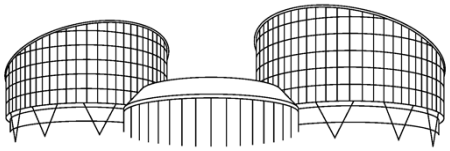

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BUTTIGIEG AND OTHERS v. MALTA

(Application no. 22456/15)

JUDGMENT

STRASBOURG

11 December 2018

This judgment is final but it may be subject to editorial revision.

In the case of Buttigieg and Others v. Malta,

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

Branko Lubarda, *President,*
Vincent A. De Gaetano,
Alena Poláčková, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 20 November 2018,

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

PROCEDURE

1. The case originated in an application (no. 22456/15) 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 three Maltese nationals, Mr Franco Buttigieg, Ms Maria Borg Costanzi and Ms Alessandra Kirkpatrick ("the applicants"), on 4 May 2015.

2. The applicants were represented by Dr M. Camilleri and Dr E. Debono lawyers practising in Valletta. The Maltese Government ("the Government") were represented by their Agent, Dr P. Grech Attorney General.

3. On 30 November 2016 the application was communicated to the Government. In addition to the parties' submissions, observations were received from the third party, the tenants living in the property at issue (couple S.) to whom the President had given leave to intervene as an interested party (Article 36 § 2 of the Convention and Rule 61 § 3).

4. The Government objected to the examination of the application by a Committee. After having considered the Government's objection, the Court rejects it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1963, 1960 and 1959 respectively. The first applicant lives in Balzan, the second applicant in Naxxar and the third applicant in Sliema.

A. Background to the case

6. The applicants are owners of apartment no. 3 situated at 94, Melita Street, Valletta. This apartment was inherited by the applicants from their father, who died in September 2006.

7. Initially, the apartment belonged to the applicants' late father and his brothers. On 4 August 1981, the late father of the applicants and his brothers entered into a contract granting a temporary emphyteusis for seventeen years to couple S. The seventeen year temporary emphyteusis was to commence on 12 August 1981 and the ground rent to be paid was set at 120 Maltese liri (MTL) (around 280 euros (EUR)) annually.

8. In 1988, one of the co-owners had taken legal action to collect arrears of ground rent for eleven years and to evict couple S. By a judgment of the Court of Appeal (civil jurisdiction) of 27 May 1992, couple S. was ordered to pay the arrears; however, the court did not order their eviction.

9. According to the applicants, in 1992, their late father had entered into negotiations with couple S., in order to reach a new lease agreement and increase the rent. Couple S. did not accept the terms of the new lease and did not pay outstanding arrears.

10. On 17 October 1994, a deed of partition was signed by the siblings and the apartment in question was assigned in its entirety to the late father of the applicants.

11. On 11 August 1998 the temporary emphyteusis came to an end. Nevertheless, couple S. continued to occupy the apartment by title of lease since the law (Article 12(2)(b)(i) of the Housing (Decontrol) Ordinance as amended by Act XXII of 1979 – see Relevant domestic law below) provided for the conversion of a temporary emphyteusis into a lease, irrespective of the owners' consent. As a result, couple S. could in practice reside indefinitely in the applicants' premises.

12. The rent established at the time, calculated in accordance with the law, was MTL 170.70 (around EUR 397.62) annually and was to be revised every fifteen years (according to Articles 12 and 13 of the Housing (Decontrol) Ordinance). The next revision of the rent was scheduled for 2013 and the rent then would be EUR 568.06.

13. Neither the applicants, nor their late father ever accepted any rent paid by couple S. on the following grounds: the rent due as calculated according to the law was far less than the rental market value of the apartment; the law in question (Article 12 of the Housing (Decontrol) Ordinance) was in breach of their rights as stipulated in Article 1 of Protocol No. 1 to the Convention; the conditions imposed by Article 12 of the Housing (Decontrol) Ordinance were disproportionate and did not pursue a legitimate aim; the owners were being denied enjoyment of their own property; and structural changes had been made to the premises without the applicants' late father's permission (or of any of his brothers).

14. According to a report of an ex-parte architect drawn up on 25 January 2011, the market value of the apartment at the time was that of EUR 125,000.

Constitutional Redress Proceedings

(a) First-instance

15. On 18 October 2012, the applicants filed proceedings before the Civil Court (First Hall) in its constitutional jurisdiction. They alleged that their predecessors had no alternative but to enter into a contract of temporary emphyteusis in order to prevent the apartment from being requisitioned, and once that contract of temporary emphyteusis had been converted into an indefinite lease, by imposition of the law and against their will, the applicants had lost the property for an indefinite period and had no means of recovering it. The applicants argued that had the Housing (Decontrol) Ordinance not been amended by Act XXII of 1979, the temporary emphyteusis on their apartment would have simply come to an end and they would have recovered their property. However, due to the change in law (brought about by Act XXII of 1979), couple S. had remained therein rendering it impossible for the applicants to regain possession of their apartment. Furthermore the rent due to them, as established by the law, failed to strike a fair balance between the rights of the owners and the rights of couple S. They also argued that they needed the apartment for their own use. The applicants requested that the court provide them with the necessary compensation for the damage they had suffered.

16. On 29 January 2014, the Civil Court (First Hall), in its constitutional competence, found against the applicants, dismissed their claims and ordered them to pay the expenses of the proceedings.

17. Relying on *Zammit v. Malta* (no. 16766/90, Commission decision of 12 January 1991, *Decision and Reports* 68) the court held that state intervention in socio economic matters such as housing is often necessary in securing social justice and public benefit. In this area the margin of appreciation available to a legislature in implementing social and economic policies was necessarily a wide one, both with regard to the existence of a problem of public concern warranting a measure of control and as to the choice of the rules for the implementation of such a measure. Recognizing that a balance between the right of owners, the state, and the person occupying the apartment needed to be struck, and that according to the European Court of Human Rights such balance had not been struck in the case of *Amato Gauci v. Malta* (no. 47045/06, 15 September 2009 in connection with the laws pertinent to this case), the court noted that neither the Convention nor the Constitution established an absolute right of property.

18. The court held that Article 12 of the Housing (Decontrol) Ordinance did not deprive the applicants of their property, but it impacted the ability of the applicants to use the apartment. Furthermore, the rent payable to the applicants did not reflect the value of the property in question - the court-appointed expert had established that the rental value of the apartment in 2014 was EUR 3,000 annually, and that the rental value of the apartment in 1998 had been EUR 2,000 annually. However, in the court's view the applicants could not validly argue that Article 12 of the Housing (Decontrol) Ordinance, as amended by Act XXII of 1979, had infringed their rights since the temporary emphyteusis had been entered into in 1981, when the amendments to the Housing (Decontrol) Ordinance by Act XXII had already been introduced. At the time, the consequences of the law as amended by Act XXII were clear and foreseeable; nevertheless, the applicants still chose to enter into such an agreement, and did so freely.

(b) Appeal

19. On 31 January 2014, the applicants appealed the above decision.

20. On 6 February 2015, the Constitutional Court dismissed the applicants' appeal and upheld the decision of the first-instance court. The Constitutional Court ordered the applicants to pay for the costs of the appeal proceedings.

It found that the inflation rate was established by the Principal Government Statistician, as required by Article 13(2) of the Housing (Decontrol) Ordinance. Having no proof to the contrary, it had to be assumed that the inflation rate established was correct and objective. The calculation of the rent due for the lease (upon conversion of the temporary emphyteusis to a lease), did not only depend on the inflation rate but also on the ground rent that had been payable at the time of the temporary emphyteusis. Thus, the rent was low not as a consequence of the inflation rate, but as a result of the ground rent, established voluntarily by the applicants' predecessors, which was lower than it should have been at the time. The Constitutional Court considered that the ground rent payable at the time of the temporary emphyteusis for the property at issue should have been EUR 1,476.27 a year (based on the inflation index for 1981 as being 408.16, and in the light of the fact that the inflation index for 1998 was 580.61 - time when the court expert had estimated the rental value of the apartment for that year at EUR 2,100) and not MTL 120 (around EUR 280) as the parties had agreed. The Constitutional Court observed that when the temporary emphyteusis agreement was entered into, two architects had been present alongside the applicants' predecessors (then owners of the apartment). Therefore, the applicants could not argue that their predecessors had not known the value of the apartment.

21. The Constitutional Court therefore concluded that the owners of the apartment (which had now been inherited by the applicants) knew that:

i) they were agreeing on a ground rent that was relatively low in amount; ii) when the temporary emphyteusis ended it would be converted into a lease that could be inherited and renewed (because Article 12 of the Housing (Decontrol) Ordinance as amended by Act XXII was already in effect at the time the temporary emphyteusis agreement was entered into); and iii) that the value of the rent would be worked out on the basis of the ground rent that was being paid, in proportion to the rise in living standards. In consequence they were aware that the rent would remain relatively low, like the ground rent had been.

22. The Constitutional Court also found that the applicants' need for the apartment, namely to place their mother who was herself living in a rented apartment paid for by the applicants (at EUR 400 a month), was not a good reason to have the property back.

23. Lastly, the Constitutional Court did not deny that the applicants' predecessors were faced with a possibility that the apartment would be requisitioned, since the apartment was empty (and empty properties could be requisitioned). However, entering into a temporary emphyteusis agreement was not the only choice they had: the applicants' predecessors could have sold the apartment or rented it for commercial purposes. Furthermore, the Constitutional Court argued that the owners could have requested a higher ground rent. Nevertheless, they didn't and they had entered the contractual relationship voluntarily fully aware of the consequences that would ensue.

II. RELEVANT DOMESTIC LAW

24. The relevant domestic law pertinent to this case is set out in *Amato Gauci* (cited above) and *Cassar v. Malta* (no. 50570/13, § 29-30, 30 January 2018).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No.1 TO THE CONVENTION

25. The applicants complained that their property rights were being infringed as a result of the law which imposed upon them a unilateral lease relationship for an indeterminate time without reflecting a fair and adequate rent in violation of 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."

A. Admissibility

1. The parties' submissions

26. The Government submitted that the applicants cannot claim victim status since the emphyteusis contract had been willingly entered into by the applicant's father knowing the consequences which would have ensued. They submitted that the applicants had thus not been subjected to an interference as their father had had opted for this particular legal regime knowingly, despite other regimes existing at the time.

27. The applicants submitted that they had suffered an interference even though their father had willingly entered into the contract in 1981. Their father, who at the time was not a court expert (he only became so years later) had no choice but to enter into such a contract because at the time the property was not decontrolled, thus leaving it empty would have meant the property would be expropriated or requisitioned by the State. Moreover, despite being an architect he could not at that time foresee the exponential increase in property prices in the decades after 1981.

2. The Court's assessment

28. The Court has previously held that in a situation where the applicants' predecessor in title had, decades before, knowingly entered into a rent agreement with relevant restrictions (specifically the inability to increase rent or to terminate the lease), the applicants' predecessor in title could not, at the time, reasonably have had a clear idea of the extent of inflation in property prices in the decades to follow. Moreover, the Court observed that when such applicants had inherited the property in question they had been unable to do anything more than attempt to use the available remedies, which had been to no avail in their circumstances. The decisions of the domestic courts regarding their request had thus constituted interference in their respect. Furthermore, those applicants, who had inherited a property that had already been subject to a lease, had not had the possibility to set the rent themselves (or to freely terminate the agreement). It followed that they could not be said to have waived any rights in that respect. Accordingly, the Court found that the rent-control regulations and their application in those cases had constituted an interference with the

applicants' right (as landlords) to use their property (see, for example, *Zammit and Attard Cassar v. Malta*, no. 1046/12, §§ 50-51, 30 July 2015).

29. There is no reason to hold otherwise in the present case. It follows that there has been an interference with the applicants' right (as landlords) to use their property, and thus they are victims of the violation complained of. The Government's objection is therefore dismissed.

30. The Court notes that the application 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 applicants

31. The applicants submitted that by virtue of the law, couple S. obtained the right to continue occupying the premises by title of lease. Thus, the law imposed a unilateral relationship allowing the tenants to indefinitely reside in the applicants' property. In their view, the law was neither precise nor foreseeable and no procedural safeguards were in place to ensure the balance of interests between those of the tenants and the applicants as owners. Their attempt to evict the tenants had been unsuccessful and no other remedy existed for them to recover possession of their premises. Similarly the rent having been imposed by law, the Rent Regulation Board could not alter such rent or increase it beyond the limits prescribed by law.

32. Moreover, the rent was extremely low. In this connection the applicants specified that this became the case after the expiry of the lease, that is, after 1998. They noted that the court-appointed expert considered that the property in 1998 had a rental value of EUR 2,100 annually, while in 2012 it had a rental value of EUR 3,500 annually. During such time the rent according to law to which the applicants were entitled to was EUR 397.62 annually. The maximum rent they could hope to attain after the revision applicable in 2013 was EUR 568.06 annually, which in no way reflected the real rental value of the property in a prominent street in the capital city of the country. The fact that the applicants were originally receiving only 25 % of the real market value and post 2012 only 10 % of the real market value meant that there had not been a fair balance.

(b) The Government

33. The Government submitted that the interference had been lawful, in accordance with the Housing (Decontrol) Ordinance which had been foreseeable as the amendments had come into force in 1979, two years before the applicant's father entered into the emphyteusis contract.

34. The measure had also pursued a public interest, namely the social protection of tenants to avoid homelessness.

35. The Government considered that it was also proportionate since when the contract was entered into in 1981, a rent of MTL 120 annually was a substantial sum of money, and had been willingly chosen by the applicant's father. Indeed the applicant's father being an architect (often appointed by the court to value property), he was well aware of the value of the property at the time when he fixed such rent. The emphyteusis was to expire seventeen years later. At that point, in 1998, it was converted into a lease by operation of law, and the rent payable was EUR 397.62 annually (according to the index of inflation, capped at 100 %) which could not be considered as an extraordinarily low rent. The Government considered that the applicants had not proved that anyone would be willing to pay the rental value they submitted, which they claimed was EUR 3,500 annually, which was excessive bearing in mind that in 2015 the national minimum wage was EUR 720.46 per month. Moreover, the Government noted that given the public interest involved, the current market value was not applicable.

36. Given that the applicant's father had voluntarily leased the property when the regime complained of had already been in place, in the Government's view it was not for the Court to enter into the question of any existing procedural safeguards. In any event they noted that following the Court judgment in *Amato Gauci v. Malta* (no. 47045/06, 15 September 2009), a rent reform took place in 2009 and as a result residential leases were no longer easy to inherit and restrictions were introduced to phase out controlled tenancies.

(c) The third party

37. The third party submitted that the applicants' ancestor was fully aware of the legal regime at the time they entered into the contract with him, as shown by the fact that he had not attempted to challenge that contract in accordance with civil law on grounds of defects of consent or fraud or other. They also considered that in examining the case the Court had to take account of their needs as pensioners to the security of their home under Article 8 of the Convention and that of their contracted and acquired rights under Article 1 of Protocol No. 1.

2. The Court's assessment

38. The Court refers to its general principles on the matter as set out in *Amato Gauci* (cited above, § 53-54 and 56-59).

39. The Court finds that the restriction arising from the 1979 amendments was imposed by Act XXIII of 1979 and was therefore "lawful" within the meaning of Article 1 of Protocol No. 1. and that the applicable legislation pursued a legitimate social-policy aim, specifically the social

protection of tenants (see *Amato Gauci*, cited above, § 55), in the present case couple S.

40. The Court observes that the applicants acknowledge that the disproportionality concerning the rent arose after 1998.

41. The Court notes that it has found in plurality of cases against Malta concerning the same subject matter that, despite the considerable discretion of the State in choosing the form and deciding on the extent of control over the use of property in such cases, having regard to the low rental value which could have or was received by the applicants, their state of uncertainty as to whether they would ever recover the property (despite more recent amendments), the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades, a disproportionate and excessive burden was imposed on the applicants who were made to bear most of the social and financial costs of supplying housing accommodation (see *Amato Gauci*, cited above, § 63; *Anthony Aquilina v. Malta*, no. 3851/12, § 67, 11 December 2014; and *Cassar v. Malta*, no. 50570/13, § 61, 30 January 2018). In those cases the Court found that the Maltese State had failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property and that there had thus been a violation of Article 1 of Protocol No.1 to the Convention.

42. Having regard to the facts of the case and the parties' observations, the same considerations apply in the present case. There has accordingly been a violation of Article 1 of Protocol No.1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicants claimed 70,000 euros (EUR) in rent, in the light of the valuations by the court-appointed expert (EUR 2,100 annually in 1998, and EUR 3,500 annually in 2012) noting that during that period they had only been due EUR 8,200 in rent (until 2017). They further claimed EUR 2,000 each in non-pecuniary damage.

45. The Government considered that the applicants' claim was excessive and that according to the court-appointed expert's valuations, the rent payable for the period 1998-2012 would amount to EUR 32,900. However, given the legitimate aim at issue the Government considered that an award

of EUR 10,000 jointly would suffice as pecuniary damage, while EUR 1,500, jointly, would suffice as non-pecuniary damage.

46. The Court notes that the applicants are entitled to compensation in respect of the loss of control, use, and enjoyment of their property from 1998 to date. In assessing the pecuniary damage sustained, the Court has, as far as appropriate, considered the estimates provided by the court-appointed expert. It has further considered the legitimate purpose of the restriction imposed, reiterating 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, for example, *Amato Gauci*, cited above, § 77). It further considers that a one-off payment of 5% interest should be added to the relevant amount (see, for example, *Anthony Aquilina*, cited above, § 72). Bearing in mind that the sums deposited in court by the tenants over the years remain retrievable by the applicants, the Court considers it reasonable to award EUR 22,000.

47. The Court further considers that the applicants must have suffered non-pecuniary damage which the finding of a violation in this judgment does not suffice to remedy. Deciding in equity, it therefore awards them EUR 4,500, jointly, in respect of non-pecuniary damage.

B. Costs and expenses

48. The applicants also claimed EUR 7,595.18 for costs and expenses incurred before the constitutional jurisdictions, as per bill of costs submitted to the Court. They further claimed EUR 4,800 jointly for costs and expenses before this Court, corresponding to sixty hours of work charged at a rate of EUR 80 hourly, as well as EUR 600 in clerical costs.

49. The Government submitted that the applicants had not shown that EUR 4363.09 in judicial costs - representing the costs of the respondents and the tenants which the applicants were made to pay by the constitutional jurisdictions - were in fact paid. They also considered that costs and expenses for proceedings before the Court should not exceed EUR 1,500.

50. Regard being had to the documents in its possession and to its case-law, and bearing in mind that unpaid court costs ordered by the domestic court remain due, the Court considers it reasonable to award the sum of EUR 9,000 covering costs under all heads.

C. Default interest

51. 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*
   (a) that the respondent State is to pay the applicants, within three months the following amounts:
      (i) EUR 22,000 (twenty-two thousand euros), jointly, in respect of pecuniary damage;
      (ii) EUR 4,500 (four thousand five hundred euros), jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 9,000 (nine thousand euros), jointly, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 11 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Branko Lubarda
Deputy Registrar	President