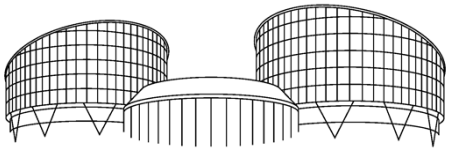

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MIFSUD AND OTHERS v. MALTA

(Application no. 38770/17)

JUDGMENT
(Just satisfaction)

Art 41 • Just satisfaction • Order for restitution of property, found not to have been expropriated in pursuit of the public interest • Payment of pecuniary damage in the absence of the return of the property

STRASBOURG

25 November 2021

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 Mifsud and Others v. Malta,

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

Ksenija Turković, *President,*
Péter Paczolay,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato,
Lorraine Schembri Orland, *judges,*
and Renata Degener, *Section Registrar,*

Having deliberated in private on 2 November 2021,

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

PROCEDURE

1. The case originated in an application (no. 38770/17) 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 twenty-one Maltese nationals, three British nationals and five Australian nationals (see Annex for details) ("the applicants"), on 23 May 2017.

2. In a judgment delivered on 13 October 2020 ("the principal judgment"), the Court held that there had been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the taking lasting from 1978 and 1984 respectively, until 2012, of the applicants' land measuring 509 sq.m. and 139 sq.m. as the applicants had not received any compensation in over forty years, and thus they were made to bear a disproportionate burden; that there had been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the expropriation, in 2012, of the applicants' land measuring 509 sq.m. and 139 sq.m., since, in respect of the former there had been no public interest, and in respect of both parcels a fair balance had not been reached in view of the compensation offered thus the applicants were made to suffer an excessive burden; and it declared the remainder of the application inadmissible (see *Mifsud and Others v. Malta*, no. 38770/17, §§ 54, 61-62, 103 and 106-07, 13 October 2020).

3. Under Article 41 of the Convention the applicants sought just satisfaction in terms of the return of the property measuring 509 sq.m. and reserved their right to claim damage for the use of that property if returned. The applicants had also claimed 6,861,428 euros (EUR) in respect of pecuniary damage and EUR 50,000, jointly, in non-pecuniary damage in connection with all their complaints and the entirety of the land (ibid., § 109).

4. Since the question of the application of Article 41 of the Convention was not ready for decision as regards the pecuniary damage in relation to i) the taking lasting from 1978 and 1984 respectively until 2012 of the applicants' land measuring 509 sq.m. and 139 sq.m. and ii) the expropriation of the parcel of land measuring 509 sq.m., the Court reserved it and invited the Government and the applicants to submit, within three months from the date on which that judgment became final in accordance with Article 44 § 2 of the Convention, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (ibid., §§ 113 and 122, and point 4 of the operative provisions).

5. The applicants and the Government each filed observations.

THE LAW

6. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

DAMAGE

A. The taking until 2012, of the applicants' land measuring 509 sq.m. and 139 sq.m.

1. The parties' submissions

7. The applicants submitted that according to their expert report the compensation for the use of the property measuring 509 sq.m. from 1978 to 2012 was EUR 528,455 (inclusive of simple interest at 2.5% on each yearly yield, until 2020). However, they considered that they should be due compensation until 2020 given that the expropriation was found to have no public interest according to the principal judgment (§ 100). According to their expert report, compensation until 2020 would amount to EUR 838,155 (inclusive of simple interest at 2.5% on each yearly yield).

8. Further, according to their expert report the compensation for the use of the property measuring 139 sq.m. from 1984 to 2012 was EUR 28,055 (inclusive of simple interest at 2.5% on each yearly yield until 2020).

9. The Government clarified that both parcels of land formed part of Land B and therefore both had been taken in 1984, and none in 1978, and thus any compensation should correspond to that period. Nevertheless, the Government considered that the applicants had not exhausted domestic remedies in this respect. Their original claim for just satisfaction had also not contained such a specific claim, thus they considered that the Court should not act *ultra petita*.

10. Without prejudice to the above, the Government submitted their own expert report, which considered both portions of land as being agricultural, and estimated the loss of rent over the relevant period (1984-2012) as being EUR 1,728 and EUR 1,017 respectively. Nevertheless, the Government considered that this total sum of EUR 2,745 should not be awarded in its entirety as (i) the values provided were only estimates and not amounts that the applicants would certainly have obtained; (ii) it could not be assumed that the property would have been rented out for the whole period had the Government not taken it over; and (iii) the measure had been in the public interest and thus the market value was not called for.

2. The Court's assessment

11. In its principal judgment (§ 112) the Court has already established that the applicants are due compensation for the use of the two smaller parcels of land until 2012. Thus, any fresh claims by the applicants requesting compensation until 2020 cannot be entertained, nor can the Court take cognisance of the Government's arguments on the admissibility of the complaint, which has already been declared admissible in the principal judgment (§ 57). However, the Court accepts that despite its reference to 1978 in the principal judgment, compensation for both parcels is due as of 1984, since both parcels formed part of Land B which was taken over by the Presidential Declaration of 16 May 1984 (see, for example, §§ 7, 14 and 61 of the principal judgment).

12. Further, the Court notes that there is no doubt that when the Government took over these portions of land (as part of Land B) in 1984 the measure had been lawful and in the public interest (see § 60 of the principal judgment). There is also no doubt that these portions of land (forming part of Land B) had been agricultural at the time of taking, as also confirmed by the Constitutional Court (see § 34 of the principal judgment).

13. Despite these findings which were clear from the principal judgment the applicants made claims in this respect based on valuations which considered the lands' development potential (into apartments and maisonettes), and which therefore do not assist the Court in awarding the relevant compensation. Thus, in the absence of any useful valuation by the applicants, the Court awards the sums calculated by the Government amounting to EUR 2,745, *in toto*, for the use of the applicants' land measuring 509 sq.m. and 139 sq.m. until 2012.

B. The expropriation in 2012 of the parcel of land measuring 509 sq.m.

1. The parties' submissions

14. The applicants submitted that following the principal judgment they unsuccessfully approached the authorities for the return of this land. They submitted that if *restituto in integrum* was not possible, they were claiming the full market value of the land, classified as developable land with reference to applicable local plans, according to their own expert valuation which amounted to EUR 926,000 (in 2020). To that the sum of EUR 687,500 amounting to the devaluation of the adjacent Land A and B (which had been returned to the applicants) according to the same expert report, had to be added, totalling EUR 1,613,500.

15. However, the applicants submitted that they would nevertheless prefer the restitution of the land, either by the Government of their own motion, or *via* the institution of a fresh set of constitutional redress proceedings, in connection with the execution of this Court's judgment. They thus requested the Court to make the award subject to the applicant's possibility to pursue the return of the property domestically, instead of accepting the award of compensation made by the Court.

16. The legal representatives indicated their firm's bank account to receive payment of all the sums awarded by the Court.

17. The Government submitted that the applicants' claims were largely disproportionate, in particular concerning the losses estimated at EUR 1,508,000 at the time of the principal judgment (§ 41) as devaluation of the remaining land. They also noted that the applicants' expert's report was based on the potential development of the much larger area of land, on the premise that this would be developed as housing units. The Government further reiterated that according to domestic law compensation was payable in accordance with the value of the land as on 1 January 2005, and for determining the classification of the land, the relevant date was that when the original declaration was issued by the President, in this case 1984. Therefore, according to the Government the land had to be considered as agriculture, and according to their expert it was valued at EUR 14,000.

2. The Court's assessment

18. As to the redress in respect of the land measuring 509 sq.m., the expropriation of which did not pursue any public interest and in respect of which the applicants obtained no compensation, the Court has already held in its principal judgment, as follows:

> "117. ... The Court notes that the restitution of the property is not impossible given that no use has been made of it, and that the adjacent properties (Lands A and B) have also been returned. Also, the applicants have requested its return (see, *a contrario*, *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 120).

118. The Court considers that, in the circumstances of the case, the return of the land measuring 509 sq.m. would be the most appropriate redress and would put the applicants as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (see, for example, *mutatis mutandis*, *Ana Ionescu and Others v. Romania*, nos. 19788/03 and 18 others, § 38, 26 February 2019).

119. Failing such restitution by the respondent State, the latter would have to pay the applicants, in respect of pecuniary damage, an amount corresponding to the current value of the land (see *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited*, cited above, § 122), to which may be added relevant losses as a result of the devaluation of the remainder of the applicants' land.

120. In this connection, the Court observes that the applicants' architect estimated the losses, in terms of the financial set back on the remaining land, at EUR 1,508,000 and this calculation has not been contested by the Government at this stage.

121. As to the value of the land, the Court observes that, on the one hand, the Government valued the parcel of land measuring 509 sq.m. at EUR 14,000 as agricultural land, in 2014, without specifying whether it was or not within a development zone. On the other hand, the applicants' valuation does not refer to the value of this parcel of land nor to its classification but seems to consider it as falling within the development zone. In such circumstances, on the basis of the material in its possession, the Court is not able to determine the value of the land today."

19. The Court reiterates that a judgment in which it 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). If the nature of the violation allows for *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 (ibid.).

20. Nevertheless, and despite the considerations cited above made in the principal judgment, the Government failed to return the property to the applicants, and no reasons have been advanced as to why this was impossible. Moreover, in their submissions to the Court the Government have insisted on compensation being paid according to domestic law. However, in determining compensation for the purposes of just satisfaction the Court is certainly not bound to follow domestic law (compare *Edwards v. Malta* (just satisfaction), no. 17647/04, § 20, 17 July 2008), which moreover is often the source of the breach itself (see for example, *Zammit and Vassallo v. Malta*, no. 43675/16, § 58, 28 May 2019 and the case-law cited therein). In particular, Article 41 empowers the Court to afford the injured party just satisfaction as appears to it to be appropriate (see *Guiso-Gallisay*, cited above, § 90).

21. The Court, as it did in the principal judgment, considers that in the circumstances of the present case the return of the land measuring 509 sq.m. would be the most appropriate redress and would put the applicants as far as

possible in a situation equivalent to the one in which they would have been if there had not been a breach of Article 1 of Protocol No. 1 (see § 118 of the principal judgment).

22. Failing such action by the respondent State, the Court reiterates that in circumstances such as those of the present case, where no public interest was found to exist behind the expropriation, in the absence of the return of the property, compensation must be awarded in an amount corresponding to the current value of the land (see *B. Tagliaferro & Sons Limited and Coleiro Brothers Limited v. Malta*, nos. 75225/13 and 77311/13, § 122, 11 September 2018).

23. The Court notes that, from the applicants' submissions in the principal judgment and the updated reports, submitted also at this stage of the proceedings, their valuations rely on the fact that the land, or rather part thereof, has potential for development on the basis of the Marsaxlokk Bay Local Plan and the planning guidelines of 1995. This has not been contested by the Government, whose 2021 valuation also states that the site falls under the Marsaxlokk Bay Local Plan. As admitted in the applicants' report, any development of the land would however be subject to a planning control application. The applicants have not submitted that any such applications have been sought or have been granted in relation to the remaining parts of their adjacent land. In consequence, the Court does not consider the valuation submitted by the applicants – which estimates the value of the property (and consequent losses) on the basis of its maximum development potential into apartments and maisonettes – to be appropriate for the purposes of considering the actual market value of the land as stands today, and any losses to the adjacent land.

24. Bearing in mind the above, the Court awards the applicants EUR 500,000 covering the value of the parcel of land measuring 509 sq.m., and the devaluation of their remaining adjacent lands, should the Government not return the property to the applicants within three months of this judgment becoming final (see for a similar approach *Stojanovski and Others v. the former Yugoslav Republic of Macedonia* (just satisfaction), no. 14174/09, § 14-17, 7 February 2019).

25. As requested, the amount awarded is to be paid directly into the bank account designated by the applicants' representatives (see, for example, *Denisov v. Ukraine* [GC], no. 76639/11, § 148, 25 September 2018, and as provided for in p. 22 of the Practice Direction on Just Satisfaction Claims (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007)).

C. Default interest

26. 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 should return the property measuring 509 sq.m. within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention;
   (b) That, in the alternative, should the respondent State fail to comply with the above obligation, the respondent State is to pay the applicants, within the same period of three months, EUR 500,000 (five hundred thousand euros), in respect of pecuniary damage;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 25 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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Renata Degener
Registrar

Ksenija Turković
President

APPENDIX
List of applicants

No.	Firstname LASTNAME	Birth year	Nationality	Place of residence
1.	Paul MIFSUD	1948	Maltese	Żabbar, Malta
2.	Rebecca AINSBURY	1976	British	Cumbria, United Kingdom
3.	Paul ALEXANDER	1941	Australian	Cowandilla, Australia
4.	Bernarda BALZAN	1933	Maltese	Żejtun, Malta
5.	Carmen BUTTIGIEG	1941	Maltese	Żejtun, Malta
6.	Daniela COOMBE	1979	British	Cumbria, United Kingdom
7.	Mary DAVIES	1950	Maltese	Peverell, United Kingdom
8.	Lourdes FARUGGIA	1944	Australian	Glenelg, Australia
9.	Mary FELICE	1952	Maltese	St Albans, United Kingdom
10.	Catherine FSADNI	1943	Maltese	Żejtun, Malta
11.	Angela GAUCI	1945	Maltese	Gżira, Malta
12.	Anthony GAUCI	1946	Maltese	Żejtun, Malta
13.	Charmaine GAUCI	1976	Maltese	Żejtun, Malta
14.	Paul GAUCI	1985	Maltese	Gżira, Malta
15.	Saviour GAUCI	1948	Maltese	Żejtun, Malta
16.	Maria MATHEWS	1961	Australian	Highbury, United Kingdom
17.	Alfred MIFSUD	1938	Maltese	Żejtun, Malta
18.	Carmel MIFSUD	1949	Maltese	Luqa, Malta
19.	George MIFSUD	1955	Australian	Baulkham Hills, Australia
20.	Paoline MIFSUD	1961	Maltese	Peverell, United Kingdom
21.	Vivienne MIFSUD	1944	Maltese	Żebbug, Malta
22.	Marcia Martha	1946	Australian	Grange, Australia

No.	Firstname LASTNAME	Birth year	Nationality	Place of residence
	SCIBERRAS			
23.	Victoria STAINER	1954	Maltese	Melksham, United Kingdom
24.	Catherine VELLA	1941	Maltese	Żejtun, Malta
25.	Joseph VELLA	1963	Maltese	Solihull, United Kingdom
26.	Paul VELLA	1938	Maltese	Żejtun, Malta
27.	Renato VELLA	1981	Maltese	Żejtun, Malta
28.	Vincent VELLA	1941	Maltese	Gozo, Malta
29.	Melanie WHILE	1975	British	Cumbria, United Kingdom