional jurisdiction] is that for the violation found."

As to the amount of compensation, the Constitutional Court noted that in such cases, given the legitimate aim, it was not required to follow market values. In the present case the court bore in mind the sums usually awarded by the European Court of Human Rights, the low amount of rent due, the relevant period from 1988 to date, the unavailability of an expert valuation of the rental value of the property, the fact that the applicants had brought proceedings in 2008 and that the more favourable order of the first-instance court was being revoked.

26. Each party was to pay his own share of the costs of the proceedings.

C. Subsequent events

27. According to the applicants, on an unspecified date, C.C. passed away and his daughter, L.B., took possession of the property and became its occupant. Subsequently, the Department of Social Housing provided L.B. with alternative housing, which she moved into. Despite the vacation of the property, the authorities did not derequisition it. On an unspecified date L.B. returned to the property.

28. The applicants claimed that the above information had come to their attention in January 2014. Their requests to the authorities (copies submitted to the Court) for official documents explaining in detail the above course of events had remained unanswered. They had therefore filed a judicial protest objecting to the conduct of the authorities and L.B.'s unlawful occupation of their property.

29. The Government submitted that the above allegations were unsubstantiated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Requisition orders

30. The relevant domestic law and practice concerning requisition orders is to be found in, *inter alia*, *Ghigo v. Malta* (cited above, §§ 18-24).

31. Further amendments were introduced in 2010 which allow for an increase in the applicable rents as per Article 1531C of the Civil Code and the Minimum Compensation for Requisitioned Buildings Regulations (Subsidiary Legislation 16.2). Article 1531C of the Civil Code reads as follows:

Article 1531C

"(1) The rent of a residence which has been in force before the 1st June 1995 shall be subject to the law as in force prior to the 1st June 1995 so however that unless otherwise agreed upon in writing after the 1st January 2010, the rate of the rent as from the first payment of rent due after the 1st January 2010, shall, when this was less than one hundred and eighty-five euro (€185) per year, increase to such amount:

Provided that where the rate of the lease was more than one hundred eighty-five euro (€185) per year, this shall remain at such higher rate as established.

(2) In any case the rate of the rent as stated in sub-article (1) shall increase every three years by a proportion equal to the increase in the index of inflation according to article 13 of the Housing (Decontrol) Ordinance; the first increase shall be made on the date of the first payment of rent due after the 1st January 2013:

Provided that where the lease on the 1st January 2010 will be more than one hundred eighty-five euro (€185) per year, and by a contract in writing prior to 1st June 1995 the parties would have agreed upon a method of increase in rent, after 1st January 2010 the increases in rent shall continue to be regulated in terms of that agreement until such agreement remains in force."

32. In so far as relevant, the Minimum Compensation for Requisitioned Buildings Regulations read as follows:

"2. (1) The provisions of article 1531C of the Civil Code shall, as from first (1st) payment of rent due after the 30th September 2011, apply to buildings consisting of a residence which are requisitioned in terms of the Housing Act.

(2) For the purposes of these regulations 'rent' shall also include compensation payable under the Housing Act for the requisition of a building consisting of a residence and in the case of such compensation being payable, the provisions of article 1531C of the Civil Code shall apply *mutatis mutandis*."

B. Code of Organisation and Civil Procedure

33. Article 734 of the Code of Organisation and Civil Procedure (COCP), in so far as relevant, reads as follows:

"(1) A judge may be challenged or abstain from sitting in a cause –

(*d*) (i) if he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependant thereon".

C. Remedies

34. Article 46 of the Constitution of Malta, in so far as relevant, reads:

"(1) ... any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court."

35. Similarly, Article 4 of the European Convention Act, Chapter 319 of the Laws of Malta, provides:

"(1) Any person who alleges that any of the Human Rights and Fundamental Freedoms, has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.

(2) The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled:

Provided that the court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law.

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court."

36. Relevant case-law on the matter includes the judgment of *Anthony Mifsud vs Superintendent Carmelo Bonello et*, Constitutional Court, 18 September 2009. In that case the Constitutional Court held as follows:

"There are two types of damage to which an applicant may be entitled: moral damage, for the breach suffered, and civil or material damage, which refers to the loss of future income as a result of a loss of earning capacity. Normally, the latter type of damage is requested by means or an ordinary remedy before courts of ordinary jurisdiction. This is so because as explained in the case of *Emanuel Ciantar, vs Commissioner of Police, Constitutional Court,* judgment of 2 November 2001: 'The principle is always that constitutional and civil jurisdictions should remain separate and distinct, even because an application to a particular jurisdiction is regulated by the specific procedures and the aim of the remedy is not always the same'. Nevertheless, it is not excluded, in appropriate cases, that a person may request both types of damage from the courts of constitutional jurisdiction, and that these may be awarded by the said courts, if the proof of the loss is brought before it (see comment of the Constitutional Court in *Fenech vs Commissioner of Land* of 20 February 2009). Indeed, as held by this Court in *Vella vs Commissioner of Police et,* decided in 1991 'when the object of the case is complex – and related to matters some of which have a remedy in some other law and other which only have a constitutional remedy, the latter action shall prevail'."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No.1 TO THE CONVENTION

37. The applicants complained that the requisition order in respect of their property was in violation of Article 1 of Protocol No.1 to the Convention, which 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."

A. Admissibility

1. The Government's objection of lack of victim status

(a) The parties' submissions

38. The Government submitted that the applicants had lost their victim status as the domestic courts had expressly acknowledged the violation and awarded appropriate redress, namely compensation of EUR 14,000. They considered that this redress (which amounted to around EUR 700 per year for twenty years) was sufficient, since the requisition had been lawful and

had pursued a legitimate aim. Indeed, it was also not far from awards made by the Court in similar circumstances. When including non-pecuniary damage, such awards had amounted to, for example, EUR 1,168 and EUR 1,400 respectively, in *Edwards v. Malta* (just satisfaction), no. 17647/04, § 22, 24, and 37, 17 July 2008), and *Ghigo v. Malta* (just satisfaction), no. 31122/05, §§ 19, 21 and 32, 17 July 2008). Moreover, since the property had been requisitioned in order to provide social accommodation, according to the Court the compensation awarded could be less than the market value of the property. The Government relied on the case of *Staykov v. Bulgaria* (no. 49438/99, § 90, 12 October 2006), where the Court had accepted that the domestic courts which awarded compensation had acknowledged the relevant violations even though their reasoning could have been more precise. In the Government's view, in the present case there was no place for *restitutio in integrum*. This was even more so since after 2011 the applicants were no longer receiving only EUR 35 per annum, but had started to receive EUR 185 per annum, and had then received EUR 193 as from 2011 and EUR 197 from 2014, in line with the amendments made to the law.

39. The applicants submitted that given the Constitutional Court's meagre award of compensation for the loss suffered over twenty-three years, they remained victims of the said violation. They submitted that the compensation awarded by the Constitutional Court did not even cover rent as provided for by law pre and post 2011, let alone appropriate just satisfaction. The applicants noted that a government scheme, which allowed owners to lease their property to the Government for social needs, attracted a monthly rent of EUR 300. Using that scheme as a yardstick, the applicants submitted that their compensation should have amounted to around EUR 100,800. Moreover, they emphasised that the amendments introduced in 2010 did not suffice to allow for the necessary reparation, since even an annual rent of EUR 185 was ridiculously low for such a property, and therefore also did not conform with Article 1 of Protocol No.1 to the Convention. Lastly, they considered that the most appropriate means of redress would be the restitution of the property to them, as had been ordered by the first-instance court.

(b) The Court's assessment

40. The Court reiterates that the adoption of a measure favourable to the applicant by the domestic authorities will deprive the applicant of victim status only if the violation is acknowledged expressly, or at least in substance, and is subsequently redressed (see *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).

Whether the redress given is effective will depend, among other things, on the nature of the right alleged to have been breached, the reasons given for the decision and the persistence of the unfavourable consequences for the person concerned after that decision (see *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 78, 21 July 2015). The redress afforded must be appropriate and sufficient. Whether an individual has victim status may also depend on the amount of compensation awarded by the domestic courts and the effectiveness (including the promptness) of the remedy affording the award (see *Paplauskienė v. Lithuania*, no. 31102/06, § 51, 14 October 2014).

41. In the present case the Court notes that the first criterion, namely acknowledgment of a violation, has been met.

42. As to the second criterion, the Court notes that, as it transpires from its case-law, appropriate redress in Article 1 of Protocol No. 1 cases requires an award in respect of both pecuniary damage (see *Frendo Randon and Others v. Malta*, no. 2226/10, § 37, 22 November 2011, and *Azzopardi v. Malta*, no. 28177/12, § 33, 6 November 2014) as well as non-pecuniary damage, which would generally be required when an individual was deprived of, or suffered an interference with, his or her possessions contrary to the Convention (see *Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, no. 26771/07, § 53, 5 April 2011).

43. The Court notes, firstly, that in the present case, it is unclear whether both heads of damage are covered by the award granted by the Constitutional Court. From the Constitutional Court's considerations (see paragraph 25 above), it would appear that the award was in relation to pecuniary damage, and no mention is made of non-pecuniary damage.

44. Even assuming that the award covered both heads of damage, the Court considers that in the present case, even though the market value is not applicable and the rental valuations may be decreased owing to the legitimate aim at issue, an award of EUR 14,000 – from which must be deducted the applicants' costs of the appeal proceedings which they were made to pay (see paragraph 26 above) – can hardly be considered sufficient for the rent of a small house for over twenty years. Although no expert valuations concerning the rental value of the property were available to the domestic courts or to this Court – a matter which would have surely helped the courts to make a proper assessment – in the light of the sale valuations (see paragraph 16 above), the Court is satisfied that the award is in fact too low, especially if it was meant also to cover non-pecuniary damage.

45. The Court also takes issue with the fact that in line with domestic case-law, such compensation awards are reduced on the grounds that the applicants have instituted constitutional redress proceedings several years after they started suffering the violation complained of. In this connection, the Court notes, first and foremost, that domestic law does not impose a time-limit for the institution of constitutional redress proceedings. The legislator leaves the choice of timing to the applicant. Moreover, in circumstances such as those of the present case, the violation complained of is a continuing one. The Court thus finds that such reasoning is questionable in the light of the circumstances of the case and the domestic legal framework, which appears to give great latitude to individuals seeking redress for human rights violations.

46. Of further concern to the Court is the persistence of the unfavourable consequences for the applicants. Indeed, following the Constitutional Court judgment, the applicants have remained subject to the same laws which have breached their rights, as the Constitutional Court did not take any action in that respect. While it is true that the 2010 amendments to the Civil Code slightly ameliorated the applicants' situation, the Constitutional Court, which gave judgment in 2011, made no specific finding to the effect that such a change struck a fair balance and that a violation of the applicants' rights did not persist following that change. Thus, the applicants continue to suffer a violation of their rights to date.

47. It follows that the redress provided by the Constitutional Court did not offer sufficient relief to the applicants, who continue to suffer the consequences of the breach of their rights, and thus retain victim status for the purposes of this complaint.

48. The Government's objection is therefore dismissed.

2. Conclusion

49. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

50. The applicants submitted that the requisition order had been issued abusively to prevent a judgment in their favour. They further considered that it had not been issued in the public interest. To the contrary, in their view, it had been issued in the private interests of a squatter who had entered the property illegally. Moreover, the effects of the requisition, in particular the forced landlord-tenant relationship, the low amount of rent, including that

following the 2009 amendments, and the fact that they could neither terminate the lease nor dispose of the property freely for an indeterminate period of time, imposed on them an excessive burden as had repeatedly been held by the Court. They referred to, *inter alia*, *Fleri Soler and Camilleri v. Malta* (no. 35349/05, ECHR 2006-X).

51. The Government admitted that the applicants had suffered a violation of their property rights prior to the Constitutional Court judgment. They considered, however, that that violation had not subsisted subsequently, given that in 2011 the rent had increased from EUR 35 to EUR 185, and would continue to increase every three years.

2. The Court's assessment

52. Having regard to the finding of the Constitutional Court relating to Article 1 of Protocol No.1 (see paragraph 24 above), the Court considers that it is not necessary to re-examine in detail the merits of the complaint. It follows that, as established by the domestic courts, the applicants were made to bear a disproportionate burden.

53. However, in view of the parties' arguments and the lack of any reference by the domestic courts to the period following the 2010 amendments, the Court considers it necessary to examine the situation relating to that period, however, solely in connection with the applicable rent. Given that any other factual developments (see paragraphs 27-29) have not been sufficiently demonstrated before this Court, it will not make any assessment in that regard.

54. As to the applicable rent, the Court takes note of the efforts made by the Government to make changes to the legislation (in the form, *inter alia*, of the 2010 amendments) in the wake of the execution phase before the Committee of Ministers in connection with a series of judgments delivered against Malta concerning this subject matter (see *Ghigo v. Malta*, no. 31122/05, 26 September 2006; *Edwards v. Malta*, no. 17647/04, 24 October 2006; and *Fleri Soler and Camilleri*, cited above). Indeed, in the first two of those cases the Court, having regard to the systemic situation it had identified, considered that general measures at national level were called for. Nevertheless, despite the passage of ten years, those cases remain open before the Committee of Ministers. In this connection, the Court cannot but note that the rents provided for by the amended law remain in stark contrast with the market values of such property.

55. In relation to the present case, the Court observes that the amelioration brought about by the 2010 amendments increased the annual rent payable to the applicants in 2010 from EUR 35 to EUR 185. The latter sum has continued to increase by a few euros every three years thereafter (for example, EUR 193 in 2011 and EUR 197 in 2014). The Court regrets that no annual rental valuations were submitted to this Court. Nevertheless, from the information available in the public domain, it appears evident that

a small house with a sale value of around EUR 153,000 would, in this decade, fetch on the open market substantially more than a rental value of around EUR 16 a month. The Court considers that even bearing in mind that legitimate objectives in the "public interest" may call for less than reimbursement of the full market value, such a low amount of compensation cannot be considered justifiable.

56. Having regard to the meagre amount of rent received by the applicants, which persists to date despite the relevant amendments, the Court finds that a disproportionate and excessive burden continues to be imposed on the applicants, who have been ordered to bear most of the social and financial costs of supplying housing accommodation to C.C. It follows that the Maltese State has failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property (*ibid*; see also, *mutatis mutandis,* in connection with the above-mentioned amendments, *Anthony Aquilina v. Malta*, §§ 63 and 67, no. 3851/12, 11 December 2014).

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

57. The applicants complained of a violation of their right to a fair trial in connection with the impartiality of the Constitutional Court. When the proceedings were instituted its president had been the Attorney General and therefore the senior legal officer responsible for the defence of the two co-defendants in the case. The presiding judge had also been the legal officer advising the Government on the drafting and introduction of Act X of 2009. They relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

Admissibility

58. The Government submitted that during the domestic proceedings the applicants had not raised a challenge in respect of the President of the Constitutional Court under Article 734 of the COCP, as shown by the absence of any decree or minute to that effect in the record of the proceedings. They explained that since this situation was a common occurrence following the appointment of the President of the Constitutional Court in 2010, it was normal practice to ask the parties whether they agreed to the composition, and a note to that effect (whether they agreed or not) would always be drawn up to form part of the court record. Indeed, in practice the President of the Constitutional Court had abstained from presiding over cases in such circumstances (see, for example, the court record of 11 May 2015 in the case of *Jane Agius vs Attorney General et*,

application no. 33/2014). In the present case, on the day such a question was posed (24 January 2011), the applicants had been absent and all the other parties had agreed to the composition and registered a declaration to that effect. In the subsequent hearings of 27 June and 20 October 2011, the applicants had not raised any objection.

59. The applicants submitted that they had raised the issue orally. They further relied on the case of *Micallef v. Malta* ([GC], no. 17056/06, ECHR 2009). Lastly, they considered that the lack of subjective impartiality in the present case was so blatant that the President of the Constitutional Court should have withdrawn from hearing the case of his own motion.

60. The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

61. Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits (see *Micallef v. Malta* [GC], cited above, § 55).

62. Although the Court notes the domestic practice in such cases as explained by the Government, it regrets that in the present case the question was raised by the Constitutional Court of its own motion when one of the parties to the proceedings, namely the applicants, was absent. As confirmed by the Government, it was only the other parties who agreed to the composition and signed a declaration to that effect. In this connection the Court has accepted in its case-law the possibility that a person may waive his or her right guaranteed under the Convention. However, such a waiver must be made in an unequivocal manner and must not run counter to any important public interest (see, for example, *Håkansson and Sturesson v. Sweden*, 21 February 1990, Series A no. 171-A, § 66, and *Dorozhko and Pozhaskiy v. Estonia*, nos. 14659/04 and 16855/04, § 46, 24 April 2008). It was not so in the present case.

63. That being so, contrary to the situation in the case of *Micallef*, relied on by the applicants, the Court considers that in the present case, a request under Article 734 (d) of the COCP, which particularly covered situations such as those pertaining to the present case, would have been a proper remedy (see, *a contrario*, *Micallef*, cited above, § 56, ECHR 2009). Thus, that remedy had to be exhausted by the applicants. However, it has not been shown that the applicants made any such request in writing. Furthermore, while the applicants claim to have raised the issue orally, no minute to that effect has been presented. The Court considers that it would have been both possible and certainly desirable that any such objection be noted in the court minutes. In the absence of any evidence to the effect that the issue was

raised before the Constitutional Court, which either ignored it or turned it down, the Court is not satisfied that the applicants have made adequate use of the remedies available to them.

64. It follows that the Government's objection is upheld.

65. The Court therefore finds that the complaint is inadmissible for non-exhaustion of domestic remedies and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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. Damage

67. The applicants did not submit a quantified claim, but requested that the property be returned to them. They also requested the payment of compensation in an amount commensurate to the pecuniary losses they had endured as a result of the loss of use of the property for over twenty-eight years.

68. The Government submitted that any pecuniary damage should not exceed 8,400 euros (EUR), namely EUR 700 annually for twelve years (2003-15). They further submitted that as the applicants had made no claim for non-pecuniary damage, no such award should be made, and that in any event such an award should not exceed EUR 6,000, in line with the Court's awards in similar cases against Malta.

69. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation under the Convention to put an end to the breach and make reparation for its consequences. If national law allows only partial reparation to be made, Article 41 of the Convention gives the Court the power to award compensation to the party injured by the act or omission that has led to the finding of a violation of the Convention (see *Hirschhorn v. Romania*, no. 29294/02, § 113, 26 July 2007).

70. As to the applicants' request that the property be returned to them, the Court considers that in the circumstances of the present case, releasing the property would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Hirschhorn*, cited above, § 114). Nevertheless, the Court is not empowered under the

Convention to direct the Maltese State to annul or revoke the requisition order (see *Edwards*, cited above, § 83).

71. However, the Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, *mutatis mutandis*, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 248, ECHR 2000-VIII).

72. As to the claim for pecuniary damage, in cases such as the present one the Court would generally proceed to determine the compensation to which the applicants are entitled in respect of the loss of control, use and enjoyment of the property which they have already suffered from 1988 to date. Nevertheless, the Court observes that the applicants have failed to quantify their claims or submit any rental valuations, limiting themselves to requesting an amount commensurate to the pecuniary losses they have endured as a result of the loss of use of the property.

73. Having examined the circumstances of the case, the Court considers that the question of compensation for pecuniary damage is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed (namely, the Government and the applicant are to submit, within three months of the date on which this judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter), having due regard to any agreement which might be reached between the respondent Government and the applicant (Rule 75 § 1 of the Rules of Court; see *Edwards*, cited above, § 84).

74. The Court further notes that the applicants have not claimed any non-pecuniary damage and therefore makes no award under that head.

B. Costs and expenses

75. The applicants made no claims for costs and expenses.

76. The Government noted that the applicants had made no claim, and submitted that in any event any such award should not exceed EUR 2,000.

77. Although invited to do so, the applicants did not submit a claim with regard to the costs and expenses they had incurred. Accordingly, the Court makes no award in this respect (see *Edwards*, cited above, § 86).

C. Default interest

78. The Court considers it appropriate that the default interest rate 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. *Declares*, the complaint concerning Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds*, that, as far as the financial award to the applicants for any pecuniary damage resulting from the violation found in the present case is concerned, the question of the application of Article 41 is not ready for decision and accordingly,
   (a) *reserves* the said question as a whole;
   (b) *invites* the Government and the applicant to submit, within three months of the date on which this judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 30 August 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	András Sajó
Registrar	President

APPENDIX

Nº.	**First name LAST NAME**	**Date of birth**	**Place of residence**
1.	Gerald MONTANARO GAUCI	20/11/1934	Sliema
2.	Alfred MONTANARO GAUCI	28/08/1936	St. Julian's
3.	Neville MONTANARO GAUCI	18/11/1938	St. Julian's
4.	Winston MONTANARO GAUCI	19/09/1946	Gozo
5.	Marie Jose SULTANA	22/07/1944	Sliema
6.	Nicolette ZAMMIT LUPI	08/07/1942	Sliema