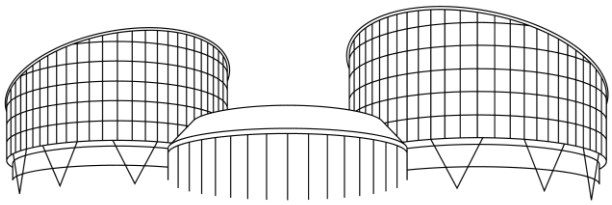

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SCHEMBRI AND OTHERS v. MALTA

(Application no. 42583/06)

JUDGMENT
(Just satisfaction)

STRASBOURG

28 September 2010

FINAL

21/02/2011

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

In the case of Schembri and Others v. Malta,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 7 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 42583/06) against Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Rosaria Schembri, Mr Saviour Schembri, Mr Carmel Schembri, Mr Anthony Schembri, Mr Emanuel Schembri, Ms Michelina Farrugia, Ms Catarina Formosa, Ms Mary Fenech, Ms Rosanna Mula, Ms Anna Zammit and Sr Rosangela Schembri ("the applicants"), all Maltese nationals, on 4 October 2006.

2. In a judgment delivered on 10 November 2009 ("the principal judgment"), the Court found a violation of Article 1 of Protocol No. 1 to the Convention. It held that by awarding compensation for the taking of property reflecting values applicable decades before and deferring the payment of such for at least twenty years, that is, until the date of the relevant decision, which did not take into account this delay, the national authorities rendered that compensation inadequate and, consequently, upset the balance between the protection of the right to property and the requirements of the general interest (*Schembri and Others v. Malta*, no. 42583/06, § 45, 10 November 2009).

3. Under Article 41 of the Convention the applicants sought just satisfaction amounting to 2,200,000 euros (EUR), namely, the value of the property in 2008 according to an architect's valuation whereby the property was estimated to be worth EUR 1,100 per square metre, in respect of pecuniary damage and EUR 50,000 in respect of non-pecuniary damage, plus costs and expenses.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the

Government and the applicants to submit, within three months from the date on which the judgment became final in accordance with Article 44 § 2 of the Convention, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (ibid., § 57 and point 3 (a) and (b) of the operative provisions).

5. The applicant and the Government each filed observations.

THE LAW

6. 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. Pecuniary Damage

1. The parties' submissions

7. The applicants claimed compensation based on the current value of the land, namely, EUR 2,641,320 as established by an architect's valuation (based on the advertisements of a private real estate agency) dated 5 January 2010. They submitted that bearing in mind the lapse of time between the dispossession and the judgment of the Court, and the fact that during this time the Government have been using the property without legal title (since the *de jure* transfer has not yet taken place) compensation should be calculated on the basis of the current value of the property in line with the approach of the Court in other cases (see *Serghides and Christoforou v. Cyprus* (just satisfaction), no. 44730/98, § 27, 12 June 2003; *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, §§ 37 and 39, Series A no. 330-B; and *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 76, 28 November 2002). They contended that in order to ensure adequate compensation, the date of the valuation of the property had to be as close as possible to the date of payment of compensation (*Guillemin v. France* (Article 50), 2 September 1998, §§ 23-24, *Reports of Judgments and Decisions* 1998-VI).

8. The damage had to be assessed on the basis of the estimates provided by the expert valuations (EUR 1,320 per square metre) and the information furnished by the architects, bearing in mind the size of the land and its location. The land, which borders a major arterial road, had a total area of approximately 2001 square metres and was subdivided into two main plots. It forms part of the Schemed development of the village of Ghaxaq and has

now been divided into fourteen separate plots. The applicants submitted commercial valuations showing the price of similarly situated land in a nearby village, which varied from EUR 1,281 to EUR 1,812 per square metre.

9. They further submitted that as a result of the authorities' taking of the land and the delay in payment, they had been compelled to take out bank loans subject to the payment of interest in order to acquire other property to build their residences.

10. The Government submitted that the value which had to be considered as the basis for the calculation was the value of the land at the time of its taking as established by the Land Arbitration Board ("LAB"), namely EUR 17,185. Unlike in the cases of *Papamichalopoulos and Others v. Greece* (24 June 1993, Series A no. 260-B), *Belvedere Alberghiera S.r.l. v. Italy* (no. 31524/96, ECHR 2000-VI) and *Carbonara and Ventura v. Italy*, no. 24638/94, ECHR 2000-VI) the Government's *de facto* taking of the property had not been unlawful. The measure of taking over the land while determination of the value was still pending was expressly provided for by law. In consequence, the only value to be taken into consideration was that of 1974 when the land at issue was agricultural land. The area only started to develop into an urban one subsequently, by means of the Government's construction of a housing estate. Moreover, any other evaluations submitted by the applicants have never been put to any form of judicial determination and did not make reference to the date of the taking of the property. Moreover, they were speculative and based on prices which land with the most beneficial building permits could fetch in a "seller's market" situation.

11. The Government further submitted information following the Court's finding that it was unable to establish responsibility for the lack of payment after 1995 (principal judgment § 56). They contended that in 1995 the LAB had fixed the publication of the deed of transfer for 22 January 1996. However, this had had to be postponed due to the applicants' appeal, which was eventually declared null and void as there was no right of appeal in such cases. In its judgment the Court of Appeal fixed the date for the publication of the deed of transfer for 22 September 1997. The applicants, however, failed to turn up on the specified date and on 18 May 1998 they filed constitutional proceedings, pending which the deed was never concluded. The Government submitted that the conclusion of the deed would not have entailed a renunciation of the applicants' rights before the constitutional jurisdictions, and in consequence the Government could not be held responsible for the failure to conclude the deed from 1995 onwards.

12. In order to conclude the matter and establish legal title the Government were willing to pay the sum of EUR 58,457. They submitted that this sum reflected the value of the land, progressively adjusted for inflation on a year by year basis from 1974 to 2009, plus interest at the

statutory rate of five per cent per annum on the value as adjusted year by year during the said period.

2. The Court's assessment

13. In reply to the parties' observations, the Court finds it opportune to refer to its case-law on matters of expropriation. It reiterates that in the case of *Papamichalopoulos and Others* it found a violation on account of a *de facto* illegal expropriation which had lasted for more than twenty-five years. The Court accordingly ordered the Greek State to pay the applicants, for damage and loss of enjoyment since the authorities had taken possession of the land, an amount corresponding to the current value of the land, increased by the appreciation brought about by the existence of buildings which had been erected since the land had been occupied. This case-law was consolidated and followed in cases concerning unlawful dispossession, particularly the judgments *Belvedere Alberghiera S.r.l. v. Italy* ((just satisfaction), no. 31524/96, 30 October 2003) and *Carbonara and Ventura v. Italy* ((just satisfaction), no. 24638/94, 11 December 2003) until a new method of calculation of damage was explored by the Grand Chamber in *Guiso-Gallisay v. Italy* ((just satisfaction) [GC], no. 58858/00, 22 December 2009). In the latter case the Grand Chamber considered that compensation for unlawful expropriation was due according to the market value of the land at the date when the applicants lost their right of ownership. Once the amount obtained at domestic level was deducted, and the difference with the market value of the land when the applicants lost ownership was obtained, that amount was to be converted to the current value to offset the effects of inflation. Moreover, simple statutory interest (applied to the capital progressively adjusted) was to be paid on this amount so as to offset, at least in part, the long period for which the applicants had been deprived of the land. It further had to assess the loss of opportunities sustained by the applicants following the expropriation by having regard to the damage occasioned by the unavailability of the land during the period from the beginning of the lawful occupation until the date of loss of ownership. Thus, the Grand Chamber adopted, for unlawful expropriations, the same method of calculation used in lawful expropriations (see *Scordino v. Italy ((no. 1)* ([GC], no. 36813/97, §§ 250-254, ECHR 2006-V) but added to the non-pecuniary assessment the amount of damage arising from loss of opportunities.

14. The Court notes that, as held in its principal judgment, the dispossession of the applicants' land in the present case was not unlawful (see *Schembri and Others v. Malta*, no. 42583/06, § 31, 10 November 2009). Thus, in the present case it is the lack of adequate compensation and not the inherent unlawfulness of the taking of the land that was at the origin of the violation found under Article 1 of Protocol No. 1. Accordingly, the compensation need not necessarily reflect the full value of the property (see

Former King of Greece and Others v. Greece [GC] (just satisfaction), no. 25701/94, § 78, 28 November 2002, and *Yagtzilar and Others v. Greece* (just satisfaction), no. 41727/98, § 25, 15 January 2004).

15. In such cases, in determining the amount of adequate compensation, the Court must base itself on the criteria laid down in its judgments regarding Article 1 of Protocol No. 1 and according to which, without payment of an amount reasonably related to its value, a deprivation of property would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 of Protocol No. 1 (see *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, § 54) and a total lack of compensation could be considered justifiable only in exceptional circumstances. The provision did not, however, guarantee a right to full compensation in all circumstances since legitimate objectives of "public interest" may call for less than reimbursement of the full market value (see *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A; and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI).

16. However, in the principal judgment the Court held that the taking in the present case did not pursue any pressing public interest objective capable of justifying reimbursement of less than the market value (§ 40). It further held that the compensation as established by Maltese law, amounting to a sum equal to the price of the land at the time when the declaration had been served, namely 1974, plus interest at 5 % was not sufficient to offset the failure to pay compensation to that date (§ 42).

17. In this light and bearing in mind recent case-law which has, in the ambit of non-pecuniary damage, diminished the distinction between lawful and unlawful expropriations, the Court considers that notwithstanding the hybrid nature of the taking, the non-pecuniary damage in the circumstances of the present case falls to be assessed according to the constant jurisprudence for lawful expropriations. However, since according to the Maltese legal context, the applicants have to date not lost ownership of the property, the Court considers it appropriate to base itself on the value of the land when the applicants first lost "possession". Thus, in the present case, the starting point of the calculation is the market value of the land at the time of the taking in 1974 (as established by the LAB). Moreover, observing that the Government have not substantiated their argument that the applicants would not have prejudiced any future claims had they accepted the compensation awarded in 1995, the Court considers that this further delay must also be taken into account.

18. Accordingly, the sum to be awarded to the applicants should be calculated on the basis of the value of the land at the time of the taking, to be converted to the current value to offset the effects of inflation, plus simple statutory interest applied to the capital progressively adjusted. As in

the present case the applicants have not yet received any payment at the national level, no such deductions are necessary. While the Court accepts the average statutory rate to be 5 % over the relevant period, it does not accept the Government's calculation of interest.

19. Having regard to those factors, and ruling on an equitable basis, the Court considers it reasonable to award the applicants, jointly, EUR 93,000 plus any tax that may be chargeable on that amount.

B. Non-pecuniary damage

20. The applicants claimed EUR 6,000 each in respect of non-pecuniary damage.

21. The Government submitted that the applicants would already be appropriately compensated by the payment of the revised amount, and in any case any award in respect of non-pecuniary damage should not exceed the amount of EUR 1,000.

22. The Court considers that the applicants must have experienced frustration and stress having regard to the nature of the breach. It therefore awards the applicants EUR 2,500, each, in respect of non-pecuniary damage.

C. Costs and expenses

23. The applicants claimed a total of EUR 6,095 for costs and expenses incurred before the domestic courts and this Court, covering legal fees of two solicitors (EUR 4,295) and an outstanding bill of EUR 1,800. The applicants also attached a taxed bill of costs before the domestic courts amounting to EUR 3,640, although they have not made any specific claim in that connection.

24. The Government submitted that the applicants still had an outstanding debt of EUR 3,275.14 in respect of costs they were ordered to pay in the domestic proceedings but which they had not paid; they thus considered that this sum should be deducted from the costs claimed.

25. 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 have been actually and necessarily incurred and are reasonable as to quantum. In the present case the Court notes that it has found a violation only in respect of Article 1 of Protocol No. 1 and has rejected the complaint under Article 6. Regard being had to the information in its possession and the above criteria, notably, the fact that the applicant did not submit any evidence substantiating the outstanding lawyer's bill and the absence of details as to the number of hours worked and the rate charged per hour, and noting that the domestic court expenses, which have not been explicitly claimed by the applicants, remain due to the Government, the Court

considers it reasonable to award the sum of EUR 6,000 covering costs under all heads.

D. Default interest

26. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds*
   (a) that the respondent State is to pay the applicants within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,
      (i) EUR 93,000 (ninety-three thousand euros), jointly, in respect of pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros), each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, 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;

2. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 28 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President