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

THIRD SECTION

CASE OF SCERRI v. MALTA

(Application no. 36318/18)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • No compensation received for an expropriation that occurred more than fifty years ago • Compensation on the basis of 1961 categorisation as agricultural land not in itself inadequate • Length of time during which the applicants remained without compensation to be taken into account • Compensation not received • Requisite balance not struck
Art 6 (civil) • Impartial tribunal • Issues determined by the same three judges who sat on the Court of Appeal and again on the Constitutional Court concerning the same persons and facts as well as intrinsically-linked issues • Judges of the Constitutional Court deciding whether they themselves, by their decision in the Court of Appeal, had contributed to the breach of the applicants' human rights • Applicants' fears objectively justified

STRASBOURG

7 July 2020

FINAL

07/10/2020

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Scerri v. Malta,

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

Paul Lemmens, *President,*
Georgios A. Serghides,
Helen Keller,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Lorraine Schembri Orland, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 36318/18) 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 four Maltese nationals, Ms Nikolina Scerri, Mr Joseph Scerri, Mr Mario Scerri and Mr Raphael Scerri ("the applicants"), on 24 July 2018;

the decision to give notice to the Maltese Government ("the Government") of the complaints concerning Article 1 of Protocol No. 1 to the Convention, alone and in conjunction with Article 14, about the low amount of compensation awarded to them for their land; as well as the complaint under Article 6 § 1 of the Convention that the Constitutional Court had not been impartial;

the parties' observations;

Having deliberated in private on 9 June 2020,

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

INTRODUCTION

The case concerns the compensation due in relation to an expropriation, in respect of which the applicants claimed to have been discriminated against, as well as the alleged partiality of the Constitutional Court.

THE FACTS

1. For details about the applicants, see the table in the annex. The applicants were represented by Dr E. Borg Costanzi and Dr P. Borg Costanzi, lawyers practising in Valletta.

2. The Government were represented by their Agent, Dr Peter Grech, Attorney General, and subsequently by their Agent Dr Victoria Buttiġieġ, State Attorney.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

4. By means of a Governor's Declaration published in the Government Gazette in 1961, the applicants' agricultural land in Safi (as well as other land not belonging to the applicants) was declared to be needed for a public purpose under the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the Laws of Malta ("the Ordinance").

5. The Government took physical possession of the land in 1993 to construct a school (with its grounds) and roads.

6. A "notice to treat" was sent to the applicants on 14 January 2003, describing the land, measuring 665 square metres ("sq.m."), as touching another property at its south-west side and a road on the east side. Compensation was offered on the basis of its status as agricultural land in 1961 i.e. 1,490 Maltese liri (MTL), approximately 3,471 euros (EUR). According to the valuation report of 5 December 2002, the land then formed part of the extension of the grounds to the school and had previously formed part of a larger surface and was therefore agricultural land in terms of the Ordinance.

7. The amount of compensation was refused by the applicants in February 2003, who considered that given the lapse of time they should be compensated on the basis of the value in 2003, when they considered it to be developable land since it was close to a school, and in view of its potential, was worth MTL 120,000, approximately EUR 279,525. Thus, in the same year, proceedings were initiated before the Land Arbitration Board ("LAB"), which, by a decision of 15 October 2009, established the compensation as being EUR 20,134 plus interest according to law, on the basis of a report by the experts, who visited the site, which designated the land as agricultural according to the Ordinance. The LAB noted that, the two experts having been unanimous, it was bound to adopt their findings according to Section 25 (5) of the Ordinance. It thus ordered the parties to proceed to conclude the contract transferring ownership.

8. During these proceedings the applicants had argued, based on documents they submitted to the LAB, that property in the vicinity had been expropriated at much higher values. In particular, in 2007 and 2003 respectively, A.Z. had been paid EUR 104,356 for land measuring 186 sq.m.; and family Z. had been paid EUR 64,757 (plus EUR 71,125.09 in interest calculated at 5 % from 4 February 1981) for only part of a piece of land measuring 615 sq.m.

9. The parties appealed before the Court of Appeal (consisting of three judges). The applicants complained primarily that the land had been valued as being agricultural, and secondly that, in any event, the price per square metre as calculated by the architect had been erroneous. They noted that the

LAB had simply rubberstamped the experts' report, which had not explained why the land was deemed to be agricultural and not developable. Indeed, the LAB had been bound by law to follow the experts, thus denying the owners an effective review by a court. Moreover, no consideration had been given to the passage of time when determining compensation, thus breaching the applicants' property rights.

10. According to the Court of Appeal, the applicants, in particular, complained that the experts had not substantiated why the land was considered to be agricultural. In that regard the applicants argued that, given that another piece of land expropriated by the same declaration had been considered as being developable and that their land fell within a development scheme, both under the old law and the new one, the land had to be considered as developable land. They considered that the compensation awarded was ridiculous and that, even assuming it had to be considered as agricultural land, it had to attract higher compensation in the light of other factors such as the locality and the price of adjacent property. Furthermore, it had not been fair that compensation proceedings had started only forty years later and yet they were being compensated on the basis of a declaration of 1961, because in their case (unlike others) no new declaration (accompanied by a new valuation) had been issued in breach of their rights under Article 6 of the Convention in conjunction with Article 1 of Protocol No. 1. They asked the Court of Appeal to revoke the valuation of the experts subject to, if necessary, a declaration as to the characterisation of the land and the criteria to be used; to quash the LAB's decision and refer it back, and in the alternative, to vary the LAB's decision augmenting the compensation awarded.

11. During these proceedings a request by the applicants for a constitutional reference in relation to claims under Article 1 of Protocol No. 1 to the Convention, alone and in conjunction with Article 14 (concerning the compensation) and Article 6 (length of proceedings), was rejected by the Court of Appeal by means of an interlocutory decision of 6 May 2013. The Court of Appeal considered that the claims were frivolous and vexatious as the applicants had not yet exhausted ordinary remedies, namely the proceedings on appeal where their claims on the merits could still be accepted.

12. By a judgment of 29 November 2013 the Court of Appeal (in the main proceedings) rejected the applicants' appeal and confirmed the first-instance decision. It noted that the LAB's decision being dated 15 October 2009 the applicable procedural law was the one before the amendments of 2009 (Act XXI of 2009 of 1 December 2009 amending various laws related to civil matters - in particular revoking the limitation on appeals which could previously be lodged solely on points of law); thus, that the applicants could only appeal on points of law (Section 25 (7) of the Ordinance [as stood before 2009]); and that the experts having been

unanimous in their valuation, the Chairman of the LAB was bound by law to follow their findings.

13. The Court of Appeal considered that, in so far as this was a point of law, the lack of any reasoning by the experts as to the land being considered as agricultural did not vitiate the LAB's decision, since the experts had been unanimous and the LAB had to follow their findings in accordance with the law. The Court of Appeal noted that the experts had stated in their report that the land was agricultural "according to the Ordinance", and in the minutes of their site visit they had also stated that "they took account of the locality and considered other factors". The Court of Appeal, noting that the law left such an evaluation in the hands of the experts, considered that it could not be said that their unanimous evaluation was arbitrary.

14. The Court of Appeal also considered that it could not deal with the pleas in relation to the lack of a proper evaluation by the experts; the higher compensation awarded to others; and the fact that they were being compensated at the value of 1961 despite proceedings being undertaken forty years later, as these were not pleas on points of law. However, on the last mentioned plea, it found it opportune to note that the Government having taken possession of the land at the time of the issuance of the declaration (sic.), it was understandable that compensation had to be calculated on the basis of its value then.

B. Constitutional redress proceedings

15. On 25 May 2013 the applicants instituted constitutional redress proceedings complaining under Article 1 of Protocol No. 1 to the Convention, alone and in conjunction with Article 14 and Article 6 of the Convention, about the lack of access to court/length of proceedings (1961-2013). They argued that they had been severely prejudiced by the delay in payment of compensation, as a result of which the land had become developable when the notice to treat was issued. Yet they had been paid the price of the land (as agricultural) in 1961, while they considered that they should have been paid the price of the land in 2003 – the date of the notice to treat. In fact, adjacent land subject to the same circumstances had been revalued in the light of development potential, but not the applicants', they had thus also been discriminated against (on political grounds).

16. During the proceedings the architect's report of 5 December 2002, as well as the report of the LAB experts (see paragraphs 6 and 7 above), were submitted to the court and a Government employee also gave evidence. He considered that, as evident from the aerial photographs of 1957, the land was agricultural land, as it did not satisfy the requirements to be classified as developable land under Section 18 of the Ordinance in force at the date of the expropriation. In particular it had no frontage on a road, was not in a

built up zone and it was not situated at less than 91.5 metres of a built up zone.

1. First-instance

17. By a judgment of 10 October 2016 the Civil Court (First Hall) in its constitutional competence found a violation of all the provisions relied on and awarded pecuniary damage in respect of the violation of Article 1 of Protocol No. 1 in the amount of EUR 270,000 (based on a valuation dated 5 December 2014, by an expert appointed by the Commissioner of Land, of the land as it stood in 2013, plus interest from 2014 to date of contract). The Civil Court (First Hall) in its constitutional competence considered that the applicants had to be paid compensation on the basis of its designation as building land, as had been the case for others who had similar properties in the area and who had been subject to the same measure. It also awarded EUR 10,000 in non-pecuniary damage for the breaches of Articles 6 and 14 in conjunction with Article 1 of Protocol No 1. The applicants were to pay no costs.

18. In particular it found that the delay to issue the notice to treat – during which time the applicants had no access to court to pursue compensation proceedings – had breached the applicants' rights under Article 6 of the Convention, as of 1987 i.e. the date of the introduction of individual petition in Malta. It also found that the compensation offered was not adequate and if paid, together with interest, for the expropriation, would breach the applicants' property rights. In particular the court considered that in 2002 when the architect drew up the report for the notice to treat to be issued, the land was no longer agricultural but had become developable, satisfying the conditions stipulated in the law. It was therefore not just for the architect and later the LAB experts to award the value on the basis of it being agricultural land.

19. In relation to the complaint concerning discrimination the court considered that the applicants were not in the same situation as another family (A.Z.) who had been paid compensation in 2007 for land (measuring 187 sq.m.) which had been taken much later than 1961. The same could not be said about the situation of family Z. – in relation to a parcel of land (measuring 615 sq.m.) situated near that of the applicants and which had also been taken in 1961 at a time when it was agricultural land – whereby, despite being in an analogous situation, family Z. had been paid, in 2003, EUR 64,757 for 615 sq.m. of land while the applicant had been offered, in the same year, EUR 3,470 for 655 sq.m. (later valued at EUR 20,134 by the LAB). There had been a substantial difference in the values offered and no reasonable justification for such a difference in treatment.

2. Appeal

20. The parties appealed to the Constitutional Court, consisting of the same three judges who had decided the applicants' civil case on appeal. The applicants challenged the judges and requested their withdrawal, relying on Article 734 (1) (d) of the Code of Organisation and Civil Procedure (see paragraph 30 below).

21. By an interlocutory decree of 20 February 2017 the applicants' challenge was rejected by the same judges on the basis that the first case had concerned civil issues while the current one concerned constitutional issues.

22. By a judgment of 26 January 2018 the Constitutional Court confirmed the violation of Article 6 and awarded EUR 7,500 in non-pecuniary compensation in this respect, but revoked the rest of the first-instance judgment finding no violation of Article 14 (as the comparator was not in a similar situation – the latter's property having been classified as building land for the purposes of compensation) and no violation of Article 1 of Protocol No. 1, considering, however, that the compensation should be augmented to EUR 26,093 based on the guidelines set out in *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, 28 September 2010) to which had to be added interest, as provided by domestic law, on the date of transfer which was to be not later than three months from date of judgment.

23. In relation to the Article 14 complaint the Constitutional Court considered that the first-instance court should not have acted as a third instance court reversing the finding by the experts (who had considered that the land was agricultural) and therefore finding that the situations of the two cases were analogous. The applicants had not challenged the law by means of which their land was deemed to be agricultural, thus the LAB's decision to that effect was binding. This was the case irrespective of the new valuation dated 5 December 2014 by the expert appointed by the Commissioner of Land. Moreover, the mere fact that the applicants' land was in the same area, did not mean that both could be developed.

24. As to Article 1 of Protocol No. 1 the Constitutional Court noted that the applicants were not contesting the lawfulness of, or the public interest behind, the measure but its proportionality. The Constitutional Court disagreed with the applicants that they were to be paid the value of the land as developable since it had changed designation over the years, noting that it had not been contested that the land was agricultural in nature in 1961, nor had there been a challenge to the applicable law, the applicants' argument being limited to the assessment by the experts which was final (*res judicata* following the LAB's decision confirmed by the Court of Appeal). It considered that the European Court of Human Rights' case-law made it clear that the value to be taken into account was that at the time of the taking of the land which had to be updated at the date of payment, and interest should be paid as from the date of taking, in line with the methodology provided by the Ordinance.

25. The applicants were made to pay half the costs of the entire proceedings, in view of their failed claims.

26. Following this judgment the applicants wrote to the authorities to receive the payment due, however only an acknowledgment was received and to date of submissions (2020) the applicants had not yet received any compensation.

II. RELEVANT LEGAL FRAMEWORK

A. The Land Acquisition Ordinance

27. 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."

28. 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 17

"Any land which is not a building site shall be valued for the purpose of determining the compensation payable in the case of compulsory acquisition as rural land or as wasteland, as the case may be."

Section 18

"(1) Land shall be deemed to be a building site for the purposes of this Ordinance if it has a frontage on an existing street and is situated within a built up area or, subject to sub section (2) of this section, within a distance of not more than ninety-one and a half metres of a built up area, measured along the axis of the street.

(2) In determining whether land is a building-site by reason of the fact that it is situated within a distance of not more than ninety-one and one half meters of a built up area regard shall be had to the probable immediate expansion of the built up area in the direction of the land in question.

(3) Land falling within the definition of subsection (1) or (2) of this section shall be deemed to be a building site to a maximum depth of twenty-five metres."

Section 17 (as amended in 2006)

"Any land which is not a building site shall be valued for the purpose of determining the compensation payable in the case of compulsory acquisition as rural land or as wasteland, as the case may be;

Provided that in determining such compensation, consideration shall be given to the value of any structures existing thereon and whether such structures are covered by a permit according to law."

Section 18 (as amended in 2006)

"(1) Land shall be deemed to be a building site if it falls within the limits of a building scheme or as indicated and approved for development in a Structure Plan or subsidiary plan which has been adopted for the time being in force under any law relating to planning.

(2) In determining the compensation due for a building site, consideration shall be given to the use or development that can be made thereof or thereon in accordance with the provisions of subarticle (1)."

Section 18A (introduced in 2006) concerning the valuation of land expropriated prior to 2003

"Notwithstanding the provisions of this or any other law, the value of any land –

(a) still in the course of acquisition on the 1st January 2005

(b) in respect of which a declaration under article 3 was issued before the 5th March 2003, and

(c) in respect of which a notice to treat was not issued before the 1st January 2005 under the provisions of this Ordinance as in force before the date mentioned in this paragraph,

shall, saving any interests due until payment is made under sub-article (3) of article 12 of this Ordinance, be its value as on the 1st January 2005."

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."

29. The amendments introduced in 2002 by means of Act XI of 2002, provided, in so far as relevant, that compensation should no longer be paid on the basis of the date of the 'notice to treat' but on the basis of the date of the 'Presidential Declaration'. Its transitory provisions also provided that interest would be paid as from the date of the Presidential Declaration and:

"For the purposes of determining whether land is to be valued as a building site, agricultural or rural land or waste land for the purposes of this sub-article the relevant date shall be the date when the original Declaration was issued by the President before the coming into force of this article."

B. The Code of Organisation and Civil Procedure

30. Article 734 of the Code of Organisation and Civil Procedure concerning the grounds for challenge or abstention of a judge, reads as follows:

> "(1) A judge may be challenged or abstain from sitting in a cause -
>
> (*a*) if he is related by consanguinity or affinity in a direct line to any of the parties;
>
> (*b*) if he is related by consanguinity in the degree of brother, uncle or nephew, grand-uncle or grandnephew or cousin, to any of the parties, or if he is related by affinity in the degree of brother, uncle, or nephew, to any of the parties;
>
> (*c*) if he is the tutor, curator, or presumptive heir of any of the parties; if he is or has been the agent of any of the parties to the suit; if he is the administrator of any establishment or partnership involved in the suit, or if any of the parties is his presumptive heir;
>
> (*d*) (i) if he had given advice, pleaded or written on the cause or on any other matter connected therewith or dependant thereon;
>
> (ii) if he had previously taken cognizance of the cause as a judge or as an arbitrator:
>
> Provided that this shall not apply to any decision delivered by the judge which did not definitely dispose of the merits in issue or to any judgment of non-suit of the plaintiff;
>
> (iii) if he has made any disbursement in respect of the cause;
>
> (iv) if he has given evidence or if any of the parties proposes to call him as a witness;
>
> (*e*) if he, or his spouse, is directly or indirectly interested in the event of the suit;
>
> (*f*) if the advocate or legal procurator pleading before a judge is the son or daughter, spouse or ascendant of the said judge;
>
> (*g*) if the advocate or legal procurator pleading before a judge is the brother or sister of the said judge;
>
> (*h*) if the judge or his spouse has a case pending against any of the parties to the suit of happens to be his creditor or debtor in such manner as may reasonably give rise to suspicion of a direct or indirect interest that may influence the outcome of the case.
>
> (2) A judge may be challenged or abstain from sitting in a cause when he has previously taken cognizance of and expressed himself on the same merits of that cause when sitting as a judge in the Court of voluntary jurisdiction."

THE LAW

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

31. The applicants complained about the low amount of compensation awarded to them on the basis of the value of the land in 1961 (when it was designated as agricultural land), more than thirty years before the

Government took physical possession of the then developable land, which they considered was in breach 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

32. Noting that competence *ratione temporis* is a matter going to the Court's jurisdiction and which it is not prevented from examining of its own motion (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III) the Court find its relevant to make the following observations.

33. The Court notes that the applicants were stripped of their property in 1961 and that they complained about the amount of compensation determined decades later and not yet paid to them since. Therefore, the applicants' complaint is directed against the acts and omissions of the State in relation to the implementation of an entitlement to a compensatory measure vested in them under Maltese law – an entitlement which continued to exist after 23 January 1967 and still exists today – thus, the Court has temporal jurisdiction to entertain the complaint (see *Bezzina Wettinger and Others v. Malta*, no. 15091/06, § 98, 8 April 2008 and the case-law therein). The same applies to the assessment of the amount of final compensation the determination of which was made by the LAB's decision of 15 October 2009 confirmed on appeal and altered by means of the Constitutional Court judgment of 26 January 2018 (see, *mutatis mutandis*, *Bezzina Wettinger and Others*, cited above, § 98).

34. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

35. The applicants submitted that the LAB's decision to award them compensation based on a classification of the land in 1961, when they were still not compensated over fifty years later, was in breach of their right to the enjoyment of their property as well as the right not to be deprived of

their property without payment of just compensation. They argued that the fact that the land was in fact built on both at the time of the physical taking of possession of the property and at the time of the notice to treat (a matter overlooked by the Constitutional Court) further aggravated the breach complained of.

36. They submitted photographic evidence showing that in 2003, the time of the notification of the notice to treat, the school built by the Government on their land was already there, therefore the land was certainly in a development zone (as confirmed by the first-instance constitutional jurisdiction, that had awarded the applicants EUR 270,000 on the basis of the evaluation of a Government's architect dated 5 December 2014 who classified the land as developable). The Government were therefore untruthful in saying that it was not the classification in 1961 which had been taken into account. In particular the expert testimony relied on by the Government had specifically made reference to aerial photographs dated 1957 to reach a conclusion (see paragraph 16 above), it therefore could not be possible that the experts were estimating the land in its 2003 state. Furthermore, the notice to treat referred to construction touching the applicants' land, there could therefore be no doubt that the land was developable in 2003.

37. The applicants pointed out that they had engaged an architect throughout the domestic proceedings who valued the property as in the year 2003 at EUR 295,000 whereas the Commissioner of Lands' own architect valued the property in 2003 [sic., *recte* 2013] at EUR 270,000. Therefore, taking the average value of the land to be EUR 282,500 in 2003, the LAB's award, confirmed by the Court of Appeal [as well as the courts of constitutional jurisdiction] was only 7.13% of the value which the applicants ought to have received – especially in light of the fact that the applicants found themselves decades after the taking, without any compensation.

38. The applicants considered that the State's lack of consideration of the amount of time that lapsed between the Governor's Declaration and the payment of compensation was in itself a breach of Article 1 of Protocol No. 1. Moreover, the Government's excuse that it took thirty-two years to have permits approved was absurd, and surely thirty-two years to build a school which was necessary in 1961 could not be considered a delay in the public interest. The applicants contested the Government's argument that they could still use the land, and relied on domestic jurisprudence to the effect that they were stripped of all the rights pertaining to the disposability of the property as from the moment of the Government's declaration.

(b) The Government

39. The Government submitted that the expropriation was lawful, based on Chapter 88 of the Laws of Malta and Chapter 136 (which was applicable

in 1961), and that it had been in the public interest, a matter not contested by the applicants during the domestic proceedings. In particular the Government relied on testimony given during the domestic proceedings to the effect that the applicants' land (together with other land) was taken with the intention of constructing a school and roads in its vicinity. In the Government's view the public interest persisted over time despite the fact that the school was only built in 1993. They considered that any delay in actualising the project was not the result of any inaction on the part of the Government but was simply due to the extremely complex matters relating to town planning, which included applying for permits and designing and construction plans.

40. The Government further claimed that during such time the applicants maintained the possession of the property which was agricultural land and therefore continued to benefit from it.

41. As to compensation, the Government submitted that when it was taken the land was agricultural and therefore compensation had to reflect its categorisation then without reference to the development made by the Government. The experts had taken into consideration both issues of fact and of law in determining the compensation. The Government noted that the LAB had increased the initial offer by almost six times (awarding its value in 2003 on the basis of its categorisation as agricultural land) and the Constitutional Court (which considered that the classification of the land as agricultural by the ordinary courts was binding) increased it further, along the lines established by the European Court of Human Rights in *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, 28 September 2010) particularly, in view of the delay in the payment of compensation. Thus, in the Government's view the sum of EUR 26,093 to which must be added 5 % interest from the date when the land was taken until the date of agreement, was sufficient compensation. In relation to the valuation submitted by the applicants, the Government noted that it had been dated 2014 and referred specifically to the value of the land in 2013.

42. Additionally the Government submitted that the applicants had every opportunity to challenge the expropriation and thus safeguarding their rights. Moreover, in the Government's view the applicants had not been in a vulnerable personal situation. In consequence a fair balance had been struck between the competing interests.

2. The Court's assessment

(a) General principles

43. The Court reiterates that 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". 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 requirement of protecting the individual's fundamental rights, the search for such 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 v. Sweden*, 23 September 1982, §§ 69-74, Series A no. 52, and *Brumărescu v. Romania* [GC], no. 28342/95, § 78, ECHR 1999-VII).

44. Compensation terms under the relevant legislation are material to the assessment of whether or not the contested measure respects the requisite fair balance and, in particular, whether it imposes a disproportionate burden on the individuals (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI). In this connection, the taking of property without payment of an amount proportionate to its value will normally constitute a disproportionate interference, whilst a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances. However, 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 warrant reimbursement of less than the full market value (see *Tagliaferro & Sons Limited and Coleiro Brothers Limited v. Malta*, nos. 75225/13 and 77311/13, § 68, September 2018).

45. 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 additional financial loss for the person whose land has been expropriated, putting him or her 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).

(b) Application to the present case

46. The Court notes that the applicants lost possession of their property more than fifty years ago and remain today uncompensated.

47. The Court observes that the lawfulness of the measure itself is not in dispute between the parties, and that the public interest behind the taking of the land has not been contested by the applicants during the domestic proceedings. In such circumstances the Court is ready to accept that the

taking was lawful and in the public interest, despite the unreasonable delay in undertaking the project.

48. However, the Court finds it opportune to point out that it has often 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 (see *Motais de Narbonne v. France*, no. 48161/99, § 21, 2 July 2002; *Vassallo v. Malta*, no. 57862/09, §§ 42-43, 11 October 2011; and more recently *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 71).

49. As to the proportionality of the measure, the applicants considered that being awarded compensation on the basis of the land being agricultural in 1961, was not a fair assessment given the delay in the payment of compensation, i.e. which had not yet been paid decades later. They, thus, considered that for the compensation to be adequate, they should have been paid its value on the date of the notice to treat, a time when they considered it to be developable.

50. In this respect, the Court observes that – regrettable as it may be that at the relevant time (pre 2009) there was no judicial review of the decision of the experts as to the classification of the land – for the purposes of the present case the classification of the land in 2003 is immaterial, in so far as it has not been contested that the law at the relevant time provided that the applicants should be paid on the basis of the categorisation of the land at the time of the Governor's Declaration, that is, in 1961. Indeed it has not been contested that, in 1961, it was designated as agricultural land. It follows that the fact that compensation was granted on the basis of that categorisation is not in itself sufficient to find that the compensation was not adequate.

51. The fair balance is lost when, in determining the value of the land (irrespective of its categorisation), the LAB does not take into account the passage of time during which the applicants remained without compensation.

52. Indeed, the Court has previously found that by awarding compensation reflecting values applicable decades before and deferring the payment of such for decades until the date of the LAB decisions which do not take into account this delay, the national authorities render the compensation inadequate and consequently upset the balance between the protection of the right to property and the requirements of the general interest (see, for example, *Schembri and Others v. Malta*, no. 42583/06,

§ 45, 10 November 2009 and *Frendo Randon and Others v. Malta*, no. 2226/10, § 70, 22 November 2011).

53. However, the Court notes that, following the findings of the LAB (which appear to have awarded the value of the land in 2003 on the basis of its categorisation in 1961), the Constitutional Court increased the applicants' compensation (see, *a contrario*, *Schembri and Others* (merits), cited above, § 17) despite the fact that it did not find a violation of the invoked provision. In doing so it applied the criteria determined by the Court in *Schembri and Others* ((just satisfaction), cited above, §§ 17-18) thus, making good for the delay in payment until then. Furthermore, interest was to be added to the sum of pecuniary compensation for the land, at the time of the deed of transfer. In addition, the Constitutional Court also awarded the applicants non-pecuniary damage for the delay in concluding the expropriation.

54. Bearing in mind the above, and the fact that the applicants did not complain domestically about the lack of public interest due to the delay in implementing the envisaged project, which would have had an impact on the compensation payable (see, for example, *Vassallo v. Malta* (just satisfaction), no. 57862/09, §§ 18-20, 6 November 2012), the Court cannot find that, in the circumstances of the present case, the applicants have not been awarded adequate compensation.

55. Nevertheless, the Court notes that despite that award, which included an adjustment for the delay in payment, to date of submissions (2020) the applicants had not yet received any compensation. The Government did not deny that in their further round of observations in reply. In consequence, given that the applicants have to date not received any compensation for the taking of their property which occurred more than half a century ago, the Court considers that the requisite balance has not been struck (see, *mutatis mutandis*, *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 74 *in fine*, and *Gauci and Others v. Malta*, no. 57752/16, § 67, 8 October 2019).

56. There has accordingly been a violation of Article 1 of Protocol No. 1.

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

57. The applicants complained that the Constitutional Court was not impartial, it having been composed of the same three judges who delivered the judgment of 29 November 2013 and who also rejected their request for a constitutional reference. They thus considered that they had not had a fair trial before an impartial tribunal as provided in Article 6 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."

A. Admissibility

58. The Government submitted that the applicants had failed to exhaust domestic remedies as they had not brought constitutional redress proceedings to complain about the matter.

59. The applicants submitted that they had asked that the judges abstain from hearing and deciding the case, but their request was denied by all three judges. Relying on the Court's case-law they considered that they had not been required to institute a further set of constitutional redress proceedings in this connection.

60. The Court firstly notes that it has already established in the context of Maltese cases before it that even though Maltese domestic law provides for a remedy against a final judgment of the Constitutional Court, the length of the proceedings detracts from the effectiveness of that remedy and, in view of the specific situation of the Constitutional Court in the domestic legal order, this is not a remedy which needs to be used in order to fulfil the exhaustion requirement (see, *inter alia*, *Saliba and Others v. Malta*, no. 20287/10, § 78, 22 November 2011 and *Bellizzi v. Malta*, no. 46575/09, § 44, 21 June 2011). Further, the Court observes that the applicants pursued the ordinary remedy available in such circumstances, namely the procedure provided in Article 734 (1) (d) of the Code of Organisation and Civil Procedure by which they asked the judges to withdraw (see, *a contrario*, *Montanaro Gauci and Others v. Malta*, no. 31454/12, § 63, 30 August 2016).

61. Thus, contrary to the Government's arguments, the applicants who undertook the relevant remedy are entitled to raise their complaint before the Court at this stage, and the Government's objection is dismissed.

62. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The submissions by the parties

(a) The applicants

63. The applicants submitted that the fact that their constitutional appeal was heard and decided by the same three judges who had decided the civil appeal as well as the request for a constitutional reference, gave rise to a breach of their right to a fair hearing in that the judges had already pronounced themselves on the matter at stake. This rendered the applicants' appeal futile as the judges were never going to strike down a judgment which they themselves had given. They relied on the Court's case-law concerning a judge's previous involvement in a case, noting however that not only had the judges been involved but more importantly they had i) been

called on to assess their own previous decision, and ii) they had already considered the applicants' constitutional claims as frivolous and vexatious (when rejecting the applicants' request for a constitutional reference). The applicants insisted that the main issue before both courts was the same, mainly, whether the LAB had been right in designating the land on the basis of its nature in 1961, and in consequence whether the compensation had been adequate.

64. In respect of the Government's submission that the Court of Appeal had rejected their request for a reference on the ground of non-exhaustion of ordinary remedies since the proceedings were still pending, the applicants noted that this was the exact purpose of a reference procedure. Indeed had proceedings ended, a reference would not have been possible. It followed that the applicants were only using the remedies provided in law.

(b) The Government

65. The Government submitted that while the two courts were composed of the same judges, the assessments they were called on to make were entirely distinct. Noting that the subjective impartiality of the judges was not at issue, the Government considered that no element of objective impartiality existed either.

66. In particular, the Government submitted that under Maltese law judges had to take an oath of office by which they swore to faithfully perform their duties without favour or partiality, and such an oath was taken in public to inspire public confidence in the members of the judiciary.

67. Moreover, and in spite of that onerous oath, the law also provided for certain situations in which a judge may withdraw (Article 724 of the Code of Organisation and Civil Procedure). The applicants had pursued this remedy relying on Article 734 (1) (d) and the Constitutional Court considered that there were not sufficient grounds justifying their recusal under Article 734 (1) (d) (ii). The Government agreed with that finding since the issues at play where different in the two proceedings. The Government submitted that the Court of Appeal had to decide on five pleas, of which three could not be entertained since they were on points of facts while the Court of Appeal's jurisdiction was limited to points of law. Thus, even assuming those three pleas were similar to the issues brought before the Constitutional Court, the former had been legally proscribed from examining them. Therefore, the only two matters dealt with in the Court of Appeal's examination were procedural issues, namely concerning the lack of motivation of the experts' report and the LAB decision, and the issue of the costs of the proceedings. In contrast, the issues to be decided by the Constitutional Court were human rights issues, and it was not tasked with the reconsideration of the decision of the Court of Appeal.

68. The Government also considered that when the Court of Appeal decided to reject the applicants' request for a constitutional reference it was

not deciding the merits of their human rights claim. In the Government's view the Court of Appeal's rejection on the grounds that the applicants' claims were frivolous and vexatious had been based on the fact that the applicants had not yet exhausted the ordinary remedies.

2. The Court's assessment

(a) General principles

69. According to the Court's constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, 24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII and *Denisov v. Ukraine* [GC], no. 76639/11, § 61, 25 September 2018).

70. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Wettstein*, cited above, § 43).

71. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 287, 4 December 2018).

72. In itself, the objective test is functional in nature: for instance, the exercise of different functions within the judicial process by the same person (see *Piersack v. Belgium*, 1 October 1982, Series A no. 53, pp. 14-15), or hierarchical or other links with another actor in the proceedings (see cases regarding the dual role of a judge, for example, *Wettstein*, cited above, § 47, and *Mežnarić v. Croatia*, no. 71615/01, 15 July 2005), give rise to objectively justified misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-XIII). It must therefore be decided in each individual case whether the connection in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 148, 6 November 2018).

73. In this respect even appearances may be of a certain importance, or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public (ibid. § 149, and *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009).

74. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (see *Mežnarić*, cited above, § 27). The Court will take such rules into account when making its own assessment as to whether the tribunal was impartial and, in particular, whether the applicant's fears can be held to be objectively justified (see *Micallef*, cited above, § 70).

(b) Application to the present case

75. In the present case the Court observes that the applicants did not call into question the subjective impartiality of the three judges sitting on the bench and forming the Constitutional Court in the present case. It therefore considers it appropriate to examine the complaint from the standpoint of the requirement of objective impartiality, and more specifically to determine whether the applicants' doubts can be regarded as objectively justified in the circumstances of the case.

76. The Court observes that the complaint can be seen in different ways. It may be considered that in the present case the same judges decided in two different sets of proceedings, where the complainants were the same persons, and which related to the same facts, a situation which might raise an impartiality issue (compare *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 59, *Reports of Judgments and Decisions* 1996-III and *Indra v. Slovakia*, no. 46845/99, § 53, 1 February 2005). Alternatively, it is possible to consider that in the present case the same judges performed different functions in the same proceedings (compare *Peruš v. Slovenia*, no. 35016/05, § 38, 27 September 2012 and *Warsicka v. Poland*, no. 2065/03, § 40, 16 January 2007). In the latter case, it is necessary to examine whether the link between the substantive issues determined is so close as to cast doubt on the impartiality of the judges (see, *mutatis mutandis, Warsicka*, cited above, § 40). The time which elapsed between the two participations, and the extent to which the judge was involved in the proceedings may also be taken into consideration (see *Peruš*, cited above, § 37). Whether the judges were called on to review their own decisions, and thus whether they had erred in their earlier decisions, is also a relevant

factor (see, for example, *Driza v. Albania*, no. 33771/02, § 81, ECHR 2007-V (extracts))

77. The Court observes that in the present case the issues determined by the same judges who sat on the Court of Appeal and again on the Constitutional Court – whether seen as judges sitting in two different sets of proceedings, or in one and the same set of proceedings – concerned the same persons and the same facts (compare *Pasquini v. San Marino*, no. 50956/16, § 145, 2 May 2019). In the Court's view they also concerned the same substantive issues, at least in so far as these concerned the designation of the applicants' land as agricultural and the method of calculation by the experts, impacting the LAB's decision, including the lack of consideration of the passage of time, forty years, and the unfairness of the situation in itself and in comparison to others (compare the two applications at paragraphs 10 and 15 above). Indeed the Court of Appeal expressed itself on the matter, in so far as it considered the related pleas as a point of law, but not in so far as it considered them a point of fact (see paragraphs 12-14 above). Later, the Constitutional Court upheld the classification of the experts considering that it had been binding, and examined the compensation due on that basis, augmenting it in view of the delay in payment and then proceeded to find that the applicants had not suffered a breach of their rights. Thus, even if it had to be considered that the issues decided by the two courts were not exactly the same, the issues examined by both courts were, nevertheless, intrinsically linked (see, *a contrario*, *Central Mediterranean Development Corporation Limited v. Malta (no. 2)*, no. 18544/08, § 35, 22 November 2011).

78. The Court further observes that the Constitutional Court had to consider whether the decision of the LAB, confirmed by the Court of Appeal (composed of the same three judges sitting on the Constitutional Court), had been lawful, and whether the outcome of that decision had the result of breaching the applicants' human rights. There is therefore no doubt that the three judges constituting the Constitutional Court were deciding, *inter alia*, whether they themselves (as a Court of Appeal) *via* their decision on the case, had contributed to the breach of the applicants' human rights. Reversing in part the judgment of the first-instance court of constitutional competence, they considered that the applicants' property rights had not been breached nor had the applicants' been discriminated against. The Court considers that the situation in the present case can be considered as comparable to that obtaining, for example, in *San Leonard Band Club v. Malta* (no. 77562/01, §§ 63-64, ECHR 2004-IX) and *Toziczka v. Poland* (no. 29995/08, § 43, 24 July 2012) where the trial judges were called upon to assess and determine whether their own application of the law had been adequate and sufficient.

79. The Court further notes that in the present case it was the entire composition of the Constitutional Court which had been previously

involved in the case, as the three judges constituting the Court of Appeal, and that there were no compelling reasons making it necessary for these three judges to sit on the bench of the Constitutional Court in the present case (compare, *Fazlı Aslaner v. Turkey*, no. 36073/04, § 38-40, 4 March 2014, and the cases cited therein). Furthermore, little comfort could be found in the domestic rules regulating the withdrawal of judges, given that not only did the judges not abstain of their own motion on the basis of Article 734 (1) (d) but they even refused to withdraw when challenged by the applicants (see paragraph 21 above).

80. These circumstances are sufficient to hold that the applicants' fears as to the lack of impartiality of the Constitutional Court were objectively justified, without necessitating a further consideration related to the Court of Appeal's decision on the request for a constitutional reference.

81. There has accordingly been a breach of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

82. The applicants complained that they had been discriminated against vis-à-vis other property owners who had been awarded compensation on the basis of their land being designated as developable land, despite the similar circumstances. They relied on Article 14 in conjunction with Article 1 of Protocol No. 1, the former provision reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

83. Having regard to the facts of the case, the submissions of the parties as well as its findings under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, and in particular that it has not been contested that the law at the relevant time provided that the applicants should be paid on the basis of the categorisation of the land at the time of the Presidential Declaration, when it was designated as agricultural land (see paragraph 50 above), the Court considers that there is no need to give a separate ruling on the remaining complaint.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicants claimed 270,000 euros (EUR) in respect of pecuniary damage and EUR 9,000 in non-pecuniary damage.

86. The Government submitted that the applicants' valuation was based on the assumption that the land was developable and referred to its value in 2013. They considered that pecuniary compensation should not exceed EUR 15,000 jointly and no non-pecuniary damage was due since the domestic court had already awarded them EUR 7,500.

87. The Court notes that in similar cases (see, for example, *Frendo Randon and Others v. Malta* (just satisfaction), no. 2226/10, § 20, 9 July 2013 and *Azzopardi v. Malta*, no. 28177/12, § 66, 6 November 2014) the sum to be awarded to the applicants was calculated on the basis of the value of the land at the time of the taking, converted to the current value to offset the effects of inflation, plus simple statutory interest applied to the capital progressively adjusted. However, in the present case the Court does not lose sight of the fact that the Constitutional Court has awarded the relevant sum progressively adjusted (excluding interest which was to be calculated on date of transfer) (see paragraphs 22-24 above). That sum and the interest have not been paid, despite the time-limit set by the Constitutional Court. Thus, that capital sum must be adjusted to date and interest must be added. However, in the circumstances, like the Constitutional Court, this Court will not quantify the interest which must be added domestically upon the finalisation of the deed of expropriation.

88. Having regard to the above the Court considers it reasonable to award the applicants EUR 27,000, jointly, plus interest due on the deed of transfer, and any tax that may be chargeable on that amount, in pecuniary damage for the expropriation of their property. The Court clarifies that by awarding this amount for damage, it has included the award made by the Constitutional Court which has remained unpaid, and thus should no longer be paid over and above this award, to avoid any risk of the applicants being compensated twice.

89. It further awards EUR 9,000, jointly, in non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

90. The applicants also claimed EUR 5,603.72 for the costs and expenses incurred before the domestic courts and those incurred before the Court.

91. The Government submitted firstly, that the applicants had only shown receipts amounting to a total of EUR 3,437.42; secondly that costs must be in accordance with the taxed bill of costs submitted (EUR 3,803.15 applicants' costs and EUR 3,982.76 defendant's cost) but since the applicants had not submitted official receipts issued by the Registry of Courts they should only be awarded EUR 1,500 jointly and EUR 1,000 for proceedings before this Court.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,725 covering costs under all heads, plus any tax that may be chargeable to the applicants.

C. Default interest

93. 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

1. *Declares*, unanimously, the complaints concerning Article 1 of Protocol No. 1 to the Convention and Article 6 § 1 of the Convention admissible;

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

3. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*, by six votes to one, that it is not necessary to examine the admissibility and merits of the complaint under Article 14 of the Convention;

5. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 27,000 (twenty-seven thousand euros), plus interest due on the deed of transfer, and any tax that may be chargeable, in respect of pecuniary damage;
(ii) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(iii) EUR 2,725 (two thousand seven hundred and twenty-five euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, by six votes to one, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova
Deputy Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.

P.L.
O.C.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. The judgment rightly finds (see paragraph 56 and point 2 of the operative part) that there has been a violation of Article 1 of Protocol No. 1 guaranteeing the right to the protection of property, as the applicants have still not received any compensation to date, about sixty years since their property was compulsorily acquired (on 17 March 1961) and despite the fact that the Constitutional Court, in January 2018, awarded them 26,093 euros (EUR) in compensation for the land taken from them (see paragraph 22 of the judgment).

2. My first disagreement with the judgment is that, despite the above finding to which I fully subscribe, when the judgment comes to determine the amount to be awarded to the applicants in respect of pecuniary damage, for the violation of their property rights under Article 1 of Protocol No. 1, it does not take – or sufficiently take – into account, *inter alia,* the following two important factors for which the applicants should not be blamed and for which the only responsible party is the respondent State: (a) the passage of time between the taking of the property on 17 March 1961 (date of Governor's declaration published in the Government Gazette, which was the relevant date announcing the compulsory acquisition, see paragraphs 4 and 27 of the judgment and Section 3 of the Land Acquisition Ordinance (Chapter 88 of the Laws of Malta)) and the present time, thus almost 60 years, without the applicants receiving any compensation; and (b) the passage of time between the taking of the property on 17 March 1961 and the date on which the "notice to treat" was sent to the applicants, i.e. 14 January 2003 (see paragraph 6), thus 42 years without any legal avenue for the applicants during that time to institute court proceedings in order to claim compensation, as is clear from the decision of the Civil Court (First Hall) in its constitutional competence (at first instance), which found for this reason a violation of Article 6 of the Convention, a decision upheld on appeal by the Constitutional Court, which also awarded the applicants EUR 7,500 for non-pecuniary damage in respect of this violation (see, in the same vein, *Frendo Randon and Others v. Malta,* no. 2226/10, § 73, 22 November 2011).

3. As the domestic authorities and the judgment in the present case decided, the value of the expropriated land was assessed according to its categorisation (i.e. status) and value in 1961, when the land was agricultural, taking into account inflation and adding interest, while rejecting the submission of the applicants that given the lapse of time they should be compensated on the basis of the categorisation of the land and its value as at 14 January 2003, when a "notice to treat" was sent to them and thus at a time when their land had become developable and was worth much more than in 1961; it was not sufficient merely to take inflation and interest into account.

4. The delay of much more than half a century was attributed to a fault of the respondent State and not to any fault of the applicants, who have nevertheless received no compensation, and it would be entirely unfair for the applicants to receive the amount that is decided in the present judgment, because such a low amount, objectively seen today, would allow the respondent State to take advantage of its own delay and fault. I will return to this point later on.

5. The Court, in the present case, awarded the applicants the amount of EUR 27,000 in respect of pecuniary damage (see paragraph 88 of the judgment and point 5 (a) (i) of its operative part), on the basis of the status applicable to the expropriated land as of 17 March 1961, when the Governor's declaration was made, including inflation and interest. The Court did so because it considered the date of that declaration to be the relevant date for assessing both the categorisation and the value of the land. In their submissions before the Court on just satisfaction, the applicants requested EUR 270,000 for pecuniary damage as the Civil Court (First Hall) in its constitutional competence had awarded this sum to them on the basis of both the categorisation and value of their land as at 14 January 2003; which decision, however, was overturned by the Constitutional Court, simply basing the assessment on a different date of valuation, i.e. 17 March 1961. The amount of EUR 270,000, which no domestic court has in fact disapproved as not reflecting the correct amount based on the 2003 value, is ten times the amount that the Court eventually awarded the applicants.

6. There are two main trends to be found in the case-law of the Court as regards the relevant date for the determination of rights to property that has been compulsory acquired, based on its status and its value. According to one line of case-law, the relevant time is the date when the land was taken; thus in the present case, 17 March 1961. In particular, compensation is then assessed by ascertaining the market value of the expropriated property at that time, adjusted to inflation and with interest added, as was the majority's approach in the present case (see cases referred to in paragraph 87 of the judgment, namely, *Frendo Randon and Others v. Malta* (just satisfaction), no. 2226/10, § 20, 9 July 2013, and *Azzopardi v. Malta*, no. 28177/12, § 66, 6 November 2014, also cited at § 87 of the judgment; see also *Michael Theodossiou Ltd v. Cyprus,* no. 31811/04, §§ 15-23, 14 April 2015).

7. The other trend supports the view that the relevant date for assessing expropriated property and its status is the present time, when the Court itself finds a violation of Article 1 of Protocol No. 1. According to this view, the present-day or current land market values are relevant when it comes to compensating an expropriated owner for his or her land in its present state. An authority for this approach is *Loukia Serghides v. Cyprus* ((just satisfaction), no. 44730/98, §§ 9 and 27, 10 June 2003), the relevant passages of which are cited below, one of which refers to what the applicant in that case had argued, citing also a Grand Chamber case, namely, *Former*

King of Greece and Others v. Greece, while the other passage refers to what the Court accepted:

> "9. As for the date of valuing the property, the applicant submitted that, in accordance with the Court's case-law, the amount of compensation should be calculated on the basis of the current value of the property (relying on *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, §§ 37 and 39; *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 76, unreported). Accordingly, the expert valuations she presented were based on recent sales of certain plots of land in the same vicinity. She also emphasised that the date of the valuation of the property had to be as close as possible to the date of payment of compensation in order to ensure the adequacy of the latter (relying on the two judgments in Guillemin v. France, judgments of 21 February 1997, Reports of Judgments and Decisions 1997-I, §§ 54-56, and of 2 September 1998, (Article 50), Reports, 1998-VI, §§ 23-24)."

> "27. The Court considers that the assessment must be made using present day land values, when the Court itself found a violation of the Convention."

8. I would suggest that, taking into account what has been said in paragraphs 2-4 of my opinion above, the Court, after finding a violation of Article 1 of Protocol No. 1 should have considered, as the Court did in *Loukia Serghides and Christoforou* ((merits), no. 44730/98, § 80, 5 November 2002), "that the question of the application of Article 41 [was] not ready for decision and that it must be reserved, having regard to the possibility of an agreement between the respondent State and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court)", thus requesting the parties to submit a valuation based on current prices, as the Court in that case ultimately decided (see *Loukia Serghides* (just satisfaction), cited above, § 27).

9. Since the present case was not adjourned by the Court as to the issue of just satisfaction, in the manner proposed above, I will proceed to assess the sum to be awarded to the applicants based on the value and status of their land as at 14 January 2003, when the "notice to treat" was sent to them, as argued by them before the domestic courts as well as before the Court. This is the time at which both parties first had the possibility of starting negotiations regarding the compensation issue, as well as the time when the applicants were able to request compensation before the domestic courts. It is to be emphasised that the applicants were not only deprived of their property in 1961 on a compulsory basis, they were also deprived of their right to submit in court proceedings any claim for compensation for their land over a period of 42 years, up to the date when the "notice to treat" was sent to them, i.e. 14 January 2003 (see paragraph 2 above). Regarding the latter, it is to be reiterated that the Constitutional Court found that there had been a violation of Article 6 of the Convention. As the time of the notice to treat in 2003 was the point at which the applicants were ultimately able to claim compensation, any earlier date than that – at worst 17 March 1961, dating back 42 years earlier – should be excluded as being irrelevant

and unfair for assessing that compensation. As is indicated in paragraph 29 of the judgment, before 2002 the relevant date for assessing compensation was the date of the "notice to treat". Had the notice to treat been sent to the applicants in 2002 or earlier, when the relevant date for assessing compensation was the date of the notice to treat and when their land was no longer agricultural but already developable, they would have benefited from a much higher amount in compensation. It was neither their action nor their choice that led to the notice to treat being sent to them 42 years after the declaration of acquisition, nor was it their action or choice that led to the notice to treat not being sent to them any time up to 2002, before which the relevant time for assessing compensation would have been far more beneficial to them.

10. In my view it is unacceptable for the respondent State to profit tenfold, being exempted from having to pay as much as EUR 243,000 in compensation to the applicants (i.e. EUR 270,000, the valuation on the basis of the status of the property acquired and its value on 14 January 2003, minus EUR 27,000, the valuation made by the Court on the basis of the status of the property acquired and its value on 17 March 1961) for the pecuniary damage resulting from a violation which has been found by the Court, taking into consideration, *inter alia,* the following factors and arguments:

(a) The respondent State should not be allowed to profit from its own delay, of about 60 years and ongoing, before paying compensation, and of 42 years before sending the applicants the notice to treat so as to enable them to claim compensation. This delay had the effect of reducing considerably the amount of compensation, as stated above. The respondent State, since it decided in 1961 that the applicants' land was needed in the public interest and proceeded with the compulsory acquisition with the Governor's declaration on 17 March 1961, should have been ready to start negotiations with the applicants for the amount due to them immediately or within a reasonable time. The fact that this did not happen until 14 January 2003, 42 years later, is far from being immediate or a reasonable time after the Governor's declaration on the expropriation. The timing decided by the respondent State to send the "notice to treat" to the applicants, immediately after the Law had changed in 2002, with regard to the relevant date for assessing the value and status of the property in question, thus no longer the date of the notice to treat but going back to the date of the Governor's declaration (see paragraph 9 above), cannot escape my attention and my impression is that the timing for such decision may not be accidental. In my mind, the fact that the respondent State decided to send the notice to treat 42 years late, and the fact that after 60 years compensation has still not been paid, are not unconnected.

(b) In connection also with (a) above, the respondent State should not be allowed to profit from its own action or inaction which resulted in a

violation of a Convention right. In my view, this can be considered the Convention version of the legal maxims "no one should be allowed to profit from his own wrong" or "no one can improve his position by his own wrongdoing" (*nullus commodum capere protest de injuria sua propria or nemo ex duo delicto meliorum suam conditionem facere potest*)[1]. The respondent State was unanimously found in the judgment to be (a) in violation of Article 1 of Protocol No. 1 for not paying compensation to the applicants for about 60 years (see paragraphs 55-56), and (b) in violation of Article 6 § 1 of the Convention for the lack of objective impartiality of the Constitutional Court (see paragraphs 80-81 of the judgment). The Court made awards to the applicants in respect not only of pecuniary damage but also of non-pecuniary damage, thus rendering the violation even greater (see paragraph 89 and point 5 (a) (ii) of the operative part of the judgment). In addition, the Constitutional Court confirmed a violation of Article 6 § 1 of the Convention on the ground that the applicant had had no access to a court to pursue compensation proceedings and awarded the applicants EUR 7,500 for non-pecuniary damage in this respect (see paragraph 22). The respondent State had, in effect, asked the Court to reach a finding to the detriment of the applicants, even though the disadvantage arose from actions or inactions on its part, regarding which the Court and the Constitutional Court have found violations of the Convention provisions and rights.

(c) I would be contradicting myself, with all that this entails, if, on the one hand, I were to rightly argue, as the judgment does, that there has been a violation of Article 1 of Protocol No. 1, and, on the other, to wrongly overlook, as the judgment does, the repercussions of the facts underlying the violation on the fair amount of compensation due to the applicants.

(d) The respondent State has never paid any compensation in respect of the applicants' expropriated property, despite the fact that the Constitutional Court ordered the State to pay them EUR 26,093 (see paragraph 22) and despite the fact that the applicants asked the Government to pay this compensation (see paragraphs 26 and 87). It is striking that the respondent State not only disrespected the applicants by failing to pay any compensation to them and by prolonging the compulsory acquisition process for about 60 years, it also ignored the finding of its own Constitutional Court, the apex court of the State, by arguing before this Court without any justification that it should pay only EUR 15,000 (see

[1] See Coke, Littleton, 148 and Digest 50, 17, 134. See on these maxims and similar maxims in F.A.R. Bennion, *Bennion on Statutory Interpretation: a Code*, 5th edn., London, 2008, section 349, at p. 1141. See similar maxims, namely, *commodum ex injuria sua nemo habere debet* and *injuria propria non cadet in beneficium facientis* in Seymour S. Peloubet, *A Collection of Legal Maxims in Law and Equity,* with English translations, New York, 1884, repr. Colorado, 1985, no. 256 (at p. 31) and no. 983 (at p. 121), respectively.

paragraph 86), thus EUR 11,093 less in compensation than the amount awarded to them by the Constitutional Court; as if this Court were a fourth-instance court and as if they were allowed to plead as applicants. The respondent State also asked the Court not to award the applicants any amount for non-pecuniary damage since the Constitutional Court on 26 January 2018 had already awarded them EUR 7,500; as if this award would cover all the violations alleged by the applicants before the Court. In any event, the respondent State had not yet paid even that amount (see paragraphs 26 and 87).

In connection with the above, it should be emphasised that when a State is the respondent State to an application filed by an individual under Article 34 of the Convention, the Court considers all the authorities of that State – judiciary, executive and legislature – as one, all part of the State, the "High Contracting Party" (see Articles 1 and 19 of the Convention). The respondent Government cannot appear before the Court representing only the executive branch of the State, as they appear to have done in the present case, having a line of argument that is different from the judiciary and even its apex court, i.e. the Constitutional Court. Moreover, in the present case the respondent State imputed any delay in the realisation of the project for which the applicants' land had been expropriated to "extremely complex matters relating to town planning" (see paragraph 39), thus to a delay by one of its administrative branches, as if that branch did not belong to the respondent State.

e) In case of doubt the Court should find in favour of the victim and the effective protection of his or her human right (*in dubio in favorem pro juris/pro libertatae/pro persona and ut res magis valeat quam pereat*), but in the present case there is no doubt about the fault and so it is even more crucial for the Court to award just compensation and not to deprive the applicants tenfold of the amount due to them. On the *in dubio pro libertatae/persona* principle, Professor Rudolf Bernhardt and former President of the Court insightfully said the following:

> "Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other."[2]

[2] See Rudolf Bernhardt "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights" (*German Yearbook of International Law*, vol. 42 (1999), 11 at p. 14. On the principle *in dubio in favorem pro libertatae*, see, *inter alia,* §§ 44-45 of my partly dissenting opinion in *Simeonovi v. Bulgaria* [GC], no. 21980/04, 12 May 2017; § 19 of my partly dissenting opinion in *Khlaifia and Others v. Italy,* [GC], no. 16483/12, 15 December 2016; § 31 of my concurring opinion in *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017; and §§ 40-43 of my concurring opinion joined by Judge

f) The assessment of compensation based on the status of the land in 1961, being ten times less than an assessment based on that of 2003, would contravene two overarching principles of the Convention, namely the principle of effectiveness[3] and the principle of proportionality, since such assessment would amount to a negation or disregard of the essence of the right to the protection of property and in particular of its requirement of just compensation in case of compulsory acquisition.

The judgment, in paragraphs 49-53, referring to the proportionality test, maintains that this test has been applied, and in paragraph 54 it seems to justify why the amount of compensation awarded was based on the 1961 status (and therefore was lower than the amount requested by the applicants), arguing that it "cannot find that, in the circumstances of the present case, the applicants have not been awarded adequate compensation". The justification given by the Court (see paragraph 54) for basing its decision on the assessment of compensation on 1961 values was because the applicants had not complained domestically about the lack of public interest due to the delay in implementing the envisaged project, a complaint which would have had an impact on the compensation payable (the Court cites *Vassallo v. Malta* (just satisfaction), no. 57862/09, §§ 18-20, 6 November 2012).

The Court refers to paragraphs 18-20 of *Vassallo* but not, however, also to paragraphs 21-22, which if taken into account would change its decision. Paragraphs 18-22 read as follows:

> "18. The Court considers that compensation in the present case could have been based on the lines of *Schembri* ... only if the breach of the applicant's property rights arose solely as a result of the lapse of time during which she had been denied

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Dedov in *Obote v. Russia,* no. 58954/09, 19 November 2019.

[3] On this principle, see, *inter alia, Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, pp. 24, 26, Series A no. 6, and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 123, ECHR 2005-I; see also Daniel Rietiker, "The principle of 'effectiveness' in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*", *Nordic Journal of International Law*, 79 (2010), pp. 245 et seq.; Georgios A. Serghides, "The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles", in (2017), 30, *Hague Yearbook of International Law*, 1 et seq.; Georgios A. Serghides, "The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights (its Nature, Mechanism and Significance), in Iulia Motoc, Paulo Pinto de Albuquerque and Krzysztof Wojtyczek, *New Developments in Constitutional Law – Essays in Honour of András Sajó,* The Hague, 2018, pp. 389 et seq. See also a pertinent and recent collection of relevant works prepared by Daniel Rietiker, "Effectiveness and Evolution in Treaty Interpretation", Oxford Bibliographies (last modified 25 September 2019):
https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0188.xml

compensation. The Court, however, notes that in the principal judgment in the instant case, it also held that the lapse of twenty-eight years from the date of the taking of the property without any concrete use having been made of it, in accordance with the requirements of the initial taking, raised an issue under Article 1 of Protocol No. 1, in respect of the public interest requirement (§ 43).

19. Thus, the Court considers that compensation in the present case must be awarded on the lines of that in *Motais de Narbonne v. France* ((just satisfaction), no. 48161/99, § 20, 27 May 2003), and *Keçecioğlu and Others v. Turkey* ((just satisfaction), no. 37546/02, § 19, 20 July 2010), in which the Court had in its principal judgments found a breach of Article 1 of Protocol No. 1 on account of a significant delay between a decision to expropriate property and the undertaking of a project in the public interest which had denied the applicants the appreciation ('plus-value') of their property (see *Motais de Narbonne v. France*, no. 48161/99, § 19, 2 July 2002 and *Keçecioğlu and Others v. Turkey*, no. 37546/02, §§ 28-29, 8 April 2008). In both these cases, where the violation pertained to a lack of public interest, the Court considered under Article 41 that the applicants were to be paid compensation corresponding to the appreciation they had been denied. It thus awarded pecuniary damage on the basis of the then current market value of that property ('*la valeur vénale actuelle du bâtiment')* and deducted what the applicants had already received in compensation for the expropriation years before.

20. However, on the one hand, the Court notes that, unlike in the above cases, where the planned project was never carried out, in the present case, in 2002, twenty-eight years after the taking, the authorities undertook the originally planned project in the public interest, namely the construction of apartments and maisonettes intended for social housing. The Court considers that this is a matter which has to be given some consideration. On the other hand, in the present case no payment has ever been made to the applicant, another issue which was at the source of the upheld violation, and which is particularly relevant to the calculation in the present case.

21. ... Thus, in assessing the amount due to the applicant the Court has, as far as appropriate, considered information available to it on land values on the Maltese property market today.

22. Having regard to the above factors, the Court considers it reasonable to award the applicant, as one of eleven owners, EUR 50,000 in pecuniary damage."

The facts of the present case are more striking than those of any other cases referred to in *Vassallo* in the sense of requiring just satisfaction based on present-day values. In the present case the lapse of time during which the applicants had been denied compensation was about 60 years, while in *Vassallo* it was 28 years. In the present case, the school for which the compulsory acquisition had been made was built in 1993 (see paragraph 39), 32 years after the declaration of compulsory acquisition, while in *Vassallo* the expropriation was materialised 28 years after the acquisition. The Court in *Vassallo* awarded compensation at present-day values ("on land values on the Maltese property market today" (§ 21, emphasis added)). The Court in *Vassallo*, though it referred to some of its case-law where it had awarded compensation at present-day values because the compulsory acquisition had not been materialised, nevertheless awarded

compensation at present-day values owing here to the long period of time between the acquisition and the payment due.

Accordingly, what is said in the present judgment (paragraphs 47 and 54), that the applicants had not complained domestically about the delay in implementing the envisaged project, is not only overly formalistic but can also be criticised on many other fronts. *Vassallo,* cited by the Court in support of its judgment, on the contrary, does not in fact support the majority view but rather the view in this dissenting opinion. This is so because in *Vassallo* the project was also implemented, as in the present case, after very many years and the Court nevertheless awarded compensation at present-day values. In any event, the applicants in the present case, being awarded compensation by the Civil Court (First Hall) in its constitutional competence on the basis of the 2003 categorisation and value, as claimed by them, had no reason to raise specifically the issue of the delay in the implementation of the project. But even without it being raised specifically, this issue was nonetheless a relevant fact before the said domestic court, which must have taken it into consideration in deciding to base its award of compensation on the 2003 categorisation and value.

Furthermore, what the Court says in paragraph 54 of the judgment, namely that it "cannot find that, in the circumstances of the present case, the applicants have not been awarded adequate compensation", is with due respect invalid, firstly, because the amount awarded by the Constitutional Court had never been paid by the respondent State and therefore the position of the applicants was similar to that of the applicant in *Vassallo*; and, secondly, because what is said in paragraph 54 contradicts the basis on which the Court unanimously found a violation of Article 1 of Protocol No. 1, namely the fact that no compensation had been paid.

11. It is unprecedented what happened to the applicants and their property in the present case. In my humble view, the compulsory acquisition of their property which occurred in 1961 in fact amounted to confiscation. The applicants had no right to claim compensation up to 2003. They had no right to challenge the validity of the acquisition (see Article 6 of the relevant Ordinance) until 1987, when people in Malta started having a right to challenge human rights violations before the courts of constitutional jurisdiction, without any time-limit (this was not, however, a complaint before the Court). And this could be a reason why the applicants did not challenge the validity of the compulsory acquisition of their property, if they had so wished. The applicants had obtained no compensation for about 60 years and the matter was still pending. They had lost possession of their land and the State had immediately taken possession of it and had built a school on it in 1993, without any requisition order or rent to be paid to the applicants and without, to date, the State obtaining ownership (since the compensation issue is still pending). The applicants were stripped of all their rights as owners, which they should have retained in a democratic

State, a member State of the Council of Europe. In other words, the applicants, as regards their property rights, have been victimised for about 60 years and still today, without any compensation ever being paid to them.

12. In view of the above, I disagree with point 5 (a) (i) in the operative part of the judgment regarding the amount of just satisfaction (pecuniary damage) to be awarded to the applicants, namely EUR 27,000. Since I do not have any evidence about the present-day value of the expropriated property, from either party, I cannot proceed to estimate the compensation on the basis of that value. I would, however, award the applicants EUR 270,000, adding both inflation and interest since 2003 when the notice to treat was sent to them. This is what the applicants requested before the Court (see paragraphs 36 and 85 of the judgment) and that was the amount awarded to them by the Civil Court (First Hall) in its constitutional competence, having before it all the relevant evidence as to the current value (see paragraph 17).

13. My second disagreement with the judgment is that it decides not to examine the alleged violation of Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, on the basis, as the judgment argues, that the applicants did not contest that the law at the relevant time provided that they should be paid on the basis of the categorisation of the land at the time of the Governor's declaration (see paragraphs 50 and 82-83). However, this reference to the applicants' position is, in my humble view, not quite correct, since they have always maintained before the domestic courts (see, *inter alia,* paragraphs 7 and 15) and the Court (see paragraphs 35-38, 85) that they should be compensated according to the categorisation and value of their land in 2003, and they managed to obtain a favourable decision, accepting their own position, before the Civil Court (First Hall) in its constitutional competence (see paragraph 17). Furthermore, contrary to the majority's view, it is clear that the applicants did contest that 1961 was the relevant time for assessing the status of the expropriated land and its value, since their very argument about discrimination under Article 14 in conjunction with Article 1 of Protocol No. 1 relied on the fact that the owners of other similar expropriated properties had been awarded higher compensation on the basis of a change in categorisation after expropriation (see paragraphs 19 and 82).

14. In my view, the applicants' complaint under Article 14, read in conjunction with Article 1 of Protocol No. 1, is tenable and I would have proceeded to examine it. If I were to find a violation of this Article in conjunction with Article 1 of Protocol No. 1, the amount I would award the applicants for non-pecuniary damage would be higher than the EUR 9,000 which the present judgment awards; but being in the minority there is no need for me to estimate the amount.

15. Lastly, a finding of a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 would have constituted a further ground in

support of assessing the applicants' land at 2003 values, as the domestic courts did in similar cases. Such additional violation would further illustrate the gravity of the mistreatment sustained by the applicants at the hands of the national authorities.

APPENDIX

No.	Applicant's Name	Birth year	Nationality	Place of residence
1	Nikolina SCERRI	1936	Maltese	Ħal Safi
2	Joseph SCERRI	1972	Maltese	Żurrieq
3	Mario SCERRI	1977	Maltese	Siġġiewi
4	Raphael SCERRI	1968	Maltese	Qrendi