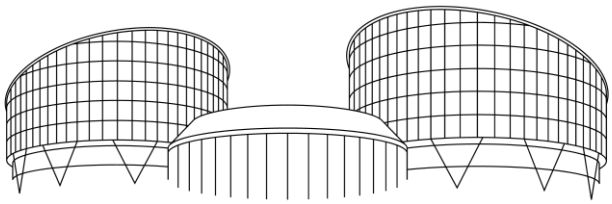

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FRENDO RANDON AND OTHERS v. MALTA

(Application no. 2226/10)

JUDGMENT
(Just satisfaction)

STRASBOURG

9 July 2013

FINAL

04/11/2013

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

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

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

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Krzysztof Wojtyczek, *judges,*
David Scicluna, ad hoc *judge,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 18 June 2013,

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

PROCEDURE

1. The case originated in an application (no. 2226/10) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by forty-six Maltese nationals, Dr Rene Frendo Randon, Ms Fabrizia Frendo Randon, Ms Maria Teresa Gatt, Ms Maria Theresa Forshaw, Ms Gabriella Pellegrini Petit, Mr Antonio Ganado, Mr Vanni Ganado, Ms Maria Galea, Ms Rita Buttigieg, Ms Josephine Farrugia Randon, Dr Stanley Farrugia Randon, Ms Roberta Fenech, Dr Philip Farrugia Randon, Ms Marisa Ellul Sullivan, Mr Martin Farrugia Randon, Ms Maria Paris, Ms Anna Camilleri, Mr Robert Randon, Mr Mario Randon, Ms Mary Rose Finn, Ms Victoria Mangion, Mr Albert Leone Ganado, Mr Godfrey Leone Ganado, Mr Joseph Leone Ganado, Mr David Leone Ganado, Ms Miriam Fenech, Mr Philip Leone Ganado, Mr Alexander Randon, Mr Anthony Randon, Ms Liliana Formosa, Mr John Pace Balzan, Mr Louis Pace Balzan, Mr George Pace Balzan, Mr Alfred Pace Balzan, Mr Anthony Pace Balzan, Ms Emma Randon, Ms Biancha Cuschieri, Ms Liliana Randon, Ms Eleonora Randon, Mr David Randon, Ms Marisa Anderson, Mr Ronald Randon, Ms Christina Randon, Mr Anthony Randon, Mr Jai-Micheal Randon, Ms Anne Marie Randon, Ms Mary Cassar Torregiani and Ms Eileen Mckee ("the applicants"), on 6 January 2010.

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

3. In a judgment delivered on 22 November 2011 ("the principal judgment"), the Court held that, having regard to the fact that part of the

applicants' land had remained unused for forty years and the Land Arbitration Board ("LAB") could not award appropriate compensation, and that the applicants had not received any such compensation for the taking of their entire property forty-two years later, the requisite balance had not been struck and therefore there had been a violation of Article 1 of Protocol No. 1 to the Convention. It further found a violation of Article 6 § 1 under the head of access to a court, and a violation of the reasonable-time principle guaranteed by the same provision, (see *Frendo Randon and Others v. Malta*, no. 2226/10, §§ 71-73, 22 November 2011).

4. Under Article 41 of the Convention, the applicants sought just satisfaction consisting of the restitution of the property which remained unused. Alternatively, they would accept other land of similar value. In the event that such restitution was not possible the applicants claimed EUR 7,531,650 in respect of pecuniary damage, reflecting the market value of the land, and EUR 225,000 in respect of non-pecuniary damage.

5. 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 of the date on which that judgment became final, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (ibid., § 77, and point 4 of the operative provisions).

6. The applicants and the Government each filed observations.

THE LAW

7. 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

1. The parties' submissions

(a) The applicants

8. The applicants requested the release of the unused property, in default of which they submitted that they should be awarded the current market value of the unused plots or compensation for the loss of their use in the event of restitution subsequent to the Court's judgment.

9. The applicants further claimed the full market value of the unused plots. Alternatively, they submitted that compensation for the unused plots of land should be based on the guidelines set out in *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, 28 September 2010), that is, on the land's value at the time of expropriation (in the present case 1969), adjusted to offset inflation, together with statutory interest. Nevertheless, they noted that official inflation statistics did not take into account the price of immovable property; thus, they considered that inflation statistics should be taken into consideration together with the immovable property statistics in order to form a realistic picture of true inflation, as recently accepted at European Union level. For this purpose the applicants submitted an economist's report which they had commissioned (which concluded that between 1969 and 2011 the retail prices in Malta on which inflation is calculated had increased by a factor of 4.28, while average house prices had increased by a factor of 11), together with an architect's report based on the normal inflation index, and suggested that the Court should take a middle point between the two for the calculation of inflation, and add statutory interest. They further noted that legal statutory interest in Malta was 8 % per annum and not 5 %, as applicable to expropriations.

According to the architect's report, the value of plot 2 in 1969, bearing in mind that a fifth of the area was deemed by the architect to be building land (although he had previously acknowledged that in 1969 it had been agricultural land) and the remaining agricultural land, amounted to 27,048 euros (EUR) (EUR 24,474 building land + EUR 2,574 agricultural land), which, adjusted according to inflation, amounted to EUR 191,047 (EUR 172,866 + EUR 18,181 respectively), to which interest had to be added (of at least 5% over 43 years), which amounted to a final value of EUR 601,800.

The value of plot 53 (without deducting the area returned to the applicants), bearing in mind that approximately half of the area was building land and the rest was agricultural land, amounted to EUR 47,281 (EUR 46,048 building land + EUR 1,233 agricultural land), which when adjusted according to inflation amounted to EUR 333,951 (EUR 325,244 + EUR 8,707 respectively), to which interest had to be added (of at least 5% over 43 years), which amounted to a final value of EUR 1,051,946.

10. The applicants did not reiterate their claim for non-pecuniary damage.

(b) The Government

11. The Government submitted that by means of Government Notices 1131 and 1133 respectively, of 6 November 2012, published in the Government Gazette of 13 November 2012, Plot 41 and the unused part of Plot 53 had been released and returned to the applicants. Similarly, by means of Government Notice 1152 of 12 November 2012, published in the

Government Gazette of 16 November 2012, Plot 3 had also been released and returned to the applicants. The Government considered that this *restitutio in integrum*, of property which was worth much more on restitution than when it was originally taken, constituted sufficient just satisfaction in relation to this property.

12. As to Plot 2 and the remaining part of Plot 53 (approximately 12,000 sq. m), the Government submitted that compensation should be calculated in line with the guidelines established in *Schembri and Others v Malta* (cited above).

Accordingly, the Government submitted that compensation due for Plot 2, calculated on the basis of the value of the land at the time of the taking (which was then agricultural land), as offered in the Notice to Treat (approximately EUR 7,500), converted to the current market value to offset inflation, plus simple statutory interest applied to the capital, progressively adjusted, amounted to EUR 47,838 (EUR 45,560 + interest).

The Government further submitted that compensation due for the used part of Plot 53, calculated on the basis of the value of the land at the time of the taking as established by the applicants in their counterclaim to the initial Notice to Treat (approximately EUR 10,266), converted to the current market value to offset inflation, plus simple statutory interest applied to the capital, progressively adjusted, amounted to EUR 65,353 (EUR 62,241 + interest).

13. Thus, in the Government's view the joint award of EUR 110,912, together with the restitution of the unused properties, constituted adequate just satisfaction for pecuniary damage.

14. As to non-pecuniary damage, the Government submitted that the sum of EUR 47,000 awarded by the domestic courts represented sufficient just satisfaction for non-pecuniary damage, and in any event the amount should not exceed EUR 2,000 per applicant.

2. The Court's assessment

15. The Court concluded in its principal judgment that, in view of the fact that the domestic proceedings relating to the payment of compensation had lasted for more than forty years, it would be unreasonable to wait for the outcome of those proceedings (see *Frendo Randon and Others*, cited above, § 77), and that by awarding amounts for damage at this stage there is no risk that the applicants will receive the said dues twice, as the national jurisdictions would inevitably take note of this award when deciding the case (ibid). Thus, the Court must now determine the applicants' claim for just satisfaction, including the compensation due in relation to the different plots of land in issue.

16. As the Court has held on a number of occasions, a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its

consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96 § 32, ECHR 2000-XI, and *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 90, 22 December 2009). The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the violation allows of *restitutio in integrum* it is the duty of the State held liable to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, however, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate (ibid.).

17. The Court notes that in its principal judgment it found that, whereas Plot 2 and most of Plot 53 had been used in connection with the Freeport Project and they satisfied the public-interest requirement (§ 60), no use had been made of Plot 3, Plot 41 and the 600 sq. m forming part of Plot 53, the latter three areas of land raising an issue under Article 1 of Protocol No. 1 in respect of the public-interest requirement (§ 62). Furthermore, having regard to the fact that the LAB could not award appropriate compensation and that the applicants had not received any such compensation for the taking of their entire property forty-two years later, the Court found that the requisite balance had not been struck (§ 71).

18. It follows that the taking in the applicant's case of Plot 2 and most of Plot 53 was not unlawful and did not lack public interest. Thus, in respect of these plots it was not an unlawful taking of the land that gave rise to the violation found under Article 1 of Protocol No. 1, but rather the delay in instituting the relevant proceedings and the fact that at the date of the principal judgment, forty-two years after the taking of the land, the applicants had still not been awarded any compensation for the expropriated land.

19. In such cases, in determining adequate compensation the Court must base itself on the criteria laid down in its judgments regarding Article 1 of Protocol No. 1, according to which a deprivation of property without payment of an amount reasonably related to its value 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*, 21 February 1986, § 54, Series A no. 98), and a total lack of compensation may be considered justifiable only in exceptional circumstances. The provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public

interest" may call for reimbursement of less than 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).

20. The Court considers that the compensation in respect of Plot 2 and most of Plot 53 should be based on *Schembri and Others v. Malta* ((just satisfaction), no. 42583/06, § 18, 28 September 2010). Thus, 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, converted to the current value to offset the effects of inflation, plus simple statutory interest applied to the capital progressively adjusted. Since in the present case the applicants have not yet received any payment at the national level, no deduction in this regard is necessary. However, unlike in the case of *Schembri and Others* (cited above), where the Court had held that the taking in that case had not pursued any pressing public interest objective capable of justifying reimbursement of less than the market value, in the present case, the Court had made no such statement when considering that Plot 2 and most of Plot 53 had been used in connection with the Freeport Project and that, even though they were eventually "privatised", their taking had satisfied the public-interest requirement (§ 60 of the principal judgment).

21. In respect of Plot 2, the Court notes that the Government's calculation takes as its starting point the offer made in the Notice to Treat of 1969 (approximately EUR 7,500), which was refused and contested by the applicants (see paragraph 8 of the principal judgment). Unlike in their submissions regarding Plot 53, it is unclear for what reason the Government have not taken the starting point to be the counterclaim made by the applicants. The Court notes, however, that in their submissions neither of the parties referred to the amount of the counterclaim. The Court further notes that, from the cases before the Court, it appears that sums offered when a Notice to Treat is issued are almost invariably contested by the victims of expropriations and eventually increased when reviewed by the LAB (see, for example, *Schembri and Others v. Malta*, (merits), no. 42583/06, § 10, 10 November 2009). In the light of that consideration the Court cannot accept the sum offered then as a starting point. However, nor is the Court prepared to accept as a starting point for the calculation the estimate of EUR 27,048 provided by the applicants as the value of the land in 1969. Indeed, the Court notes that, while acknowledging that the land was agricultural land in 1969 (as also submitted by the Government), the architect's report went on to calculate its 1969 value on the basis that one fifth of that plot was considered to be building land. In the light of this the Court finds that none of the values are workable and considers it appropriate in the circumstances to take EUR 14,000 as the value of the land (which measures approximately 16,000 sq. m. and is therefore larger than Plot 53 discussed below) in 1969.

22. Similarly, in respect of the relevant part of Plot 53 (measuring approximately 12,000 sq.m.), the Court finds no reason to take as a starting point the applicants' architect's estimate of EUR 47,281 which amounts to more than four times what the applicants considered to be the value of their property in 1969 and which evaluation once again refers to part of the land as being building land. It follows that for the purposes of this plot the Court should accept that the starting point for the calculation, namely the value of the plot in 1969, is EUR 10,266, as expressed in the applicants' counterclaim and to which the Government substantially agreed (see paragraph 12, *in fine*, above).

23. As to the adjustment of the value to offset the effects of inflation, the Court notes that it should not be obliged to undertake intricate calculations and that the parties should be able to provide detailed explanations in respect of their computations. In the present case it notes the absence of such information in the Government's submissions showing the accuracy of their proposals.

24. In response to the applicants' submissions (paragraph 9 above), the Court notes that it has always made such adjustments on the basis of the inflation indexes recorded in the States concerned. While the applicants' argument may not be devoid of merit in general terms, the system they propose has not gained sufficient recognition and acceptance to date. The Court notes that the applicants failed to specify the European Union body that has allegedly taken such a position; similarly, they have provided no evidence that States have started to take this element into consideration for the purposes of calculating their inflation indexes. In these circumstances the Court finds no reason to depart from its normal practice.

25. The Court notes that it has previously found the average statutory rate over the relevant period to be 5% (see *Schembri* (just satisfaction), cited above, § 18) and sees no reason to depart from it. Furthermore, it does not accept the parties' calculation of the interest due.

26. Having regard to the above factors, and the values taken as a starting point, the Court considers it reasonable to award the applicants, jointly, EUR 200,000, plus any tax that may be chargeable on that amount, in compensation for the taking of Plot 2 and the relevant part of Plot 53.

27. In respect of Plot 3, Plot 41 and the 600 sq. m. forming part of Plot 53, the Court notes that the applicants' preference was to regain ownership of the said land. The Government have substantiated their claim that the said plots were released in favour of the applicants in November 2012. In the light of this, the Court considers that the return of the relevant land to the applicants constitutes adequate compensation for its taking. The Court therefore does not find it necessary to award any further sums in respect of pecuniary damage.

28. Lastly, the Court notes in the context of the reserved Article 41 submissions that the applicants did not make a claim for non-pecuniary

damage; it therefore makes no award under this head. Nevertheless, the Court considers it relevant to point out that the aggregate sum of EUR 47,000 awarded by the Maltese Constitutional Court in respect of non-pecuniary damage in two different judgments in the applicants' favour remains due to them.

B. Costs and expenses

29. The applicants claimed their own costs incurred in the proceedings before the domestic courts, which they had to pay despite their being successful in their claims. The applicants further claimed EUR 8,300 for costs incurred before this Court (including EUR 4,300 for the economist's report).

30. The Government claimed that the applicants had not submitted a claim for costs and expenses at the time of the principal judgment. In any event they considered that the sum for costs and expenses in respect of the proceedings before this Court should not exceed EUR 1,000.

31. 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. The Court notes that the applicants did not submit bills relating to legal fees or any taxed bills of costs regarding the domestic court proceedings to substantiate their claims under this head, except for those referring to the economist's report. Nevertheless, it is clear from the judgments of the Constitutional Court that the applicants were ordered to pay their share of the costs. Regard being had to the limited information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000, jointly, covering costs under all heads.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds*

(a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,

(i) EUR 200,000 (two hundred thousand euros), jointly, plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 2,000 (two thousand euros), jointly, 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;

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

Done in English, and notified in writing on 9 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President