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

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FIRST SECTION

Application no. 56888/16

Domenica SORASIO against Italy

and 3 other applications

(see list appended)

STATEMENT OF FACTS

1. A list of the applicants is set out in the appendix.

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 owners of different plots of land classified as agricultural land in Villanova Solaro.

4. In 2004 the Cuneo Prefect issued an order authorising the Interregional Agency for the Po River (Agenzia Interregionale per il fiume Po – "the AIPO") to occupy portions of the applicants' land in order to begin the construction of a protective river embankment.

5. On 29 June 2006 the AIPO took physical possession of the different plots of land and began the building work.

6. On 24 February 2006 the Higher Public Water Court (Tribunale superiore delle acque pubbliche) annulled the order by the Prefect on the ground that it had not been issued in accordance with the law. It also annulled all other administrative orders issued in connection with the occupation of the applicants' land and the authorisation to conduct public works.

7. On 3 December 2008 the decision was upheld by the Court of Cassation, sitting as a full court.

8. As no action from the authorities was forthcoming, notwithstanding the decisions in the applicants' favour, on 12 November 2006 the applicants lodged a fresh set of proceedings before the Higher Public Water Court seeking the enforcement of that court's judgment of 24 February 2006. They requested, in particular, the restitution of the property after it had been restored to its original condition or, should that not be possible, compensation.

9. On 1 July 2010 the Higher Public Water Court found in favour of the applicants and ordered the AIPO to comply with the terms of the court's judgment within ninety days. The court also appointed a special commissioner (commissario ad acta) entrusted with the task of intervening, in the event of a failure by the AIPO to comply with the decision, to ensure either the return of the land to the owners or the "regularisation" of the transfer of ownership to the administrative authorities under Article 43 of Presidential Decree no. 327 of 8 June 2001.

10. In its judgment no. 293 of 8 October 2010, the Constitutional Court declared Article 43 of Presidential Decree no. 327 unconstitutional on formal grounds, namely that the delegated legislator had exceeded the boundaries set by the delegating legislation.

11. On 5 August 2011 the Special Commissioner issued an order to "regularise" the acquisition of the property under Article 42 bis of Presidential Decree no. 327, which had been introduced to replace Article 43 following the Constitutional Court's judgment. The order formalised the transfer of the applicants' land to the AIPO In the text of the order the Commissioner considered, among other things, that the removal of the river embankment that had already been built could entail a danger for the inhabitants of the town of Villanova Solaro, particularly in the light of the fact that the area had been affected by flooding in the past. In the Commissioner's view, as the restitution of the land and the demolition of the public works was not a practicable option owing to the foregoing considerations, the most appropriate solution was the "regularisation" of the acquisition of the property by the relevant public authority. The total compensation due to the property owners in respect of the pecuniary and non-pecuniary damage they had suffered was set at 241,067.20 euros (EUR). Compensation for the period of unlawful occupation (from 29 June 2006 to 5 August 2011), to be calculated according to the criteria set out in the third paragraph of Article 42 bis, was to be added to that amount.

12. On 10 November 2011 the applicants challenged the order issued under Article 42 bis before the Higher Public Water Court arguing, inter alia, that it was incompatible with Article 117 of the Italian Constitution and Article 1 of Protocol No. 1. They argued that the legislation in question sought to "regularise" the administration's unlawful conduct, making it legally valid and thus allowing the public authority in question to profit from its own unlawful conduct. This corresponded, in their view, to a form of "indirect expropriation" which provided an alternative to expropriations carried out in the proper manner. They pointed out that the European Court of Human Rights had already found such practices to be incompatible with the Convention. In this connection, they requested that the court raise a question of constitutionality before the Constitutional Court.

They also submitted that the order issued under Article 42 bis had not been adequately reasoned in terms of the balancing of the public and private interests at stake, and that the compensation set in the order had been insufficient in that it did not cover the losses sustained by the applicants.

13. On 14 March 2012 the Higher Public Water Court rejected the applicants' application. It found that the question of constitutionality was manifestly ill-founded. It further concluded that the reasoning contained in the order, albeit "brief in certain passages", could be deemed sufficient in the light of the particularly clear public-interest reasons that emerged in the case under scrutiny, namely the protection of the safety of a number of individuals. The court also noted that the applicants had had the opportunity to participate in the evaluation of the interests at stake. As to the complaint concerning compensation, the court found that the calculation had been correct and that the applicants had failed to provide sufficient evidence in support of the additional sums they had claimed.

14. On 29 May 2012 the applicants lodged an appeal on points of law before the Court of Cassation against the decision of the Higher Public Water Court. They reiterated their arguments as to the unconstitutionality of Article 42 bis and its incompatibility with Article 1 of Protocol No. 1 and as to the allegedly inadequate reasoning of the order issued under Article 42 bis and the insufficiency of the compensation calculated by the Special Commissioner.

15. On 13 January 2014 the Court of Cassation raised a question of constitutionality as regards the compatibility of Article 42 bis with the Italian Constitution and referred it to the Constitutional Court.

16. In its judgment no. 71 of 30 April 2015, the Constitutional Court found that Article 42 bis was compatible with the Italian Constitution (see paragraph 22 below).

17. On 25 March 2016 the Court of Cassation dismissed the applicants' appeal. As to the issue of constitutionality, the court took note of the Constitutional Court's judgment of 30 April 2015 and declared the matter resolved. As regards the complaints concerning the reasoning of the order issued under Article 42 bis, the court was not able to conclude, as submitted by the applicants, that the Commissioner had failed to provide reasoning on the existence of a danger to the public. As regards compensation, the court agreed with the lower court's finding that the applicants' complaint had not been adequately substantiated.

B. Relevant domestic law and practice

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

18. 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).

2. Consolidated Law on Expropriations (Presidential Decree no. 327 of 8 June 2001)

19. On 30 June 2003 Presidential Decree no. 327 of 8 June 2001, as amended by Legislative Decree no. 302 of 27 December 2002, also known as the Consolidated Law on Expropriations, came into force.

20. Article 42 bis was inserted in the Consolidated Law on Expropriations by Article 34 of Legislative Decree no. 98 of 6 July 2011 (urgent measures for financial stabilisation), and converted into law, with amendments, by section 1(1) of Law no. 111 of 15 July 2011, after the Constitutional Court declared Article 43 of the same Consolidated Law unconstitutional (judgment no. 293 of 2010). The relevant parts of Article 42 bis provide as follows:

Wrongful use of property [occupazione senza titolo] for public-interest purposes

"1. An authority that uses property for public-interest purposes and modifies it in the absence of a valid and effective expropriation order or public-interest declaration may, on the basis of a balancing of the competing interests at stake, issue an order whereby the property is acquired, non-retroactively, as part of public assets ... and the owner is paid compensation in respect of the pecuniary and non-pecuniary damage suffered; the latter shall be calculated on a flat-rate basis equal to ten per cent of the market value of the property.

2. The acquisition order may be issued even in the event that the order establishing restrictions with a view to expropriation [vincolo preordinato all'esproprio], the public-interest declaration or the expropriation order have been annulled. The acquisition order may be issued even if judicial proceedings lodged with a view to seeking the annulment of the administrative acts mentioned in the first sentence of the present paragraph are ongoing, subject to the withdrawal of the impugned administrative acts by the authority that issued them. In such cases, any amount already paid to the property owner as compensation, plus the amount of statutory interest due, shall be deducted from the compensation due under the present Article.

3. Except in cases where the law provides otherwise, compensation for the damage referred to in paragraph 1 shall be determined in an amount corresponding to the market value of the property used for public-interest purposes and, if the occupation concerns a plot of land classified as building land, in accordance with the provisions of Article 37 §§ 3, 4, 5, 6 and 7. For the period of wrongful use [occupazione senza titolo], if there is no evidence of additional damage, compensation shall be calculated as equal to interest at the rate of five per cent per annum on the sum determined pursuant to this paragraph.

4. The acquisition order shall identify the circumstances that led to the wrongful use of the property and, if possible, the date from which it began, it shall provide specific reasoning with reference to the current and exceptional public-interest grounds that justify issuing it, to be comparatively assessed with the opposing private interests, and it shall demonstrate the absence of reasonable alternatives to its adoption; in the same order, the payment of the compensation referred to in paragraph 1 shall be ordered and payment shall be made within thirty days. The order shall be served on the landowner and shall entail the transfer of property rights subject to the payment of the sums due pursuant to paragraph 1, or the deposit of the same sums, [the order] shall be subject to

registration at the land registry on the initiative of the relevant public authority, and a copy of it shall be sent to the office set up pursuant to Article 14 § 2.

...

7. The authority that issues the acquisition order under the present Article shall inform the Court of Audit and submit a full copy [of the order] within thirty days [from the issuing of the order].

8. The provisions of this Article shall also apply to events prior to its entry into force, even if there has already been an acquisition order that has been subsequently withdrawn or annulled. However, in such cases, the assessment of the relevance and prevalence of the public interest must in any case be carried out again ..."

3. Constitutional Court case-law

21. In January, May, and June 2014 four questions of constitutionality were referred to the Constitutional Court, two raised by the Lazio Regional Administrative Court and two by the Court of Cassation, on the subject of Article 42 bis.

22. In its judgment no. 71 of 30 April 2015, the Constitutional Court declared the questions of constitutionality raised by the Lazio Regional Administrative Court inadmissible and the questions raised by the Court of Cassation unfounded. The relevant parts of the Constitutional Court's reasoning read as follows:

"6.9.3. ... It is, indeed, true that the provision also applies to facts that occurred before it came into force, for which facts there are cases pending, and also where an acquisition measure already existed and was later retracted or annulled. It is also true, however, that this provision responds to the same primary need that underlies the introduction of the new mechanism ...: the need to definitively eliminate the phenomenon of 'indirect expropriations', which brought about what the ECtHR labelled a 'systemic defect' (in its judgment in Scordino v. Italy [(no. 3) (just satisfaction), no. 43662/98], 6 March 2007), in violation of Article 1 of [Protocol No. 1].

Nor should it be omitted that with Article 42 bis of the [Consolidated Law] on Expropriations – as was already the case, moreover, with former Article 43 – the acquisition of ownership by the public authorities is no longer tied to judicial scrutiny, characterised, as such, by the margins of unpredictability highlighted critically by the ECtHR. Above all, as stated above ..., Article 42 bis contains significant innovations when compared with former Article 43, which render the mechanism compatible with the case-law of the ECtHR as far as so-called indirect expropriations are concerned, and, on the contrary, respond to the need to find a definitive and balanced solution to the phenomenon, by means of the adoption of a formal measure on the part of the public authorities.

The differences with the earlier acquisition mechanism lie in the non-retroactive character of the acquisition (which prevents the mechanism from being used where a final ruling has already ordered restitution of the property to the private party), the obligation to repeat the evaluation of the

relevance and importance of the public interest in carrying out the acquisition, and, finally, the strict duty to provide justification for the adoption of the measure.

Even in the light of the alleged violation of the first and second paragraphs of Article 111 and the first paragraph of Article 117 of the Constitution, this duty to provide justification, on the basis of the relevant provision, which requires 'the absence of reasonable alternatives to its adoption', must be interpreted, as stated above ..., to mean that the adoption of the measure is permitted – once other options have been excluded, including a voluntary transfer of the property through purchase and sale and under the requirement to perform an effective balancing act with conflicting private interests – only when partial or full restitution of the property, restored to its previous condition, to the private party whose right of ownership has been improperly affected is impossible.

Indeed, only if it is thus interpreted does the provision allow for:

– recognising the existence of 'imperative reasons of general interest' for situations that came about prior to its entry into force, legitimising the application of ius superveniens in pending cases. These reasons entail the inescapable necessity to eliminate a situation entailing a systemic defect, as stigmatised by the ECtHR;

– arranging for, in situations that follow its entry into force, the application of the provision as extrema ratio, preventing it from constituting a simple alternative to expropriation procedures carried out 'in good and due form' according, once again, to ECtHR case-law;

– concluding that the condition established by the ECtHR in the above-cited Scordino judgment of 6 March 2007, which required the Italian State to 'remove the legal obstacles which systematically and in principle prevent restitution of the land' has been satisfied;

– preventing the public authorities – in harmony, once again, with the recommendations of the ECtHR – from taking advantage of a de facto situation for which they themselves are responsible;

– eliminating the risk of arbitrariness or unpredictability of administrative decisions, which would be to the detriment of interested parties.

Finally, the provision found in paragraph 7 of Article 42 bis of the [Consolidated Law] on Expropriations must be duly appraised, on the basis of which '[t]he authority that issues the acquisition measure ... must provide communication, within thirty days, to the Court of Audit'. This referral to potential consequences for officials who, during the expropriation, diverge from the rules of due diligence found in the law, responds to an invitation made by the ECtHR (again in Scordino v. Italy, 6 March 2007) according to which 'the respondent State should discourage practices which are incompatible with the rules of expropriation in good and due form, by adopting dissuasive provisions and by holding liable those responsible for such practices'."

COMPLAINTS

The applicants complain that the manner in which they were dispossessed of their land resulted in a violation of their right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1.

QUESTIONS TO THE PARTIES

Have the applicants been deprived of their possessions in compliance with the requirements of Article 1 of Protocol No. 1?

In particular, can the dispossession of the applicants' property be considered as having been carried out in the public interest, and in accordance with the conditions provided for by law, within the meaning of Article 1 of Protocol No. 1?

In any case, can the applicants still be considered victims of a violation of their rights under Article 1 of Protocol No. 1, or have the domestic authorities acknowledged a breach of the Convention and provided the applicants with appropriate and sufficient redress?

In replying to the foregoing questions, the parties are invited to address the reasoning of the Italian Constitutional Court in its judgment no. 71 of 30 April 2015.

INFORMATION SOUGHT

The parties are invited to clarify whether the applicants have received payment of compensation and, in the affirmative, to provide evidence thereof.