



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

FIRST SECTION

DECISION

Application no. 50821/06
Paolo and Alessandro GUISO and Vincenza CONSIGLIO
against Italy

The European Court of Human Rights (First Section), sitting on
16 January 2018 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President*,

Kristina Pardalos,

Guido Raimondi,

Krzysztof Wojtyczek,

Armen Harutyunyan,

Pauliine Koskelo,

Jovan Ilievski, *judges*,

and Abel Campos, *Section Registrar*,

Having regard to the above application lodged on 11 December 2006,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Paolo Guiso (“the first applicant”) and Mr Alessandro Guiso (“the second applicant”) are Italian nationals who were born in 1962 and 1960 respectively. Mrs Vincenza Consiglio (“the third applicant”) was an Italian national who was born in 1929. She died on 2 February 2008. The first and second applicants are her heirs, and expressed their wish to pursue the proceedings before the Court. They were represented before the Court by Mr. P. Guiso, a lawyer practising in Nuoro.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

3. The applicants were the joint owners of various parts of different plots of building land in Nuoro.

4. The plots in question – measuring a total surface area of 13,614 square metres – were recorded in the land register as Folio no. 43, parcel nos. 1141, 1147, 1148, 1339, 1136, 1137, 1143, and 1146.

5. By different orders issued between March and October 1991 Nuoro City Council approved a project to build a residential complex on the applicants' land.

6. By four orders issued on 18 October 1991 by the mayor of Nuoro, through an expedited procedure and on the basis of a public interest declaration, the Nuoro municipality was authorised to take possession of the above-mentioned plots of land, with a view to subsequently expropriating them. The deadline for issuing a formal expropriation order was 31 December 1995.

7. In November 1991 the authorities took physical possession of the land and began the building works.

8. By an order issued on 12 December 1995 by Nuoro City Council, the deadline for issuing the expropriation order was extended to 31 October 1996.

9. By an order of 21 August 1996 Nuoro City Council further extended the deadline for issuing the expropriation order.

10. On 11 October 1996 an expropriation order was issued in respect of the land.

11. On 24 January 1997 the applicants lodged an application with the Sardinia Regional Administrative Court ("the Regional Administrative Court"), contesting the lawfulness of the mayor's orders of 18 October 1991 and the orders extending the deadline for issuing the expropriation order.

12. By a judgment of 12 May 1999 the court found that the orders extending the deadline for issuing the expropriation order had been unlawful, and that the expropriation order of 11 October 1996 had consequently also been unlawful.

13. On 22 November 2000 the applicants applied to the Regional Administrative Court for compensation for their being unlawfully deprived of their property, relying on the same court's judgment of 12 May 1999. In this connection, they sought an amount equal to the property's market value on the date when the land had been irreversibly altered, plus a sum reflecting an adjustment for inflation and statutory interest. They further contended that the application of the "constructive expropriation" rule, which was likely to be applied in their case, had been found by the Court to be incompatible with Article 1 of Protocol No. 1 to the Convention.

14. On an unspecified date the court ordered an expert valuation of the land. A report produced in September 2004 stated that the affected surface area of the land was equal to 13,614 square metres, and that the market

value of the land in May 1996 had been 122.32 euros (EUR) per square metre.

15. By a judgment of 24 January 2005 the court found that, pursuant to the constructive expropriation rule (*occupazione appropriativa*), the applicants were no longer the owners of the land, which had become the property of the Nuoro municipality following completion of the public works. It dismissed the applicants' argument that the constructive expropriation rule was incompatible with Article 1 of Protocol No. 1 to the Convention. However, the court conceded that, as the transfer of property had been unlawful, the applicants were entitled to compensation. In this connection, it relied on the expert report which had assessed the market value of the land at EUR 122.32 per square metre. However, the court did not award compensation reflecting the market value, but instead proceeded to make an award based on the criteria contained in Article 5 *bis* of Legislative Decree no. 333 of 11 July 1992, as amended by Law no. 662 of 1996. All amounts were to be adjusted for inflation and include statutory interest from the date the occupation of the applicants' land had ceased to be lawful, which the court identified as 1 January 1996.

16. On 24 May 2005 the applicants lodged an application with the *Consiglio di Stato*. They contested the lower courts' legal classification of how they had been deprived of their property and complained that the reduction in their compensation was incompatible with their right to property. They claimed, *inter alia*, that they were entitled to compensation corresponding to the market value of the land, and a sum for loss of enjoyment of the land. They also complained about the fact that the award would be subject to taxation.

17. On 16 February 2006 the Nuoro municipality paid the applicants the amounts due under the judgment of the Regional Administrative Court. The sum they received jointly amounted to EUR 429,814.64. Tax at a rate of 20% was deducted at source from these sums.

18. On 2 February 2008 the third applicant died.

19. On 2 October 2009 the *Consiglio di Stato* issued a decision declaring that it did not have jurisdiction to decide the applicants' claim.

20. The applicants lodged an application with the Court of Cassation in order to settle the issue of jurisdiction.

21. On 12 January 2011 it ruled, sitting as a full court (*Sezioni Unite*), that the administrative courts had jurisdiction to decide the applicants' claim for compensation, as the issue at stake concerned the unlawful exercise of public authority.

22. On an unspecified date the applicants resumed their appeal before the *Consiglio di Stato*. They contested the lower courts' legal classification of how they had been deprived of their property and complained that the reduction in their compensation was incompatible with their right to property. They asked the court to award an amount corresponding to the

property's market value. They also complained about the fact that the award would be subject to taxation.

23. By a judgment delivered on 12 July 2011, filed with the registry on 2 November 2011, the *Consiglio di Stato* confirmed that the applicants had been deprived of their property unlawfully. It further drew on the Constitutional Court's judgment no. 349 of 24 October 2007, whereby Article 5 *bis* of Legislative Decree no. 333 of 11 July 1992, as amended by Law no. 662 of 1996, had been declared unconstitutional, and held that the applicants were entitled to compensation corresponding to the full market value of the property, minus what had already been paid to them under the judgment of the Regional Administrative Court. The court further stated that the applicants were entitled to a sum reflecting an adjustment for inflation as well as statutory interest from the date that they were deprived of their property. It also awarded them EUR 50,000 in compensation for non-pecuniary damage. The court stated that it lacked jurisdiction to examine the complaint about prospective taxation.

24. On 25 May 2012 the Nuoro municipality paid the applicants the remaining amounts due to them under the judgment of the *Consiglio di Stato*, which amounted to EUR 480,757.76. Tax at a rate of 20% was deducted at source from these sums.

B. Relevant domestic law and practice

1. Constructive expropriation ("occupazione acquisitiva", "occupazione appropriativa" or "accessione invertita")

25. The relevant domestic law and practice concerning constructive expropriation is to be found in *Guiso-Gallisay v. Italy* ((just satisfaction) [GC], no. 58858/00, §§ 18-48, 22 December 2009).

26. In judgments nos. 348 and 349 of 22 October 2007, the Constitutional Court held that national law had to be compatible with the Convention as interpreted by the Court's case-law, and consequently declared Article 5 *bis* of Legislative Decree no. 333 of 11 July 1992, as amended by Law no. 662 of 1996, unconstitutional.

27. In judgment no. 349 it noted that the insufficient level of compensation provided for by Law no. 662 of 1996 was contrary to Article 1 of Protocol No. 1 to the Convention and Article 117 of the Italian Constitution, which required compliance with international obligations.

28. A number of changes in domestic law occurred following the Constitutional Court's judgments. Section 2/89(e) of the Finance Act (Law no. 244) of 24 December 2007 established that, in cases of constructive expropriation, the compensation payable had to correspond to the market value of the property in question and could not be reduced.

2. *Taxation pursuant to Law no. 413/1991*

29. Law no. 413 of 30 December 1991 (hereinafter “Law no. 413/1991”) was created, *inter alia*, to broaden the tax base and streamline, facilitate and strengthen tax administration.

30. The relevant parts of section 11(5) provide that capital gains (*plusvalenza*) on compensation for expropriation or unlawful forms of acquisition of property (*somme dovute per effetto di acquisizione coattiva conseguente ad occupazione di urgenza divenute illegittime*) paid to individuals not operating a business are taxable under the Consolidated Income Tax Act (*Testo Unico delle Imposte sui Redditi*).

31. As to the practical means of enforcement of the tax, section 11(7) provides that when paying the compensation mentioned in section 11(5), including, *inter alia*, compensation for constructive expropriation (*risarcimento danni da occupazione acquisitiva*) the authorities entrusted with making the payment (*enti eroganti*) must deduct tax at source at a rate of 20% from the entire sum. It is open to the taxpayer to opt for ordinary taxation in his or her annual tax return, in which case the sum deducted at source will be considered as an advance on the final tax payment due.

COMPLAINTS

32. The applicants alleged that they had been unlawfully deprived of their land and that the situation had infringed their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1. They highlighted the fact that the application of the “constructive expropriation” rule had been found to be incompatible with the Convention on many occasions by the Court.

33. The applicants further advanced the argument that, even though the domestic courts had acknowledged the unlawful nature of the expropriation and awarded compensation equal to the property’s market value, adjusted the amount for inflation, added statutory interest and a sum for non-pecuniary damage, they had not received redress that could be considered “appropriate and sufficient” owing to the taxation imposed. In their view, the application of the fiscal measure meant that they had ultimately received a sum amounting to only 80% of the property’s market value. The fiscal imposition therefore reflected a legislative expedient to reduce the costs of acquiring land for public purposes by 20%, though formally disguised as a tax.

34. In support of their contention that the situation is incompatible with the Court’s case-law, the applicants pointed out that the Court had always included the phrase “plus any tax that may be chargeable” in its just satisfaction awards in cases involving both lawful and unlawful

expropriations. In this connection they cited, amongst other cases, *Guiso-Gallisay v. Italy* ((just satisfaction) [GC], no. 58858/00, 22 December 2009, § 106 and the operative part of that judgment).

35. The applicants further emphasised that the tax at issue had not been levied on expropriation compensation awarded following a lawful dispossession but, rather, on an award of compensation for pecuniary and non-pecuniary damage for a deprivation of property which the domestic courts had recognised as unlawful. They contended that that was the only instance at national level in which an award of compensation could be subject to taxation.

36. Lastly, the applicants complained under Article 14 of the Convention that the application of Law no. 662 of 1996 to their case produced discriminatory effects.

THE LAW

37. In respect of the above complaints, the applicants relied on 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.”

38. The Court notes at the outset that the applicants were deprived of their property by means of an indirect or “constructive” expropriation, an interference with their right to the peaceful enjoyment of their possessions which the Court has previously considered, in a large number of cases, to be incompatible with the principle of lawfulness, leading to findings of a violation of Article 1 of Protocol No. 1 (see, among many other authorities, *Carbonara et Ventura c. Italie*, n° 24638/94, §§ 63-73, CEDH 2000-VI; *Guiso-Gallisay v. Italy*, no. 58858/00, §§ 93-97, 8 December 2005; *De Caterina and Others v. Italy*, no. 65278/01, §§ 30-34, 28 June 2011; and, more recently, *Messana v. Italy*, no. 26128/04, §§ 38-43, 9 February 2017). There are no elements in the case file that would lead the Court to reach a different conclusion in the present case.

39. That said, the Court further notes that – as was also conceded by the applicants – the *Consiglio di Stato* acknowledged that the deprivation of property had been unlawful and, by drawing on the Constitutional Court’s judgment no. 349 of 24 October 2007, held that the applicants were entitled

to redress in conformity with the criteria established by the Court's case-law (see paragraph 23 above). The Court is satisfied that that amounts, in substance, to an acknowledgement by the domestic courts of the infringement complained of. Following the determination, the court awarded an amount equal to the market value of the land at the time they were deprived of their property, increased by an amount reflecting an adjustment for inflation as well as statutory interest from the date that they were deprived of their property. In a similar case, the Court found that an analogous award constituted appropriate and sufficient redress for the breach of Article 1 of Protocol No. 1 suffered by the applicant, and concluded that the applicant could no longer be considered a victim of the violation complained of (see *Armando Iannelli v. Italy*, no. 24818/03, §§ 35-37, 12 February 2013). The Court sees no reason to depart from the approach it adopted in that case. Moreover, the Court points out that in the present case the *Consiglio di Stato* awarded a further EUR 50,000 for the non-pecuniary damage suffered owing to the unlawful nature of the property deprivation (see paragraph 23 above).

40. Nevertheless, the applicants argued that the redress afforded by the *Consiglio di Stato*, which they do not appear to have complained about *per se*, was insufficient on account of the tax levied on the amount received. The Court notes that there is no evidence in the case file that, following the raising of the issue at a time when it was premature (see paragraphs 22 and 23 above), the applicants complained about the taxation aspect before the domestic courts once the tax measure had actually been applied. However, it considers that it is not necessary to rule on the issue conclusively because this part of the complaint is in any event inadmissible for the reasons set out below.

41. The Court notes at the outset that the impugned tax measure was imposed on the applicants by the Nuoro Municipality under Law no. 413/1991, which regulates, *inter alia*, the collection of taxation on compensation awards for both lawful and unlawful deprivations of property (see paragraphs 30 and 31 above). It would therefore appear to the Court to be the most appropriate approach to examine the applicants' complaint from the standpoint of a control of the use of property "to secure the payment of taxes" (see *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 79, *Reports of Judgments and Decisions* 1997-VII). In the Court's view, therefore, the levying of taxation in the present case ought not to be considered against the backdrop of the redress afforded for the deprivation of property but, rather, under the second paragraph of Article 1 of Protocol No. 1.

42. According to the Court's well-established case-law (see, among many other authorities, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 62, Series A no. 306-B, and *N.K.M.*

v. Hungary, no. 66529/11, § 42, 14 May 2013), an interference, including one resulting from a measure to secure the payment of taxes, must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued. Lastly, applicants must not bear an individual and excessive burden (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 73, Series A no. 52).

43. Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court has consistently held that it will respect the legislature’s assessment in such matters unless it is devoid of reasonable foundation (see *Gasus Dosier- und Fördertechnik GmbH*, cited above, § 60, Series A no. 306-B; *Imbert de Trémiolles v. France* (dec.), nos. 25834/05 and 27815/05 (joined), 4 January 2008; and *Arnaud and Others v. France*, nos. 36918/11 and 5 others, § 25, 15 January 2015). It is, indeed, primarily for national authorities to decide the type of taxes or contributions they wish to levy, since decisions in this area will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the competence of the States parties, the domestic authorities being better placed than the Court in this connection (see *N.K.M. v. Hungary*, cited above, § 57).

44. Turning to whether a fair balance has been struck in the case at hand, the Court considers at the outset that it was well within the area of discretionary judgment for the Italian legislature to develop substantive tax rules providing for taxation of capital gains arising from disposessions of property. Consequently, the legislation cannot be considered to be arbitrary as such (see *Di Belmonte v. Italy*, no. 72638/01, § 42, 16 March 2010, and, *mutatis mutandis*, *Arnaud*, cited above, § 27). Moreover, choices as to the type and amount of tax to be levied, but also, as in this case, the related question as to what may be classified as taxable income, fall within those issues that the domestic legislature is certainly better placed than the Court to assess and determine (see, *mutatis mutandis*, *Gáll v. Hungary*, no. 49570/11, § 56, 25 June 2013; *Baláž v. Slovakia* (dec.), no. 60243/00, 16 September 2003; and *Spampinato v. Italy* (dec.), no. 69872/01, 29 March 2007). The Court finds that the same can be said as regards the choice as to the concrete means of enforcement, namely deduction at source, with the option left to the taxpayer to choose the regular taxation route. In view of the foregoing, the Court considers that the respondent State should be afforded a particularly wide margin of appreciation in the present case.

45. It remains to be ascertained whether the impugned fiscal measure could be viewed as having imposed an unreasonable or disproportionate burden on the applicants.

46. The Court considers at the outset that the tax rate applied in the present case, which amounted to 20% of the total compensation awarded, cannot be considered, from a quantitative standpoint, as prohibitive. Moreover, it cannot be said that the deduction of such an amount had the effect of nullifying or essentially frustrating the award of compensation made by the *Consiglio di Stato*, to the extent of causing the tax burden to acquire a “confiscatory” nature. Nor did it lead to a paradoxical situation whereby the State took away with one hand – in this case in taxation – more than it awarded with the other as compensation for a deprivation of property (see, *mutatis mutandis*, in the context of the application of court fees, *Perdigão v. Portugal* [GC], no. 24768/06, § 72, 16 November 2010). The Court is, in other words, satisfied that the fiscal measures applied in the present case did not go as far as to impair the very substance of the applicants’ property rights.

47. The Court also notes that there is no evidence in the case file – and in any event it is not argued by the applicants – that the levying of such a sum fundamentally undermined their financial situation. This is one of the factors which the Court has given weight to when gauging whether a fair balance has been struck in a given case (see, *N.K.M. v. Hungary*, cited above, § 42, and the further references cited therein).

48. In its assessment, the Court has also taken into consideration the nature of the sum that was subject to tax and what purpose it served (*ibid.*, § 68). In the present case, the purpose of the award was to provide redress for an unlawful act of the administration. In that context, the applicants argued that, given the unlawfulness of the expropriation (see paragraphs 14–16 above), they should be exempted from any tax in the same manner as applicants in the procedure before the Court.

It is true that the Court may – and often does – exempt sums which it awards under Article 41 of the Convention from taxation in certain cases. The underlying reason is to prevent the respondent State from clawing back part, or even all, of the award made by the Court. The granting of such an exemption is not, however, automatic. In particular, where awards are made to compensate for loss of earnings or commercial profits, which would ordinarily have been taxable, it may not be appropriate to exempt them from taxation (see, for example, *Heldenburg v. the Czech Republic* (just satisfaction), no. 65546/09, 9 February 2017, concerning rental income). The Court decides in each case whether or not an exemption is appropriate (see, for example, *Vistiņš and Perepjolkins v. Latvia* (just satisfaction) [GC], no. 71243/01, § 43, ECHR 2014).

The present case concerns a tax provided for by domestic legislation and levied at the domestic level. The tax exemption clause in the Court’s

judgments which, as explained above, applies to just satisfaction awards under Article 41 of the Convention if appropriate, cannot be considered applicable by mere analogy to domestic awards, even if those awards serve a similar purpose. Moreover, the Court would draw attention to the fact that the domestic courts recognised that the deprivation of the applicants' property had not been in accordance with the law and awarded EUR 50,000 to compensate them for the non-pecuniary damage suffered due to the unlawful nature of the dispossession of their land.

49. Lastly, the Court finds it relevant to point out that the applicants had the choice under the legislation under scrutiny to opt for taxation under the ordinary income tax regime if they so wished, as taxpayers can choose between accepting the 20% deduction applied to the sum obtained, or opt for ordinary taxation, which determines the amount due as tax taking into account the capital gains in combination with other components of their income (see paragraph 31 above).

50. In view of the foregoing, and taking into account the wide margin of appreciation which the States have in taxation matters, the Court considers that the levying of the tax on the compensation awarded to the applicants did not upset the balance which must be struck between the protection of the applicants' rights and the public interest in securing the payment of taxes.

51. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

52. As to the complaint under Article 14, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that the present case does not disclose any appearance of a violation of the above-mentioned Article of the Convention.

53. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 8 February 2018.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President