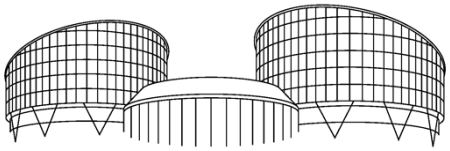

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF PORTANIER v. MALTA

(Application no. 55747/16)

JUDGMENT

STRASBOURG

27 August 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Portanier v. Malta,

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

Georgios A. Serghides, *President,*
Vincent A. De Gaetano,
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Alena Poláčková,
María Elósegui, *judges,*
and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 2 July 2019,

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

PROCEDURE

1. The case originated in an application (no. 55747/16) 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 a Maltese national, Mr Victor Portanier ("the applicant"), on 19 September 2016.

2. The applicant was represented by Dr I. Refalo, Dr M. Refalo and Dr S. Grech, lawyers practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech, Attorney General.

3. The applicant alleged that he was still a victim of the violation of Article 1 of Protocol No. 1 upheld by the Constitutional Court given the low amount of compensation awarded. He also considered that there had been a breach of Article 13 in so far as the Constitutional Court was not an effective remedy as shown by its recurring practice.

4. On 4 September 2018 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1931 and lives in Swieqi.

A. Background to the case

6. The applicant holds the perpetual *utile dominium* of an apartment in Depiro Street Sliema.

7. On 5 December 1974 the applicant (and his now late wife) had entered into a contract of sub-emphyteusis with couple P. for seventeen years at a sub-ground rent of 140 Maltese lira (MTL), approximately 326 euros (EUR), annually. On 10 December 1991 the applicant (and his now late wife) prolonged the contract for another seventeen years, this time at a ground rent of MTL 313, approximately EUR 729 annually.

8. In 2008 on the expiry of the sub-emphyteusis, couple P. claimed that by operation of law (Section 12 of Act XXIII of 1979 amending Chapter 158 of the Laws of Malta, the Housing (Decontrol) Ordinance - hereinafter "the Ordinance"), that contract was converted into one of lease. According to law the applicable rent payable by couple P. was EUR 1,186.46 annually.

B. Constitutional redress proceedings

9. The applicant and his now late wife (the claimants) instituted constitutional redress proceedings claiming that the provisions of law - which granted an emphyteuta or sub-emphyteuta the right to retain possession of the premises under a lease - imposed on them as owners a unilateral lease relationship for an indeterminate time without reflecting a fair and adequate rent, in breach of, *inter alia*, Article 1 of Protocol No. 1 to the Convention.

10. By a judgment of 27 October 2016 the Civil Court (First Hall) in its constitutional competence rejected the claims. It considered that when the claimants prolonged the contract of sub-emphyteusis, the 1979 amendments were already in place and thus they could not complain about their effects which had been foreseeable at the time.

11. The applicant's wife having passed away pending proceedings, the applicant appealed, relying on *Zammit and Attard Cassar v. Malta*, (no. 1046/12, 30 July 2015).

12. By a judgment of 29 April 2016 the Constitutional Court reversed the first-instance judgment in respect of Article 1 of Protocol No. 1 and upheld a breach of the applicant's property rights.

13. The Constitutional Court found that the claimants had not had a free choice in 1991, since their options at the time were either to renew the sub-emphyteusis or to transform it into a lease which carried less favourable conditions. Prior to that, when they entered the contract of sub-emphyteusis in 1974, they expected to get back their property in 1991. This did not happen due to the relevant amendments in the law.

14. While the interference had been in accordance with the law and pursued a public interest, it could not be said to be proportionate. According to the applicant's architect, in 2009 the apartment had a sale value of EUR 198,000 and a rent value of EUR 608.19 monthly or EUR 7,298.28 annually. It was of relevance that couple P. had made improvements to the

apartment, and yet according to the applicant's architect the apartment in 2013 was valued for the purposes of sale at EUR 100,000 bearing in mind that it had been leased for a long time. In his view had it been free from lease it would be worth EUR 140,000. According to a court-appointed expert the sale value in 2014 was EUR 152,000. Relying on the sale value of the court-appointed expert the Constitutional Court considered that the rental value must have been around EUR 5,600 annually. When taking into account the improvements made by couple P. and the fact that the property might not have been constantly rented out, the Constitutional Court considered that a fair rent would be between EUR 3,000 and 4,000 annually. Under the contract of lease, couple P. were paying EUR 1,186.46 which, in light of the public interest of the measure, was not entirely disproportionate, amounting as it did to around half of its real rental value. However, the law left little possibility of the applicant ever recovering his property, and the increase in rent every three years, according to law, was of no comfort given that it only reflected inflation increases. Moreover, there existed no mechanism to establish a fair rent in the light of the needs of the owner versus those of the lessee. It followed that Section 12 of the Ordinance did not respect the principle of proportionality required by the Convention and the applicant's property rights were therefore breached.

15. The Constitutional Court, bearing in mind that the applicant was due damages since 2008, awarded him EUR 2,500 covering pecuniary and non-pecuniary damage. The Constitutional Court considered that it was not necessary to evict the tenants, but held that the tenants could not rely on Section 12 of the Ordinance to claim title to the property. One sixth of the costs of the entire proceedings (amounting to EUR 1,291.15) were to be paid by the applicant.

C. Eviction proceedings

16. On 14 July 2016 the applicant instituted proceedings to evict couple P. By a final judgment of 30 May 2017 the Civil Court (First Hall) in its ordinary competence found in favour of the applicant who obtained the re-possession of his property in September 2017. The court found in favour of the applicant on the basis of the order made by the Constitutional Court and the fact that the tenants had no other title to the property.

II. RELEVANT DOMESTIC LAW

17. The domestic law relevant to the time of the present case in relation to the conversion from temporary emphyteusis to lease by means of the operation of Act XXIII of 1979 is set out in *Amato Gauci v. Malta* (no. 47045/06, §§ 19-25, 15 September 2009).

18. After the facts of the present case, Act XVIII introducing relevant amendments came into force and in so far as relevant, Section 12B of Chapter 158 of the Laws of Malta, now reads as follows:

"(1) Where a person is in occupation of a dwelling house under title of lease created by virtue of a previous title of emphyteusis or sub-emphyteusis which commenced before the 1st June 1995 through the application of article 5, 12, or 12A the following conditions shall, insofar as they are inconsistent with the provisions of the said articles of this Ordinance apply in respect of such lease as from, the 10th April 2018 notwithstanding the provisions of the said articles of the Ordinance or of any other law.

(2) The owner shall be entitled to file an application before the Rent Regulation Board demanding that the rent be revised to an amount not exceeding two percent per annum of the open market freehold value of the dwelling house on the 1st January of the year during which the application is filed and that new conditions be established in respect of the lease.

(3) The procedure applicable to the hearing of applications before the Rent Regulation Board shall apply to the hearing of an application made under sub-article (1):

Provided that:

(i) the Housing Authority shall be notified with the application and shall have a right to fully participate as *amicus curiae* in the proceedings; and

(ii) the tenant and the landlord shall always be entitled to the benefit of legal aid in proceedings filed in terms of this article if they are not in full-time gainful employment; and

(iii) at the initial stage of the proceedings the Board shall conduct a means test of the tenant which shall be based on the means test provided for in the Continuation of Tenancies (Means Testing Criteria) Regulations issued under articles 1531F and 1622A of the Civil Code or any regulations from time to time replacing them.

The means test shall be based on the income of the tenant between the 1st January and the 31st December of the year preceding the year when the proceedings are commenced and the capital of the tenant on the 31st December of the said year. The means test shall be conducted with particular reference*, inter alia*, to regulations 4 to 8 of the said regulations which shall apply *mutatis mutandis*.

(4) Where the tenant does not meet the income and capital criteria of the means test the Board shall, after hearing any evidence and submissions produced by the parties, give judgement allowing the tenant a period of five years to vacate the premises. The compensation for occupation of the premises payable to the owner during the said period shall amount to double the rent which would have been payable in terms of articles 5, 12 or 12A.

(5) Where the tenant meets the income and capital criteria of the means test the Board shall proceed according to the following sub-articles.

(6) In establishing the amount of rent payable in accordance with sub-article (1) the Board shall give due account to the means and age of the tenant and to any disproportionate burden particular to the landlord and it may determine that any increase in rent shall be gradual. The Board, after briefly hearing the parties and examining any evidence which it considers relevant, may also order that an increased

amount of rent be paid whilst the hearing of an application filed in terms of sub-article (1) is pending.

(7) Where an amount of rent is established in terms of sub article (1) that rent shall apply in respect of the lease of the dwelling house, unless the lease is previously terminated, for a period of six years, after which it shall be subject to being revised in accordance with sub-article (1) unless an agreement is reached between the parties.

(8) (a) Upon the happening of a material change in circumstances during the continuance of a lease established in accordance with article 5, 12 or 12A the owner shall be entitled to file an application before the Board demanding that the conditions of the lease be revised on account of their causing a disproportionate burden upon him.

(b) The owner may also demand the dissolution of the lease if he can prove through unequivocal evidence that the tenant is not a person in need of the social protection provided by articles 5, 12 or 12A and by this article:

Provided that:

(i) the provisions of paragraph (a) of this sub-article shall not apply where the hearing of an application under sub-article (1) is pending or has been determined for less than three years;

(ii) the tenant shall always be deemed to be a person not in need of the social protection provided by articles 5, 12, 12A and by this article if the Housing Authority or the landlord offer alternative accommodation suitable to the tenant and guarantees the availability of such accommodation to the tenant for at least ten years for a rent which is not in excess of that which would have been payable by the tenant had the tenant continued the lease under articles 5, 12 or 12A.

(9) (a) Any person who has a right to be recognised as a tenant in terms of the proviso to the definition "tenant" in article 2 shall, unless the said is a person referred to in paragraph (a) of the said definition, only acquire a right to occupy the dwelling house for a period of five years upon the expiration of which he shall vacate the said dwelling house. The compensation for occupation of the dwelling house payable to the owner during the said period shall, unless the occupier meets the income and capital criteria of the means test referred to in paragraph (iii) of sub-article (3), amount to double the rent which would have been payable in terms of articles 5, 12 or 12A.

(b) Any dispute as to whether the occupier meets the criteria of the means test may be referred by either party to the Board by application and the provisions of sub-article (3) shall apply.

(10) The provisions of article 1555A of the Civil Code shall apply in respect of any lease which came into effect by virtue of articles 5, 12, 12A or this article.

(11) The provisions of this article shall also apply in all cases where any emphyteusis, sub-emphyteusis or tenancy in respect of a dwelling house regulated under articles 5, 12, or 12A has lapsed due to a court judgment based on the lack of proportionality between the value of the property and the amount receivable by the landlord and the person who was the emphyteuta or the sub-emphyteuta or the tenant still occupies the house as his ordinary residence on the 10th April 2018. In such cases it shall not be lawful for the owner to proceed to request the eviction of the occupier without first availing himself of the provisions of this article."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO.1

19. The applicant complained that he was still a victim of the violation of Article 1 of Protocol No. 1 upheld by the Constitutional Court given the low amount of compensation awarded. The provision 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."

20. The Government contested that argument.

A. Admissibility

1. The Government's objection of lack of victim status

21. The Government submitted that the applicant had lost his victim status following the Constitutional Court's finding which acknowledged the violation and awarded EUR 2,500 in compensation. They noted that the tenants had maintained the property and that the rental value of the premises accepted by the domestic court was between EUR 3,000 to EUR 4,000 annually, which was not too different to the EUR 1,186.46 they were being paid since the conversion of the lease.

22. Relying on the Court's case-law the applicant maintained that he remained a victim of the violation upheld by the Constitutional Court. He noted that the rental value of the property according to the court-appointed expert was EUR 5,600 annually, thus the domestic court's award had only covered a period of six months.

23. The Court refers to its general principles about the matter as set out in *Apap Bologna v. Malta* (no. 46931/12, §§ 41 and 43, 30 August 2016).

24. In the present case the Court notes that there has been an acknowledgment of a violation by the domestic court. As to whether appropriate and sufficient redress was granted, the Court considers that even though the market value is not applicable and the rent valuations may be decreased due to the legitimate aim at issue, an award of EUR 2,500 - from which part costs amounting to EUR 1,291.15 must be deducted - can hardly be considered sufficient for a violation which persisted for more than eight years during which the applicant was being paid a disproportionately low amount of rent.

25. It follows that the redress provided by the Constitutional Court did not offer sufficient relief to the applicant, who thus retains victim status for the purposes of this complaint.

26. The Government's objection is therefore dismissed.

2. Conclusion

27. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

28. The applicant submitted that there had been a violation of Article 1 of Protocol No. 1 as upheld by the domestic courts.

29. The Government submitted that the applicant had not suffered any interference since he had voluntarily entered in to the contract and in any event a fair balance had been struck by the authorities.

30. Having regard to the findings of the domestic court relating to Article 1 of Protocol No. 1 (see paragraph 12 above), the Court considers that it is not necessary to re-examine in detail the merits of the complaint. It finds that, as established by the domestic court, the applicant was made to bear a disproportionate burden.

31. There has accordingly been a violation of 1 of Protocol No. 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

32. The applicant complained of a violation of Article 13 as he considered that constitutional redress proceedings were not effective. The provision reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

33. The Government submitted that the applicant could have instituted a fresh set of constitutional redress proceedings to complain under Article 13 about the Constitutional Court judgment.

34. The applicant submitted that such an action would not have been appropriate and that the ordinary action at such stage was to bring the complaint before the Court.

35. The Government's objection to this effect has been rejected *ad nauseam* by this Court (see, amongst multiple authorities, *Apap Bologna*, cited above, § 63, and more recently *Grech and Others v. Malta*, no. 69287/14, § 50, 15 January 2019).

36. The Government's objection is therefore dismissed.

2. Conclusion

37. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

38. According to the applicant, while it was true that the courts of constitutional jurisdiction had "unlimited powers", in his case those courts had failed to use their wide-ranging powers to rectify the breach. Indeed, domestic case-law showed that the Constitutional Court systematically reduced compensation awards made by the first-instance constitutional jurisdiction without giving any weighty reasons, and sometimes also without any adequate reasoning. Moreover, generally the Constitutional Court also ordered applicants who had been successful in their claims to pay part of the costs of the proceedings. They made reference to a number of domestic cases (see the list set out in *Grech and Others*, cited above, § 53).

39. As to eviction orders the applicant noted that the Constitutional Court had persistently shot down first-instance decisions by the constitutional jurisdictions which had ordered such evictions, as shown by the list submitted by the Government (see paragraph 43 below). It was only in some of those cases that the Constitutional Court ordered, instead, that the tenants could no longer rely on the relevant law to maintain title to the property. The applicant considered that the latter order was not tantamount to an eviction order. While it was true that, like in the present case, once the Constitutional Court had ordered that the tenants could no longer rely on the relevant provisions of law to retain title to the property, an owner is sometimes successful in evicting the tenant, in the applicant's view such a process was burdensome and entailed another set of proceedings. In the applicant's case, following the judgment of the Constitutional Court of 29 April 2016, he instituted eviction proceedings which were decided on

30 May 2017 and physical possession of the property was only effectively achieved in September 2017. This meant that that he had to incur further expenses and that he continued to lose rent for nearly a year and a half after the Constitutional Court's judgment finding that he had been suffering a breach of his property rights. It followed that the Constitutional Court had not adequately remedied the violation it had found.

40. The applicant also pointed out that Act XXVII of 2018 (hereinafter "the 2018 Act") relied on by the Government had made the scenario only worse, since its Article 12B effectively erased the effects of any such order made by the Constitutional Court, including in respect of cases decided by the Constitutional Court before the enactment of the Act as had occurred in the recent case of *Galea vs Ganado*, judgment of the Civil Court of Appeal (Inferior) of 25 February 2019.

(b) The Government

41. The Government submitted that constitutional proceedings were capable of providing adequate redress for the violation found by the domestic courts. In fact and in practice, the courts of constitutional jurisdiction could award any type of redress, ranging from an award of compensation, which was the usual type of redress granted in cases of a violation of Article 1 of Protocol No. 1 (they relied, for example, on *AIC Joseph Barbara vs the Prime Minister*, Constitutional Court judgment of 31 January 2014, and *Angela sive Gina Balzan vs the Prime Minister*, Constitutional Court judgment of 7 December 2012), to various other types of orders. The Government submitted, as examples from actual judgments, the reintegration of an employee into the public service, as well as an order made to the courts of criminal jurisdiction to discard a statement made by the accused when it had been taken by the police without legal assistance. They reiterated that there were no limits to the powers of the courts of constitutional jurisdiction to grant redress for Convention violations.

42. In reply to the Court's specific question to submit relevant examples, the Government submitted the following cases where the domestic courts of constitutional jurisdiction upheld the violation of the claimants' property rights (in circumstances similar to the present case), awarded compensation and ordered that the tenants could no longer rely on the protection afforded by Chapter 158 of the Laws of Malta to retain title to the property, and thus facilitated eviction:

- *Maria Pia* sive *Marian vs the Attorney General*, Constitutional Court judgment of 31 January 2014,
- *Vincent Curmi vs the Attorney General*, Constitutional Court judgment of 24 June 2016,
- *Rose Borg vs the Attorney General*, Constitutional Court judgment of 11 July 2016,

- *Maria Stella* sive *Estelle Azzopardi Vella et vs the Attorney General*, Constitutional Court judgment of 30 September 2016.

43. A further four examples to this effect, all dated 2018, were also included:

- *Thomas Cauchi et vs the Attorney General*, Constitutional Court judgment of 2 March 2018,

- *Evelyn Montebello et vs the Attorney General*, Constitutional Court judgment of 13 July 2018,

- *John Mattei et vs the Housing Authority* Constitutional Court judgment of 5 October 2018,

- *Maria Pia* sive *Marian Galea vs the Attorney General*, Constitutional Court judgment of 14 December 2018.

In the last-mentioned three cases the Constitutional Court revoked the eviction order which had been ordered by the first-instance court. In the other case the claimants had not been successful at first-instance.

44. The Government also submitted four examples dated 2016 where no eviction was ordered by the courts:

- *Carmelo Grech vs the Housing Authority*, Constitutional Court judgment of 10 February 2016,

- *Maria Ludgarda* sive *Mary Borg et vs Rosario Mifsud et*, *Raymond* Constitutional Court judgment of 29 April 2016,

- *Cassar Torreggiani et vs the Attorney General*, Constitutional Court judgment of 29 April 2016,

- *Ian Peter Ellis et vs the Attorney General*, Constitutional Court judgment of 24 June 2016.

45. Lastly, the Government considered it important for the Court to be aware of Act No XXVII of 2018 providing amendments to the lease regime regulated by Chapter 158 of the Laws of Malta, which they considered provided an effective remedy.

2. The Court's assessment

46. The Court reiterates its general principles under Article 13 as set out in *Apap Bologna* (cited above, §§ 76-79). In particular it reiterates that, for the purposes of Article 13, it is for the Court to determine whether the means available to an applicant for raising a complaint are "effective" in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred. In certain cases a violation cannot be made good through the mere payment of compensation and the inability to render a binding decision granting redress may also raise issues (ibid., § 77).

(a) "Preventing the alleged violation or its continuation"

47. The Court notes that as in *Apap Bologna*, cited above, in the present case the constitutional jurisdictions and in particular the Constitutional Court did not order the eviction of the tenant. There is no doubt that, in law, the courts of constitutional jurisdiction could annul an order and evict a tenant (as sometimes ordered by the first-instance constitutional jurisdiction, see paragraph 43 *in fine* above), which measure would have prevented the continuation of the violation. However, it is clear, from the case-law relied on by the Government, that in situations such as those of the present case, namely where as a result of a protected rent regime (such as that arising from Chapter 158 of the Laws of Malta at issue in the present case) the owners have suffered an excessive burden leading to a violation, the courts of constitutional jurisdiction, and in particular the Constitutional Court on appeal, do not take such action. More particularly, the Constitutional Court revokes such an action when it was ordered by the first-instance court. Indeed, the Government have not provided one example of a final finding ordering eviction, despite having been requested to do so, and despite the fact that numerous violations of the kind have been found at the domestic level. In similar circumstances, in *Apap Bologna* (concerning violations arising from requisition orders) the Court found that, despite having the power to do so, in practice, the Constitutional Court had repeatedly failed to take the required action which would bring the violation to an end (ibid., § 86).

48. In *Apap Bologna*, § 88, the Court also expressed regret at the interpretation given by the constitutional jurisdictions as to their impossibility of awarding a higher future rent which would constitute a measure *vis-à-vis* an individual applicant, which would provide for an end to the violation without affecting the tenant. This course of action, however, has not been popular with the constitutional jurisdictions, save for one particular case at first-instance, submitted by the Government, which gave an all-encompassing remedy, including a temporary future rent. In *John Mattei et* (cited above) the first-instance court ordered the eviction of the tenants and the Housing Authority to find alternative accommodation for them. It also ordered the Housing Authority to pay EUR 800 monthly in rent to the applicants until the eviction took place. That judgment must be praised by this Court, as it takes an approach which provides a solution to all the concerns raised by it in *Apap Bologna*, and conforms to the principles of adequate redress. Such an impeccably comprehensive remedial action was revoked by the Constitutional Court in its judgment of 5 October 2018 and the Court has not been informed that this course of action has been adopted by the constitutional jurisdictions, including the Constitutional Court, in other cases. That said, the Court reiterates that in the event that the constitutional jurisdictions award a higher future rent (to be paid by the Government, with the possibility of an arrangement with the tenants who

would have for years benefitted from a generous regime), eviction would not always be necessary. Indeed, when the measure did pursue a legitimate aim (such as the social protection of needy tenants), the adaptation of the future rent to present circumstances might be sufficient to repair the existing disproportionality and thus bring the violation to an end.

49. However, the Court notes that in the present case, while none of the above actions were taken, the Constitutional Court took an alternative action. It ordered that the tenants could no longer rely on the relevant law provisions to retain title to the property. From the domestic case-law brought to the Court's attention by the Government, that same action appears to have become rather customary, at least since 2016, and remains so to date despite a legislative amendment in 2018 which attempts to stultify court pronouncements to that effect, and which the Government felt was important to bring to the Court's attention, albeit for the wrong reasons. However, the Court will not enter into an examination of the 2018 amendments, which are irrelevant to the present case, the facts of which came to an end in September 2017 and which have escaped any repercussions resulting from the application of the 2018 amendments. Indeed, irrespective of the domestic courts' interpretation as to the applicability of the 2018 amendments to judgments pronounced prior to its entry into force (see paragraph 40 above), the Court notes that, in the present case, on the basis of the order made by the Constitutional Court, the applicant was successful in evicting the tenant within one year and a half of the Constitutional Court judgment.

50. The Court has previously expressed its reservations about the fact that the Constitutional Court, whose role is to bring a violation to an end and to redress the upheld violation, abdicates the responsibility assigned to it by the Constitution of Malta and refers applicants to yet another remedy despite it having the power and authority to grant such redress (see *Edward and Cynthia Zammit Maempel v. Malta*, no. 3356/15, § 83, 15 January 2019, in the context of another compensatory remedy).

51. Nevertheless, the Court appreciates that after years of ineffectual judgments delivered by the Maltese Constitutional Court which upheld violations but did not offer adequate redress, the Constitutional Court has finally taken an approach which could potentially redress applicants in situations such as those of the present case. However, the Court still has doubts as to this approach. Unfortunately, the parties' limited submissions have shed little light on the situation pertaining to eviction proceedings in general in such cases. No other cases of eviction proceedings in similar circumstances have been brought to the Court's attention by the parties. In consequence, the Court is unable to establish whether such proceedings are generally, *inter alia*, too lengthy or too expensive. In this connection the Court reiterates that the speed of remedial action is also relevant to the effectiveness of a remedy and that successive procedures further burden

applicants with supplementary legal costs and expenses (see, *mutatis mutandis*, *Edward and Cynthia Zammit Maempel*, cited above, § 85).

52. In the absence of comparative cases the Court is also unable to establish its prospects of success. Admittedly, it would appear that the success of the eviction request before the ordinary jurisdictions would be evident in the absence of any other legitimate title to the property, but then such an approach begs the questions - what purpose does such an action pursue if the result is automatic? Why does an applicant have to undertake another set of proceedings with connected expenses, and continue to suffer the violation for a number of months or years, if its result is automatic? In what way is the applicant redressed for the months or years during which the eviction proceedings are pursued and during which the owners continue to suffer the upheld violation? It has not been argued, nor does it appear likely from the proceedings in the present case, that such eviction proceedings serve the purpose of examining any of the tenants' interests protected by the Convention – which in any event would have more appropriately been dealt with in the constitutional redress proceedings, to which the tenants are usually also parties.

53. The Court cannot but note that while an eventual eviction would surely cause some distress to the tenant, who is also the holder of certain rights under the Convention, it would be for the Government to relocate such a tenant if necessary. It is the role of the courts of constitutional jurisdiction to provide the available remedy for Convention violations, thereby protecting the victim (in this case the owners) from a continuing violation irrespective of any Government discomfort. This is particularly so when the Government could avoid any such situations by amending the law in such a way as to provide for a reasonable amount of rent (see, *mutatis mutandis*, *Apap Bologna*, cited above, § 87).

54. In the absence of any particular detail on the matter, the Court will refrain from adjudicating on the effectiveness of this approach in general; it suffices for the purposes of the present case to find that in the instant circumstances the applicant has been successful in his eviction and thus the violation no longer persists.

(b) "Providing adequate redress for any violation that had already occurred"

55. The Court notes that it has repeatedly found that the sums awarded in compensation by the Constitutional Court do not constitute adequate redress. The Court makes reference to its considerations in paragraphs 24 and 25 above. The Court considers that, just like an award for pecuniary damage under Article 41 of the Convention, an award for pecuniary damage made by a domestic court must be intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred. It transpires from the information and cases brought before the Court that this is often not the case. Such pecuniary awards are also often not

accompanied by an adequate award of non-pecuniary damage and/or an order for the payment of the relevant costs (ibid. § 90 and *Grech and Others*, cited above, § 62). No domestic case-law dispelling such conclusions has been brought to the Court's attention in the present case.

56. In the light of the above considerations relating to the relevant time, the Court concludes that although constitutional redress proceedings are an effective remedy in theory, they were not so in practice, in cases such as the present one. In consequence, they cannot be considered an effective remedy for the purposes of Article 13 in conjunction with Article 1 of Protocol No. 1 concerning arguable complaints in respect of the rent laws in place, which, though lawful and pursuing legitimate objectives, impose an excessive individual burden on applicants.

(c) Conclusion

57. No other remedies have been referred to by the Government.

58. Accordingly, the Court finds that there has been a violation of Article 13, in conjunction with Article 1 of Protocol No. 1 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. 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

60. The applicant claimed 77,692 euros (EUR) in respect of pecuniary damage representing the loss of rent (plus interest) from December 2008 to 2018, noting that while the tenants vacated the property in September 2017 they had left the property in such a terrible state that it could not be rented out immediately. The court-appointed expert had estimated the sale value of the property at EUR 152,000 and the annual rental value of the property at EUR 5,600 which had to be multiplied by ten years (EUR 56,000). From that the sum awarded by the Constitutional Court (EUR 2,500) had to be deducted and interest at 8% per annum added (EUR 24,192). The applicant further claimed EUR 32,648 he incurred in repairing damage to the property caused by the tenants without prejudice to any further right to compensation he might have. He also claimed EUR 20,000 in non-pecuniary damage.

61. The Government submitted that the applicant's claims were inflated. In accordance with an *ex parte* valuation dated 2019 submitted by the

Government the sale market value of the property in 2017 was EUR 132,500 and the total market rental value of the property from 2008-2017 amounted to EUR 27,500 (for example, EUR 3,600 annually in 2017) out of which, the Government noted, the tenants had been paid EUR 10,678.14. They also noted that judicial interest was only payable from the date of judgment according to Maltese legislation. They also contested the claim for damages which should have been raised domestically before the ordinary civil courts. In their view the award for pecuniary damage should not exceed EUR 5,000 and that in non-pecuniary damage should not exceed EUR 1,500 as awarded in *Amato Gauci v. Malta* (no. 47045/06, 15 September 2009).

2. The Court's assessment

62. The Court must proceed to determine the compensation the applicant is entitled to in respect of the loss of control, use and enjoyment of the property which he has suffered for the period December 2008 to September 2017, when the violation came to an end.

63. The Court notes that the annual rental value of the property estimated on the basis of its sale value according to the court-appointed architect was EUR 5,600. Nevertheless the domestic court considered its value to be more likely EUR 3,000 to 4,000 (see paragraph 14 above). The latter appears to be in line with the Government's architect's valuation which also reflects similar figures. With that in mind, in assessing the pecuniary damage sustained by the applicants, the Court has, as far as appropriate, considered the estimates provided and had regard to the information available to it on rental values on the Maltese property market during the relevant period. It has also considered the legitimate purpose of the restriction suffered, bearing in mind that legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (see, *inter alia*, *Ghigo v. Malta* (just satisfaction), no. 31122/05, § 18 and 20, 17 July 2008). Furthermore, the rent already received by the applicant for the relevant period must be deducted.

64. The Court reiterates that an award for pecuniary damage under Article 41 of the Convention is intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred. It therefore considers that interest should be added to the above award in order to compensate for the loss of value of the award over time. As such, the interest rate should reflect national economic conditions, such as levels of inflation and rates of interest. The Court thus considers that a one-off payment of 5% interest should be added to the above amount (ibid., § 20).

65. The Court thus awards the applicant EUR 8,000.

66. The Court does not discern any causal link between the violations found and the pecuniary damage alleged in connection with the costs to reinstate the property, which may be recovered domestically from the relevant party, it therefore rejects this claim.

67. Bearing in mind the Constitutional Court's award, which remains payable to the applicant, and the fact that the costs related to those proceedings are claimed below, the Court need not award a further sum in non-pecuniary damage, it therefore rejects such claim.

B. Costs and expenses

68. The applicant also claimed EUR 5,734.46 (*sic*) for the costs and expenses incurred before the domestic courts representing EUR 1,291.15 (as per taxed bill of costs) and EUR 2,103.20 (other legal costs incurred) in connection with the constitutional redress proceedings and EUR 1,180 in relation to other legal costs of the eviction proceedings as well as EUR 2,451.26 for those incurred before the Court.

69. The Government contested the claims of EUR 2,103.20 in connection with the constitutional redress proceedings and EUR 1,180 in connection with the eviction proceedings in so far as they had not been included in the taxed bill of costs. They further considered that costs for the proceedings before this Court should not exceed EUR 1,500.

70. 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, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,000 covering costs under all heads.

C. Default interest

71. 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. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, 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 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 27 August 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Georgios A. Serghides
President