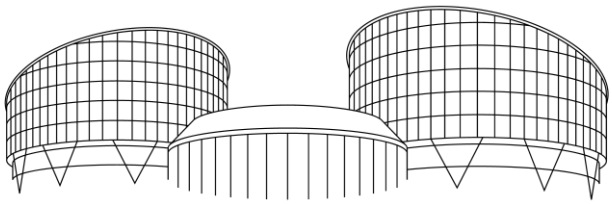

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FRENDO RANDON AND OTHERS v. MALTA

(Application no. 2226/10)

JUDGMENT
(*Merits*)

STRASBOURG

22 November 2011

FINAL

22/02/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Frendo Randon and Others v. Malta**,**

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

Nicolas Bratza, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
David Scicluna, ad hoc *judge,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 3 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 2226/10) 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 forty-six Maltese nationals, Dr Rene Frendo Randon, Ms Fabrizia Frendo Randon, Ms Maria Teresa Gatt, Ms Maria Theresa Forshaw, Ms Gabriella Pellegrini Petit, Mr Antonio Ganado, Mr Vanni Ganado, Ms Maria Galea, Ms Rita Buttigieg, Ms Josephine Farrugia Randon, Dr Stanley Farrugia Randon, Ms Roberta Fenech, Dr Philip Farrugia Randon, Ms Marisa Ellul Sullivan, Mr Martin Farrugia Randon, Ms Maria Paris, Ms Anna Camilleri, Mr Robert Randon, Mr Mario Randon, Ms Mary Rose Finn, Ms Victoria Mangion, Mr Albert Leone Ganado, Mr Godfrey Leone Ganado, Mr Joseph Leone Ganado, Mr David Leone Ganado, Ms Miriam Fenech, Mr Philip Leone Ganado, Mr Alexander Randon, Mr Anthony Randon, Ms Liliana Formosa, Mr John Pace Balzan, Mr Louis Pace Balzan, Mr George Pace Balzan, Mr Alfred Pace Balzan, Mr Anthony Pace Balzan, Ms Emma Randon, Ms Biancha Cuschieri, Ms Liliana Randon, Ms Eleonora Randon, Mr David Randon, Ms Marisa Anderson, Mr Ronald Randon, Ms Christina Randon, Mr Anthony Randon, Mr Jai-Micheal Randon, Ms Anne Marie Randon, Ms Mary Cassar Torregiani and Ms Eileen Mckee ("the applicants"), on 6 January 2010.

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

3. The applicants alleged a violation of their rights under Article 1 of Protocol No. 1 to the Convention and Article 6 § 1 (lack of access to court and a fair hearing within a reasonable time).

4. On 13 September 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr V. De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28 of the Rules of Court). The President of the Chamber accordingly appointed Mr David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1926, 1969, 1925, 1923, 1926, 1937, 1938, 1949, 1953, 1946, 1973, 1975, 1949, 1950, 1953, 1951, 1955, 1957, 1946, 1941, 1944, 1944, 1945, 1946, 1950, 1960, 1955, 1931, 1923, 1926, 1940, 1941, 1943, 1944, 1946, 1925, 1955, 1954, 1930, 1958, 1959, 1954, 1979, 1982, 1987, 1953, 1929 and 1959 respectively. The first thirty-eight applicants live in Malta, the next eight applicants live in the United States of America, the penultimate applicant lives in Canada and the last applicant lives in the United Kingdom.

A. Background of the case

7. The applicants or their predecessors in title (hereinafter "the applicants") owned four plots of land of varying sizes. The applicants were notified that their land had been made subject to two declarations by the Governor General dated 13 February 1969 and 20 February 1969, stating that the land would be expropriated for a public purpose. The intended public purpose was the building of the Malta Freeport. The said plots were numbered Plot 2 (16,544 sq.m), Plot 3 (405 sq.m), Plot 41 (6,841 sq.m) and Plot 53 (12,538 sq.m).

8. Following notices to treat of 21 February 1969 and 24 February 1969 respectively, the applicants were offered 3,225 Maltese liras ((MTL) - approximately 7,512 euros (EUR)) for Plot 2, MTL 973,40 (approximately EUR 2,267) for Plot 3, MTL 575 (approximately EUR 1, 340) for Plot 41, and MTL 1,127 (approximately EUR 2,625) for Plot 53. In March 1969 the applicants refused the above-mentioned offers in respect of Plots 2, 41 and 53 and submitted their counteroffers. According to the Government, the applicants accepted the offer in respect of Plot 3; however, the applicants contested this. Subsequently, the Commissioner of Lands (CoL) was

required to institute proceedings before the Land Arbitration Board (LAB) (see "Relevant domestic law below"). Although no such proceedings ensued, the CoL gave possession of the four plots of land to the Malta Freeport Corporation.

9. The applicants unsuccessfully requested the CoL to initiate proceedings a number of times; however, the latter did not do so, insisting that he wanted further information in relation to the applicants' ownership title. The law at the relevant time did not provide for a procedure which would allow the applicants to initiate proceedings for compensation. The initiation of compensation proceedings was an action which could be undertaken only by the authorities, and to which no time-limit applied. However, in the 1990s it had been confirmed that the ordinary courts had the competence, upon a request made by persons in a similar position to the applicants, to set a time-limit for the performance of that obligation, by virtue of Article 1078 of the Civil Code.

10. Thus, on 27 August 1996 the applicants lodged ordinary civil proceedings, requesting the court to order the CoL to initiate the necessary proceedings within an established time frame.

11. On 4 February 2000 the Civil Court upheld the applicants' request, and ordered the CoL to initiate proceedings before the LAB within three months of that date. It noted that the relevant notices to treat had been issued to all the owners concerned who at the time were still alive. Moreover, it was incumbent on the CoL to establish the identity of the owners of the land and to ensure that they were notified and that the relevant proceedings were pursued properly. No appeal having been lodged, the judgment became final.

12. On 18 April 2000 the CoL instituted compensation proceedings in respect of only two of the plots of land in question (Plots 41 and 53). These proceedings are still pending, as they were suspended *sine die*, pending the outcome of the constitutional proceedings mentioned below.

13. Compensation proceedings in relation to Plots 2 and 3 had not been initiated by the time the applicants instituted constitutional redress proceedings. However, pending the constitutional proceedings, on 6 February 2003, a schedule of deposit was filed in court, in relation to Plot 2, consisting of MTL 3,225 (approximately EUR 7,512) covering the price of the land and MTL 3,288 (approximately EUR 7,659) as damages for the delay in payment.

14. By that date, only a portion of the four plots of land had been used, the remaining portion remaining unused but earmarked for future expansion. More precisely, most of Plot 2 is currently being developed as a stacking area for containers for the purposes of the Freeport, the remaining 500 sq. m forming part of an area of land conceded on lease by the Freeport Corporation to Medserv Ltd. Plot 3 (consisting of a farmhouse and adjacent rural structures) and Plot 41 are outside the Freeport zone, and are currently

in their original state but may be earmarked for future expansion. Plot 53 is almost entirely within the Freeport zone and has been used for that purpose, including the building of roads, except for a piece of land measuring 600 sq.m, which is outside the Freeport zone and is currently in its original state but may be earmarked for future expansion.

15. In consequence, the applicants, who remain uncompensated to date, instituted two sets of constitutional proceedings.

B. The first set of constitutional redress proceedings (17/2002)

1. Proceedings before the Civil Court

16. In 2002 the applicants instituted proceedings in relation to the taking of Plots 41 and 53, complaining under Article 6 of the Convention of a lack of access to court; a lack of a fair hearing within a reasonable time (in respect of the thirty years before the proceedings started and in respect of the current pending proceedings before the LAB), before an independent and impartial tribunal, the latter in that they considered that the LAB's constitution did not fulfil the said requirements. They further complained under Article 1 of Protocol No. 1 to the Convention about the lack of adequate compensation in relation to the taking; in particular, they noted that the law as it stood referred to values applicable at the time of taking. At the final stages of oral submissions they further argued that the taking had not been carried out in the public interest as it had been given to a commercial entity and that the unused land was to be returned according to the *Cachia* jurisprudence (see relevant domestic law and practice below).

17. On 20 October 2008, the Civil Court (First Hall) in its constitutional jurisdiction found a violation of Article 6 § 1 of the Convention, in that the applicants had been denied access to court. Indeed, it was only the CoL who could institute proceedings according to domestic law. The fact that recently the law had been applied to allow the applicants to take up proceedings requesting a court to order the latter to act within a time-limit did not detract from the fact that it ultimately remained the duty of the CoL to take up these proceedings, and the affected individuals had no obligation to solicit such an action. Moreover, even in the event that ownership of land was at issue, it referred to the Civil Court's earlier reasoning in this respect (see paragraph 11 above) and, moreover, considered that the CoL could have instituted proceedings by means of a curator. It awarded them EUR 100,000 by way of damages and dismissed the remainder of their claims. It held that the taking of the two plots of land which were being used for the Freeport had been in the public interest, the latter being an important economic venture for the country. The fact that it was later privatised did not take away the element of public interest, despite the fact that the deed of expropriation had not yet been finalised. Moreover, the one-tenth of the two

plots which was outside the Freeport zone which had remained unused could have been used for future development. It failed to take cognisance of the complaint regarding compensation, holding that this had not yet been determined by the LAB. As to the complaint about the length of the proceedings, namely thirty years for the CoL to initiate proceedings, the court held that apart from the fact that this had been related to the previous complaint under Article 6, the provision referred to proceedings which had already begun and had taken an unreasonable time to be finally decided; therefore it was not applicable in the present case which was still pending. Lastly, since the law had been changed, the composition of the LAB clearly satisfied the Article 6 requirements.

2. Proceedings before the Constitutional Court

18. On appeal, by a decision of 10 July 2009 the Constitutional Court reversed the said judgment in part. It confirmed that there had been a violation of Article 6 in so far as the applicants had been deprived of access to a court but only from the period starting on 30 April 1987, the date when Malta introduced the right of individual petition. It also considered that there had been a violation of the reasonable time principle between 30 April 1987 and 18 April 2000, the date when the compensation proceedings were initiated. It had regard however to the fact that the applicants were also to blame for not having taken up the civil remedy available to solicit the CoL earlier than they had done. Moreover, no proof had been supplied that the proceedings currently pending before the LAB were not satisfying the reasonable time requirement.

19. The Constitutional Court further found a violation of Article 1 of Protocol No. 1 to the Convention. Holding that the public interest had to persist from the date of the taking to the date of the conclusion of the act of expropriation, it considered that even the land which had remained unused had been taken for such a purpose, since the Freeport could reasonably expand to cover such land. Moreover, the privatisation of the Freeport did not detract from the public interest involved. The court further confirmed that it was not in a position to consider the amount of compensation which had yet to be decided by the LAB. However, the fact that the process of expropriation had taken decades had caused the applicants to suffer a disproportionate burden, constituting a violation of the applicants' property rights.

20. The Constitutional Court reduced the amount of compensation to EUR 20,000, covering moral damage in relation to the said violations and confirmed the rejection of the remaining complaints.

C. The second set of constitutional redress proceedings (18/2002)

21. In parallel, in 2002 the applicants instituted proceedings in relation to the taking of Plots 2 and 3, with identical complaints to those in case no. 17/2002 (see paragraph 16 above).

22. On 20 October 2008 the Civil Court (First Hall) in its constitutional jurisdiction found a violation of Article 6 § 1 of the Convention, in that the applicants had been denied access to court, and rejected the remaining complaints on the same ground of the judgment in case no. 17/2002 (see paragraph 17 above). It added however that the present case was a more serious breach of the applicants' right of access to court, as the CoL had failed to institute proceedings even after he was ordered to do so by a court. It thus awarded the applicants EUR 125,000 by way of damages.

23. On appeal, by a decision of 10 July 2009 the Constitutional Court reversed the said judgment in part. It held that the findings of the Constitutional Court in its judgment in case no. 17/2002, applied in the same way in this case, except for the fact that the violation of the reasonable time principle was in respect of the period from 30 April 1987 to the date of this judgment, since the CoL had not yet instituted the relevant proceedings. It awarded the applicants EUR 27,000 in moral damage.

D. Developments while these proceedings were pending

24. Shortly before and during the constitutional proceedings certain developments took place. Domestic jurisprudence developed by means of the *Cachia* case (see "Relevant domestic law" below); and the Government announced the privatisation of the Freeport, by conceding it on a long-term lease (of thirty years at the price of one million United States dollars (USD) per year, to be augmented over the years to reach a maximum of USD 15,220,000 per year); the jurisprudence in the *Cachia* case was overturned; and, in 2002 the law was amended to provide a procedure for an individual to initiate compensation proceedings before the LAB in relation to new and recent expropriations.

E. Developments after the constitutional proceedings were concluded

25. At the hearing of 5 November 2009 the CoL informed the LAB of the outcome of the constitutional proceedings. However, neither the applicants nor their lawyers were present at that hearing; nor were they present at the subsequent five hearings. On 31 January 2011 the applicants requested an adjournment in order to regularise their position.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Expropriation

26. The Land Acquisition (Public Purposes) Ordinance (Chapter 88 of the Laws of Malta), in so far as relevant, reads as follows:

Section 3

"The President of Malta may by declaration signed by him declare any land to be required for a public purpose."

Prior to the amendments introduced in 2002, the Land Acquisition (Public Purposes) Ordinance provided that:

Section 12 (1)

"...the competent authority shall give to the owner a notice ... by means of a judicial act, stating the amount of compensation, as shown in a valuation to be attached to the notice to treat."

Section 13(1)

"The amount of compensation to be paid for any land required by a competent authority may be determined at any time by agreement between the competent authority and the owner ..."

Section 22

"If the owner shall by a judicial act decline to accept the offer made by the competent authority, the matter shall be brought before the Board by an application to be made by the competent authority, and the Board shall give all necessary orders or directions in accordance with the provisions of this Ordinance."

B. Obligations

27. Article 1078 (b) of the Maltese Civil Code, Chapter 16 of the Laws of Malta, in so far as relevant, reads as follows:

"Where the time for the performance of the obligation has been left to the will of the debtor, or where it has been agreed that the debtor shall discharge the obligation when it will be possible for him to do so, or when he will have the means for so doing, the following rules shall be observed:

(b) if the subject-matter of the obligation is other than the payment of a sum of money, the time within which the obligation is to be performed shall be fixed by the court according to circumstances."

C. Domestic case-law

28. In *Pawlu Cachia vs Avukat Generali u l-Kummissarju ta l-Artijiet* (*Rikors Nru* 586/97, 28/12/2001) the Constitutional Court held, after giving an overview of the applicable principles under Article 1 of Protocol No.1 to the Convention, that whenever the process by which an individual is divested of his property is not concluded, the interference therefore remains one of control of use, the State has the obligation to release the property to its rightful owners as soon as it transpires that there no longer exist grounds on which the State had originally, validly and justifiably taken the measure by which the owner's use was restricted. It was for the Government to prove that both at the time of the Governor's declaration and throughout the proceedings until the transfer of the property concluding the expropriation there existed a public interest for the taking of the property.

29. In this case the evidence revealed that for at least four years the competent authorities had actively considered releasing the property to its rightful owners, as it was no longer needed for the purposes for which it had originally been taken. Moreover, decades had passed since the date of the declaration and the present application, and thus the lack of public interest was evident. The Constitutional Court noted that a general interest had indeed existed at the time of the declaration. However, it subsequently emerged that Mr C.'s property would not have been used for that purpose and therefore the Government should have returned the said property. Failure to comply with this latter obligation amounted to a breach of the applicants' property rights under the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION AND ARTICLE 6 OF THE CONVENTION

30. The applicants complained under Article 1 of Protocol No. 1 to the Convention and Article 6 of the Convention that the expropriation of their land had not been in the public interest and that they had suffered an excessive individual burden, in view of the failure to institute compensation proceedings and the subsequent length of the proceedings, together with the fact that Maltese law did not provide for adequate compensation. The relevant provisions read, in so far as relevant, as follows:

Article 1 of Protocol No. 1

"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."

Article 6 § 1

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

31. The Government contested that argument.

A. Admissibility

1. The Government's preliminary objection

32. The Government submitted that the proceedings before the LAB, following the constitutional proceedings, had been delayed through the fault of the applicants, who had failed to appear when those proceedings had resumed following the constitutional redress proceedings. In respect of the two plots of land in relation to which no proceedings had allegedly been initiated, the Government noted that in respect of Plot 2, a schedule of deposit had been filed with the court, and with respect to Plot 3, the compensation offered had been accepted, although payment had not been made (in view of the pending sufficient proof of title which was still outstanding). Moreover, the judgments of the Constitutional Court of 10 July 2009 had upheld the violations which had been found of the applicants' rights under Article 6 and Article 1 of Protocol No. 1 to the Convention, and had awarded the applicants a sum totalling EUR 47,000. In consequence, the applicants could not still claim to be victims of the said violations.

33. The applicants considered that they were still victims of a violation of Article 1 of Protocol No. 1, and Article 6 § 1 of the Convention (lack of access to court and of a fair hearing within a reasonable time), since the compensation awarded by the Constitutional Court had been too low and because no proceedings had been initiated in respect of two of the plots of land. Moreover, in respect of the latter complaint, they had no means of enforcing the judgment of 4 February 2000 ordering the CoL to initiate proceedings. As to any previous arrangement in respect of Plot 3, this had never been debated before the domestic courts. As to Plot 2, they contended that it was not possible to challenge the amount awarded, as the new procedure only referred to recent expropriations. Furthermore, the awards made by the Constitutional Court had not been paid to date and there were

no means of enforcing such claims. Lastly, the applicants remained, to date, uncompensated for the taking of all the plots of land.

34. The Court reiterates that an applicant is deprived of his or her status as a victim if the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress for, a breach of the Convention (see, for example, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-193, ECHR 2006-V, and *Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, no. 26771/07, § 50, 5 April 2011).

35. As regards the first condition, namely the acknowledgment of a violation of the Convention, the Court considers that the Constitutional Court's findings in the two separate judgments - namely that the process of expropriation which had lasted for decades, had caused the applicants to suffer a violation of their property rights and their right of access to court and to have proceedings heard within a reasonable time - amounted to an acknowledgment that there had been a breach of Article 1 of Protocol No. 1 and Article 6 of the Convention. However, it notes that in the Constitutional Court's view this breach was limited to the period after 1987. The Court observes that, in the absence of an express limitation, the Maltese declaration of 30 April 1987 is retrospective and the Court is therefore competent to examine facts which occurred between 1967, the year of ratification, and 1987, the year in which the State's declaration under former Article 25 became effective (see *Bezzina Wettinger and Others v. Malta*, no. 15091/06, § 54, 8 April 2008). As the Government's declarations in respect of the applicants' property were made in 1969, the Court considers that there has not been an acknowledgment that the applicants had been suffering a violation of their rights, throughout the eighteen-year period from 1969 to 1987.

36. With regard to the second condition, namely appropriate and sufficient redress, the Court must ascertain whether the measures taken by the authorities, in the particular circumstances of the instant case, afforded the applicants appropriate redress in such a way as to deprive them of their victim status. The Court notes that the Constitutional Court in its two separate judgments awarded the applicants jointly EUR 20,000 and EUR 27,000 respectively.

37. The Court observes that after forty years the Constitutional Court, having established that there had been a violation of the applicants' rights following decades of inaction, failed to determine the amount of pecuniary compensation due. Indeed, forty years after the taking, the proceedings in respect of Plots 41 and 53 are still pending, and the proceedings in respect of Plots 2 and 3 have never been initiated, notwithstanding the court's order of 4 February 2000 to this effect. The fact that a schedule of deposit had been deposited by the Government in respect of Plot 2 does not detract from this conclusion. In respect of Plot 3, the Court finds it surprising that the Government's argument (see paragraph 32 above) has never been brought

before the ordinary courts, particularly since the latter ordered the CoL to institute proceedings even in respect of that plot, and given that the Constitutional Court found a violation of the applicants' right also in relation to this plot. In the light of the foregoing, the Court cannot but follow the domestic courts which have taken positive action also in respect of Plot 3 (see paragraphs 21 and 22 above). The Court notes that not only was the offer accepted by some and not all of the applicants at the time, but moreover, in forty years the transfer of property has not yet been concluded, it follows that any such arrangement cannot be considered to be enforceable today.

38. As to redress in monetary terms, it is true that the constitutional jurisdictions made an award covering non-pecuniary damage. However, even assuming that it was in itself sufficient (namely, comparable to Strasbourg awards) for the period in respect of which violations were found, this amount failed to take into account the period preceding 1987. Moreover, as acknowledged by the parties, none of these sums have yet been paid by the Government.

39. Indeed, in the present case the violations persisted for more than forty years after the Convention came into force in respect of Malta and the applicants have not to date received any compensation for the takings and/or the subsequent violations. Thus, the Court considers that the Constitutional Court judgments did not offer sufficient relief to the applicants, who continue to suffer the consequences of the breach of their rights (see, *mutatis mutandis*, *Dolneanu v. Moldova*, no. 17211/03, § 44, 13 November 2007).

40. For the above-mentioned reasons, the Government's objection is dismissed.

2. Conclusion

41. The Court notes that the application 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 applicants' submissions

42. The applicants submitted that the expropriation of their plots of land had not been in the public interest. As regards the land which had been used and incorporated into the Freeport zone, no public interest persisted once it had been *de facto* privatised. As to the larger portion of land earmarked for future use, the lack of public interest was evident from the fact that for forty

years it had remained unused for Freeport purposes, and a part of the land continued to host a farmhouse (in relation to which the applicants received rent from the tenants to date). They argued that, no use having been made of the land, which remained in the applicants' possession, the Government should have returned it to its owners (in accordance with domestic case-law) and re-expropriated it when needed, instead of keeping the land under the pretext that it was being earmarked for future expansion, the sole aim of the Government being to pay the much lower prices which were applicable in the 1960s.

43. As to their ownership, the applicants noted that during the domestic proceedings they had proved that all the relevant information had been submitted, and as had been stated by the domestic courts, if the CoL had not been satisfied he could still have initiated proceedings by means of a curator.

44. The applicants therefore attributed the delay in the expropriation proceedings entirely to the CoL. His failure to act for over twenty years, according to the applicants, constituted a lack of access to court and a violation of their right to a fair hearing within a reasonable time. It was only after he was forced to do so by court order that proceedings had finally commenced. However, to date they had not ended. Moreover, no proceedings had been initiated in respect of two of the plots of land. In this regard, they further argued that they had no means of enforcing the judgment of 4 February 2000 ordering the CoL to initiate proceedings. They further contended that they could not be held to blame for instituting proceedings to force the CoL to take action only in the 1990s, since up to that date the prevailing case-law had found that the civil courts did not have any jurisdiction to review acts carried out by the Government *jure imperii*. Indeed, the first judgments recognising that the victims of expropriation could apply for such an order had only been delivered in the 1990s. This was irrespective of Article 1078 of the Civil Code, which the applicants acknowledged could allow for such an action, had it not been for the aforementioned impediment. Moreover, they contended that the proceedings before the LAB had been suspended again, in view of the current proceedings before the Court, and were to date still pending. Furthermore, they alleged that the CoL had intentionally initiated these proceedings in the names of the deceased, notwithstanding that notification of their heirs had been officially made to him, thus, rendering the proceedings null.

45. The applicants further submitted that the LAB could not under Maltese law provide for adequate compensation. Property in Malta in the 1960s had been grossly undervalued, so receiving the market value applicable in 1969 with 5% interest, as provided for by law, could not compare with what the applicants could have bought at the time had they been adequately compensated. Thus, in view of the delay in payment and the amount of any eventual payment, they claimed to have suffered an

excessive burden, constituting a breach of their rights under Article 1 of Protocol No. 1 to the Convention.

2. The Government's submissions

46. The Government submitted that the expropriation of the land had been in the public interest, as it had been intended for use in connection with the Freeport Terminal Project and the further expansion of the Terminal. This was probably the largest public project to have been implemented in Malta in the last forty years, and it played a major role in the Maltese economic and social context. It catered for the needs and interests of the import/export industry through adequate port facilities, which at the time did not exist. The Government noted the use being made of the property (see paragraph 14 above) and contended that the mere fact that Freeport had been privatised on the basis of a lease agreement could not detract from the public purposes it aimed to achieve and the social and economic importance of the project.

47. The Government submitted that the applicants had been to blame for the delay in the conclusion of the expropriation proceedings, both because they had failed to produce proof of ownership and by instituting constitutional proceedings, as a consequence of which the LAB proceedings had been brought to a standstill. Moreover, it was only in 1996 that the applicants had first brought proceedings to force the CoL to initiate compensation proceedings, notwithstanding the long-standing existence of Article 1078 of the Civil Code, and certain case-law misapplying the *jure imperii* principle. The Government contended that the applicants' *modus operandi* had shown that they wanted to recover their land in order to reap higher monetary benefits, taking advantage of the public investment made by the Government, which had transformed the land from agricultural to land attracting commercial interest. In respect of the option of the CoL instituting proceedings by means of a curator, the Government considered that this was not an appropriate course of action, since it could deprive the eventually established owners from contesting the amount of compensation awarded. As for the pending proceedings, the Government claimed that they were being held up by the applicants, who had not appeared at the hearing; they also rejected the contention that the proceedings had been suspended *sine die*, or that they had been erroneously instituted against incorrect persons, and were therefore at risk of nullity. The Government submitted that the LAB would eventually determine the dispute as regards value, in a fair, objective and proportionate manner.

48. In relation to proof of ownership, the Government submitted that in practice declarations were published in the Government Gazette to allow owners to come forward, as the Government could not be in a position to know the owners. It was then for the owners to provide proof of ownership in order for the Government to issue a notice to treat.

49. As to compensation, the Government submitted that the applicants would in future be paid the full value of the land at the time of the taking (as to be established by the LAB, according to their wide margin of discretion), plus 5% interest per annum from that date to the date on which it would be paid or deposited. While at this point the amount of this compensation was speculative, the Government produced evidence showing that the LAB often augmented the price originally offered by the CoL. However, the Government were unable to supply examples of awards in respect of land which had been expropriated in connection with the Freeport. Moreover, legitimate objectives called for the reimbursement of less than the full market value. The Government submitted that the EUR 47,000 awarded by the constitutional court judgments had compensated the applicants for currency depreciation and any frustration endured in the meantime. Such an amount would be paid to the applicants as soon as the relevant bill was presented and claim made to the authorities, who had no intention of putting into practice the exception provided in the law in respect of non-enforcement of titles against the Government. Thus, the future LAB award, together with that awarded by the constitutional jurisdictions made the interference proportionate and therefore the applicants had not suffered an excessive burden.

50. Lastly, the Government reiterated that in respect of Plot 2, a schedule of deposit had been filed with the court and the applicants still had the possibility of contesting that amount before the LAB. Today, such a challenge could be lodged by the applicants and did not require action solely on the part of the CoL. With respect to Plot 3, the compensation offered had been accepted (by twenty-nine out of thirty owners, and the only owner who had not accepted had not made any counterproposal, thus tacitly accepting the offer); payment had not been made in view of the pending sufficient proof of title which was still outstanding.

3. The Court's assessment

(a) General principles

51. 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 and 30, Series A no. 316-A).

52. A taking of property 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". The Court reiterates that because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Furthermore, the notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI; *Immobiliare Saffi v. Italy*, [GC], no. 22774/93, § 49, ECHR 1999-V; and, *mutatis mutandis*, *Fleri Soler and Camilleri v. Malta*, no. 35349/05, § 65, 26 September 2006). 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 individual's right of property (see *Abdilla v. Malta* (dec.), no 38244/03, 3 November 2005).

53. Thus, any interference with property 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).

54. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the individuals (see *Jahn and Others,* cited above, § 94). In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 of Protocol No.1 only in exceptional circumstances (see *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A). However, while it is true that in many cases of lawful expropriation only full compensation

can be regarded as reasonably related to the value of the property, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances. Legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see *Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, § 115, ECHR 2007-XIII).

55. The Court reiterates, however, that the adequacy of the compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as unreasonable delay. Abnormally lengthy delays in the payment of compensation for expropriation lead to increased financial loss for the person whose land has been expropriated, putting him in a position of uncertainty (see *Akkuş v. Turkey*, 9 July 1997, § 29, *Reports of Judgments and Decisions* 1997-IV). The same applies to abnormally lengthy delays in administrative or judicial proceedings in which such compensation is determined, especially when people whose land has been expropriated are obliged to resort to such proceedings in order to obtain the compensation to which they are entitled (see *Aka v. Turkey*, 23 September 1998, § 49, *Reports* 1998 -VI).

(a) Application to the present case

i. Article 1 of Protocol No. 1 to the Convention

56. While the Government have not explicitly claimed that the applicants did not have a possession within the meaning of Article 1 of Protocol No. 1, in so far as they were not "owners" of the said property, the Court considers it opportune to note the following.

The applicants instituted proceedings both before the ordinary courts for the performance of an obligation by the CoL and before the constitutional jurisdictions. The latter courts did not see any obstacle to the applicants' bringing their claims, which were moreover upheld. Indeed, the Constitutional Court in two separate judgments awarded the applicants (presumably as owners of the said land) compensation for non-pecuniary damage for the violations they had suffered. Moreover, the Government insisted that the applicants had failed to prove their ownership and contended that persons had to prove their ownership before a notice to treat could be issued (see paragraph 48 above). The Court notes that this was the procedure according to the law in force at the time, as also reiterated by the Constitutional Court (paragraph 35 of judgment 17/2002/1). Indeed, the Court notes that, in the present case, not only were the applicants notified of the relevant declarations (see paragraph 7 above), they were also issued with the relevant notice to treat. Furthermore, the applicants maintained that all the requisite proof had been submitted, and it has not been contested in any way that all the applicants were the said owners, but only that they failed to

provide further information in this respect. Moreover, the Court considers that, as held by the Civil Court (see paragraph 11 above), in the context of an expropriation mechanism, it can understandably be the responsibility of the Government to identify the relevant owners. Indeed, in the present case the State authorities had identified the applicants. Lastly, the Government have not contested that the applicants were receiving rent in relation to one of the properties.

57. In the Court's view, these circumstances indicate that the applicants have been acting as the owners of the premises without disturbance for more than forty years and have been at least tacitly acknowledged as such by both the authorities and the domestic courts. Moreover, it has not been contested that some of the applicants were the rightful heirs of their predecessors, as also evidenced by documentation submitted to the Court. This is sufficient to conclude that the applicants are the owners of the land in question.

58. The Court further notes that it has not been contested that in the present case there has been a deprivation of possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1, and that the taking was carried out in accordance with procedures provided by law. It does, however, note that from the parties' observations it transpires that the Government have not taken actual possession of parts of the land at issue. In fact, the applicants still receive rent from the tenants making use of part of the property. However, bearing in mind that under the relevant provision any interference must be proportionate, whether it is one constituting a deprivation of property or one of control of the use of property, the Court will assess the case, as did the domestic courts, on the basis that the taking by way of expropriation in the present case amounted to a deprivation of property.

59. The Court will therefore analyse the public-interest requirement. It reiterates that in the case of *Beneficio Cappella Paolini v. San Marino* (no. 40786/98, § 33, ECHR 2004-VIII), which concerned property that had been lawfully expropriated but not used, it found that the partial use of expropriated land raised an issue as to respect for property rights, having regard in particular to the change in use following the approval of a new land-use plan. A similar situation obtained in the cases of *Keçecioğlu and Others v. Turkey* (no. 37546/02, §§ 28-29, 8 April 2008) and *Motais de Narbonne v. France* (no. 48161/99, § 19, 2 July 2002). In the latter case the Court found a breach of Article 1 of Protocol No. 1 on account of a significant delay between a decision to expropriate property and the actual undertaking of a project in the public interest which had formed the basis of the expropriation. While the placing in reserve of expropriated property, even for a long period of time, does not necessarily entail a breach of Article 1 of Protocol No. 1, there is clearly an issue under that provision where such an action is not itself based on public-interest grounds and

where, during that period, the property in question generates a significant increase in value of which the former owners are deprived (ibid., § 21).

60. The Court accepts that, in the present case, the original intention behind the expropriation of the land, namely the Freeport Terminal Project, was in the public interest. The Court rejects the applicants' contention that following the "privatisation" of the Freeport, no public interest persisted in respect of the land which was actually being used. It reiterates 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 of promoting the public interest (see *James and Others v. the United Kingdom*, 21 February 1986, § 40, Series A no. 98). Moreover, the taking of property effected in pursuance of legitimate social, economic or other policies may be in "in the public interest", even if the community at large has no direct use or enjoyment of the property taken (ibid., § 45). The Court therefore considers that Plot 2 and most of Plot 53 have been used in connection with the Freeport Project and that, even though they were eventually "privatised", their taking satisfied the public-interest requirement.

61. However, the Court notes that no use has been made of Plot 3, Plot 41 and 600 sq.m forming part of Plot 53. This area, amounting to approximately 8,000 sq.m, an area not negligible in size, is entirely out of the Freeport zone, and has remained unused for forty years (see paragraph 14 above). The Government considered that it was appropriate for a project of this scale to earmark land for future development. The Court is convinced that a project of this scale may require further expansion; however, it is of the view that the Government, when expropriating the relevant land, should have had some concrete plans at least for its forthcoming, if not for its imminent, development. Any further expansion after the start of the project or, as in the present case, one which might have been necessary four decades after the initiation of the project, may require further expropriation of land at later stages. In consequence, it cannot be said that the delay in making use of Plots 3, 41, and part of Plot 53 was itself based on any public-interest concern (see *Motais de Narbonne*, cited above, § 22, *in fine*). Moreover, the Government themselves acknowledged that the value of the land at issue had substantially increased over the years that followed the taking of the land, although they claimed that such an increase in value was entirely due to the project which the authorities had undertaken. The Court considers that, irrespective of the underlying reasons, it is indisputable that the land has seen an increase in value, of which the applicants have been deprived (see *Motais de Narbonne*, cited above, § 22).

62. Thus, the Court considers that the lapse of over forty years from the date of the taking of Plots 3, 41 and 53 (in relation to the part consisting of 600 sq.m) without any concrete use having been made of them, in

accordance with the requirements of the initial taking, raises an issue under Article 1 of Protocol No. 1, in respect of the public-interest requirement.

63. This having been said, the Court will also look at the proportionality of the measure.

64. The Court notes that the applicants have not received any compensation for the expropriation of their property to date, forty-two years after the taking.

65. In so far as the Government argued that the delay in paying compensation was due to the owners, the Court notes that, according to the Land Acquisition (Public Purposes) Ordinance, it was up to the authorities to initiate the relevant compensation proceedings (see paragraph 26 above) (see also *Bezzina Wettinger and Others v. Malta*, cited above, § 92). Whatever the effectiveness of an action under the Civil Code might be, the Court considers that, in such cases, owners could not be expected to incur the expense and burden of instituting proceedings to ensure the authorities' fulfilment of their legal obligation (see, *mutatis mutandis*, *Apostol v. Georgia*, no. 40765/02, §§ 64-65, ECHR 2006-XI, in relation to enforcement proceedings).

66. In respect of the argument that the applicants had failed to prove ownership, the Court notes that, as acknowledged by the domestic courts (see paragraph 17 above), the Maltese legal system also provided for the possibility of initiating proceedings by means of a curator. Moreover, in this connection, the Court also refers to its reasoning above in paragraph 56 *in fine*.

67. It follows that the period of thirty-one years that it took the authorities to institute proceedings in respect of Plots 41 and 53 is entirely imputable to them.

68. Moreover, the mere fact that the Government could have been forced by means of a court decision to initiate proceedings, would not guarantee that those proceedings would thereafter be pursued with due diligence. Indeed, the Court has previously found a violation of the reasonable time requirement in relation to LAB proceedings in the Maltese context (see *Bezzina Wettinger and Others*, cited above, § 93, and *Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, cited above, § 43). The Court observes, in this context, that although the CoL had been ordered to start proceedings and the proceedings were instituted in respect of two of the plots of land, the case is still pending today, eleven years after the institution of those proceedings before the LAB. The Government attributed this latter delay to the fact that constitutional proceedings were eventually taken up by the owners, and in consequence the proceedings before the LAB were suspended, and to the fact that following the end of the constitutional proceedings, the applicants failed to appear at the relevant hearings. The Court reiterates that the judicial authorities remain responsible for the conduct of the proceedings before them and ought to weigh the advantages

of continued adjournments pending the outcome of other cases against the requirement of promptness (see, *mutatis mutandis*, *Gera de Petri Testaferrata Bonici Ghaxaq*, cited above, § 43). More importantly, the Court considers that the owners cannot be held to blame (as submitted by the Government) for having eventually made use of their right to institute constitutional proceedings to safeguard their property rights, in view of the authorities' inaction and/or on the merits of the taking itself. Thus, while considering that the applicants are responsible for the delay following the Constitutional Court judgments, this does not suffice to counteract the authorities' lack of diligence in pursuing these proceedings.

69. Furthermore, the Court notes, once again, that no proceedings have been initiated in respect of Plots 2 and 3, notwithstanding the court order of 4 February 2000 and in this connection it makes reference to its conclusions in paragraph 37 above.

70. The Court further notes that, as conceded by the Government, the applicants will receive, in compensation for the taking of the property, the value of the land in 1969, as established by the LAB within their "wide margin of discretion", together with 5% interest. The Court has already held that awarding compensation reflecting values applicable decades before and deferring payment for decades, without taking into account this delay, is inadequate and constitutes a breach of Article 1 of Protocol No. 1 to the Convention (see *Schembri and Others v. Malta*, no. 42583/06, § 45, 10 November 2009). Save for the interest, the LAB is constrained by law to keep to 1969 values, and it has not been shown that any account can be taken of such delays. While it is true that the constitutional jurisdictions awarded an amount in damages to the applicants, the Court rejects the Government's argument that such awards covered both currency depreciation and non-pecuniary damage for the violations suffered at the domestic level, the wording of the judgment clearly referring to "moral damage".

71. In conclusion, having regard to the fact that part of the land remained unused for forty years, that the LAB cannot award appropriate compensation and that the applicants have not received any such compensation for the taking of their entire property, forty-two years later, the Court considers that the requisite balance has not been struck.

72. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

ii. Article 6 § 1 of the Convention

73. Bearing in mind the CoL's inaction for over forty years, in respect of the expropriation of Plots 2 and 3, and his inaction of thirty-one years in respect of the expropriation of Plots 41 and 53, during which time the applicants did not have direct access to the LAB, together with the fact that eleven years after the introduction of the latter proceedings they are still

pending, and based on the reasoning announced above in paragraph 68, in connection with that explained in more detail in the domestic constitutional court judgments of 10 July 2009, the Court finds that there has also been a violation of Article 6 § 1 under the head of access to a court, and a violation of the reasonable-time principle guaranteed by the same provision, for the period from 1969 to the present date.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

74. 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, costs and expenses

75. The applicants sought the restitution of the property which remained unused. In respect of the property which had been used by the Government and leased to third parties, they proposed to take over the said leases on a *pro rata* basis. Alternatively, they could accept other land of similar value. If such restitution were not possible the applicants claimed EUR 7,531,650 in respect of pecuniary damage, reflecting the market value of the land today (EUR 3,572,000 for Plot 2, EUR 281,250 for Plot 3, EUR 741,400 for Plot 41 and EUR 2,937,000 for Plot 53). They further claimed EUR 225,000 (the sum originally awarded by the first-instance constitutional jurisdictions) for non-pecuniary damage.

76. The Government submitted that the restitution of any of the plots was improbable. The same held for the applicants' taking over of the lease. As to monetary compensation, the Government noted that the expropriation had not been unlawful, and that therefore, according to the Court's case-law the applicants could not claim the current market value of the land with improvements. Thus, while pecuniary claims in respect of Plot 41 and Plot 53 were premature, since the matter was still pending before the LAB, the Government contended that the compensation for Plot 2 should be that set out in the schedule of deposit filed with the domestic courts and that of Plot 3, the amount which they alleged had been accepted by the applicants in 1969. Lastly, the sums granted by the constitutional courts, namely EUR 47,000, sufficed as an award for non-pecuniary damage and no further award by the Court was necessary. The Government submitted that, while it was unclear whether any fees were being claimed, the sum of EUR 1,000 would suffice to cover the legal expenses before the Court.

77. The Court has already rejected the Government's above-mentioned arguments in respect of each plot when it dealt with the merits of the complaint. It reiterates that it has found a violation of Article 1 of Protocol No. 1 and Article 6 under multiple heads. The Court considers that by awarding amounts for damage at this stage there is no risk that the applicants will receive the said dues twice, as the national jurisdictions would inevitably take note of this award when deciding the case (see *Serghides and Christoforou v. Cyprus* (just satisfaction), no. 44730/98, § 29, 12 June 2003). Moreover, in view of the fact that the domestic proceedings relating to the payment of compensation have lasted for more than forty years, the Court considers that it would be unreasonable to wait for the outcome of those proceedings (see *Serrilli v. Italy* (just satisfaction), no. 77822/01, § 17, 17 July 2008, and *Mason and Others v. Italy* (just satisfaction), no. 43663/98, § 31, 24 July 2007). However, in view of the submissions made by the parties at this stage, in particular the lack of any detailed calculations along the lines of *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, 28 September 2010)) with respect to pecuniary damage, the question of the application of Article 41 is not ready for decision. That question must accordingly be reserved as a whole and the subsequent procedure fixed, having due regard to any agreement which might be reached between the respondent Government and the applicants (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of denial of access to court and length of proceedings;

4. *Holds* that 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 applicants to submit, within three months from 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 Section the power to fix the same if need be.

Done in English, and notified in writing on 22 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President