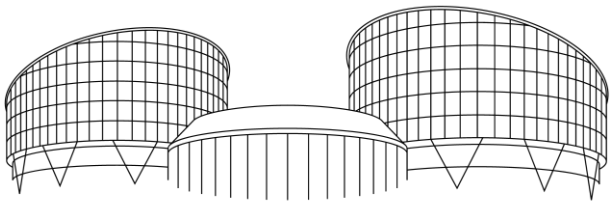

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GERA DE PETRI TESTAFERRATA BONICI GHAXAQ v. MALTA

(Application no. 26771/07)

JUDGMENT
(Just satisfaction)

STRASBOURG

3 September 2013

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 Gera de Petri Testaferrata Bonici Ghaxaq v. Malta,

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

Ineta Ziemele, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva, *judges*,
Josepf Zammit Mckeon, ad hoc *judge*,

and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 9 July 2013,

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

PROCEDURE

1. The case originated in an application (no. 26771/07) 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, Ms Agnes Gera de Petri Testaferrata Bonici Ghaxaq ("the applicant"), on 28 June 2007.

2. Mr V. De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). The President of the Chamber accordingly appointed Mr Joseph Zammit McKeon to sit as an *ad hoc* judge (Rule 29 § 1(b)).

3. In a judgment delivered on 5 April 2011 ("the principal judgment"), the Court held that there had been a violation of Article 6 and Article 1 of Protocol No. 1 in the light of the inadequacy of the compensation offered to the applicant and the fact that she was deprived of her property for nearly fifty years (*Gera de Petri Testaferrata Bonici Ghaxaq v. Malta*, no. 26771/07, §§ 46 and 59-60, 5 April 2011).

4. Under Article 41 of the Convention the applicant sought just satisfaction in the amounts of EUR 926,812.10 and EUR 5,620,797.13, in respect of pecuniary damage for (i) loss of rent from the date of the Constitutional Court judgment onwards as a consequence of the failure to enforce the judgment; and (ii) loss of rent for the period during which the owners were deprived of the possession of their property respectively. She further claimed compensation for the value of the property, which had never been returned to her. Lastly, she claimed EUR 100,000 for non-pecuniary damage and approximately EUR 9,400 in costs and expenses.

5. Since the question of the application of Article 41 of the Convention was not ready for decision as regards pecuniary damage, in part, the Court

reserved it and invited the Government and the applicant to submit, within three months from the date on which the judgment became final, their written observations on that issue, namely in respect of the amount of rent for the period during which the owners were deprived of the possession and use of their property and, in particular, to notify the Court of any agreement they might reach (ibid., § 76, and point 5 of the operative provisions). The Court rejected the remaining claims for pecuniary damage and awarded EUR 25,000 in non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

6. The applicant and the Government each filed observations.

THE LAW

7. 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 domestic compensation proceedings following the Court's principal judgment

8. From the information provided by the parties, by a first-instance judgment of 29 March 2012 the applicant was awarded EUR 1,283,588 in compensation for the loss of use of the property in the period from January 1967 to January 2007. The court arrived at this amount after having considered the case-law of the Court and all the circumstances of the case. It relied on the court appointed experts valuation but felt bound to alter it in part. In particular the court took into account that up until 1995 the property was subject to restrictive rent laws and that, unlike that established by the architects, no commercial rates were to be taken into account for the purposes of the calculation given that when the taking occurred the property was a residential one.

9. At the beginning of these proceedings, which started in 2007, the applicant made no specific claims, but attached an architect's valuation establishing a claim of EUR 2, 476, 288. During these proceedings various *ex parte* valuations had been submitted by the parties.

One report commissioned by the Ministry of Tourism (Cacopardo) dated 30 July 2007 valued the property at 1.5 million Maltese Liras (MTL), approximately EUR 3.5 million, with improvements, and MTL 1.2 million, approximately EUR 2.8 million, without improvements. The report

considered that only some of the improvements had a permanent effect on the value of the property, namely the construction of the roof and an extra floor.

Another report commissioned by the Manuel Theatre Management Committee, an organ of the Ministry of Culture and Education (Drago), dated 19 February 2007, valued the property free and unencumbered at MTL 1.2 million, approximately EUR 2.8 million. According to the report the value of the property in its 1958 condition brought forward to date (that is, not having been subject to major improvements) was MTL 635,000, approximately EUR 1,480,000. Government improvements between 1990 and 2006 were valued at MTL 293,500, approximately EUR 683,700. According to the same report the open market rental value (on that date) was estimated to be in the region of MTL 72,000, approximately EUR 167,715, and that of the property in its unconverted state was estimated to be in the region of MTL 38,000, approximately EUR 88,500. This report was revised on 3 July 2007.

Another report commissioned by the Attorney General (Cassar) dated 26 July 2007 estimated the open market rental value (on that date) to be MTL 48,640 (44,740 + 3900 (shops)), approximately EUR 113,300. It estimated the expenses incurred by the Government between 1994 and 2007 at MTL 300,000, approximately EUR 699,000.

The report by the applicant's expert (Aquilina) estimated the rental value for the year 2006, in the state the property was in at that date, at MTL 110,000, approximately EUR 256,230.

The report by the court-appointed expert (Abela) estimated the rental value for the year 2006, in the state the property was in at that date, at EUR 127,730, approximately MTL 54,835. This valuation was contested by the Government in the domestic proceedings.

The last-three-mentioned reports also contained rental estimates for each year from 1958 to 2006.

The parties appealed and by a decision of 18 March 2013 the Court of Appeal awarded the applicant EUR 641,794. It considered that damages in the civil sphere had to be based on a relationship of cause and effect and that such damage had to be proved. However, the applicant had failed to prove that she would have obtained the estimated rents had the property been in her possession. The rental values presented in the reports had been ideal values but not realistic ones in the light of various factors capable of affecting rental values such as parking problems in Valletta. Moreover, the court considered that the applicant had remained in possession of the property up until 1972, and that she would benefit from improvements made by the Government. Bearing in mind those factors, *in arbitrio boni viri*, it reduced the amount of compensation awarded by the first instance court by half.

2. The parties' submissions

10. The applicant claimed EUR 6,639,353 in pecuniary damage, in line with the domestic-court-appointed architect's valuation, representing the rent due per year (on the open market) from 25 February 1958 to 8 January 2007 (EUR 2,983,928) and interest at 8% per annum (EUR 3,655,425). She further claimed interest on those amounts from 2007 to the date of the judgment, to be calculated by the Court. She submitted that this award should be free from any tax and without prejudice to further amounts due on account of the failure of the authorities to return the property. The applicant requested the Court to make the award on the basis of its case-law in *Scordino v. Italy (no. 3)* ((just satisfaction), no. 43662/98, 6 March 2007) and *Guiso-Gallisay v. Italy* ((just satisfaction) [GC], no. 58858/00, 22 December 2009). The applicant further noted that during the relevant period she had never accepted any offer of rent, so no deductions were due to this end.

11. The applicant further submitted that the property had not been badly damaged during the war and that it had deteriorated while in the Government's possession. Moreover, the owners had been entitled to war damage compensation in order to renovate the property; however, those claims could not be pursued since the Government had been in possession of the property at the time, and therefore the owners could not undertake reconstruction works. Indeed, the Government were entitled to recover such compensation and their failure to do so could not be seen as the applicant's fault. She therefore considered that the compensation had to be calculated on the basis of the property being in good condition, restored with funds that would have otherwise been available to the owners under the War Damage Ordinance. In any event, she considered that, as stated in the Cacopardo architect's report, only some of the improvements could add permanently to the value of the property. Furthermore, the applicant noted that these improvements had been carried out against her will; in fact, in 2003 she had sought two injunctions to forbid the carrying out of the works planned by the Government. Lastly, the applicant considered some of the improvements useless and of no benefit to the property, such as MTL 40,000, approximately EUR 93,000, spent on kitchen equipment which was now outdated.

12. The Government, noting that the claims put forward by the applicant were much higher than those presented before the domestic courts and previously before this Court, considered that the claims were unrealistic and absurd. They noted that the court-appointed architect's valuation did not take into account a number of important factors including (i) the use of the premises at the time of the taking, namely a residence before the war, and the fact that subsequent to the war the property had been left in a derelict state. Eventually the basement had been leased out to the Boy Scouts and a residential tenant. However, the architect had based his valuation on the

premise that the building had been a commercial property; and (ii) the huge investment made by the Government, namely reconstruction of the building after the war, restoration of the premises, building of a new floor (all amounting to EUR 733,000) and continued maintenance. Moreover, the architects' reports suggested, without justification, drastic increases in rent in particular years. Indeed, according to the Government, both the court-appointed expert report and the report drawn up by the applicant's ex-parte architect presented unrealistic amounts of rent which the applicant could not have reasonably been expected to earn had the premises not been taken over by the Government. Moreover, the applicant's *ex parte* architect report also considered the premises to have always been commercial.

13. The Government noted that the taking had been lawful. They therefore considered that the Italian case-law cited by the applicant was not relevant in the instant case and that the applicant was not entitled to market value, not to mention that the market values submitted were not substantiated. Moreover, the applicant had remained the owner of the said property, which in any event at the time would have been subject to controlled tenancies and controlled rents. The Government considered that the amount of damages awarded should be in line with the case of *Fleri Soler and Camilleri v. Malta* ((just satisfaction), no. 35349/05, 17 July 2008) which concerned similar circumstances and where the property at issue, also situated in Valletta, was of a similar size to the one in the instant case, had it not been for the extra floor built by the Government. Thus, the Court's award should not exceed that sum, particularly because the premises in that case had not been dilapidated when taken over and the Government had not made any improvements, save for normal maintenance.

14. The Government noted that only one valuation, namely that commissioned by the Manuel Theatre Management Committee (Drago), had valued the property in its 1958 condition brought forward to date. However, the valuation had incorporated 120 square metres which had not been part of the property at issue in the instant case and therefore needed to be deducted. Moreover, the cost of maintenance which the owner would have had to pay should also be deducted from the award. Nevertheless, the Government disagreed with the values estimated in that report, in particular because of restrictions on development in Valletta and increased development costs together with the unsuitability of the property for commercial purposes and/or the expense of running it as a residential property.

15. By way of comparison the Government submitted that, in their experience of renting out property in Valletta, the best rent ever obtained for a shop in the heart of Valletta's prime shopping location was EUR 125,820 a year; and premises until recently used by a leading bank, which are much larger than the property at issue in the instant case and are completely adapted for commercial use were leased from private owners at EUR 60,580 per annum. The premises used for the best located coffee shop in Valletta

were rented out at EUR 27,960 a year, and another coffee shop in the heart of Valletta was rented at EUR 93,233 a year. Another large property rented to a leading retail outlet was rented at EUR 46,600 a year. All these premises were in the commercial heart of Valetta as opposed to the property at issue, which is situated outside Valletta's commercial hub.

16. Furthermore, the Government considered that the applicant's claim could only be entertained from 1967 onwards, as that was the year in which the Convention came into force in respect of Malta. However, according to Maltese law, claims for damages due in lieu of rent, as claimed by the applicant, became time-barred after two years. Thus, having instituted proceedings in 1996, the applicant could not claim the rent due prior to 1994.

17. The Government submitted that the value declared by the owners in 1941 was MTL 210, approximately EUR 490. According to the Rent Restriction (Dwelling Houses) Ordinance the rental value of a new house was established at 3% of the value of the site and 3.25% of the value of the construction costs. Therefore a rent of MTL 210 a year capitalised by 3% would establish the value of the property in 1944 at roughly MTL 7,000, approximately EUR 16,305. Without prejudice to the arguments submitted above, the Government considered that lost rent should be calculated as follows.

With regard to the years 1958 to 1999, working out the rental value at 5.5% of the value of the property (EUR 16,305) and deducting 20% from the resulting amount on account of maintenance costs which the applicant would have had to pay if the property had been rented out in accordance with law and practice in the taxation of rental income, this would amount to EUR 66,912.10.

With regard to the years 2000-2007, taking the value given by architect Drago for the property in its 1958 state brought forward to date, and taking the rental value to be 5.5% of the value of the property (EUR 1,480,000), deducting 15% reflecting the area included in the report which is not subject to the merits of this case and deducting 20% from the resulting amount on account of the maintenance costs which the applicant would have had to meet if the property had been rented out in accordance with the law and practice on the taxation of rental income, this would amount to EUR 128,563.41.

Thus, the amount of lost rent would be EUR 195,475.51

18. The Government further contested the interest at 8% per annum claimed by the applicant, which they considered was not in line with the Court's case-law. They considered that no interest was due in this case as the rent received would have been subject to income tax, which could have reached 60% in respect of the years prior to 1987 and 35% in respect of subsequent years. Moreover, when the applicant inherited the property in 1988 it had been valued at EUR 9,320 and therefore she had paid a pittance

by way of succession duty; had the property generated such rent it would have been subject to succession tax at a rate which could easily have reached 65%.

3. The Court's assessment

19. For the purposes of Article 41 the Court must determine the amount of rent for the period during which the owners were deprived of the possession and use of their property. In reply to the Government's argument regarding prescription of the claim, the Court notes that little detail has been submitted in this respect, an argument which has not been upheld by the domestic courts. The Court considers that this award reflects the pecuniary damage arising out of a continuing violation of Article 1 of Protocol No. 1. It reiterates, however, that the Court can only take into consideration the period following 30 April 1967, the date when the Convention entered into force in respect of Malta (see *Saliba and Others v. Malta*, no. 20287/10, § 98, 22 November 2011) up to the date of the Constitutional Court's judgment ordering the release of the property. The Court further notes that in first-instance the applicant was awarded EUR 1,283,588 in the light of the case-law of the Court and all the circumstances of the case. In particular, that up until 1995 the property was subject to restrictive rent laws and that no commercial rates were to be taken into account. On appeal this amount was reduced to EUR 641,794 on the basis that the applicant had failed to prove that she would have obtained the estimated rents, which were ideal values, had the property been in her possession, that she had remained in possession of the property up until 1972, and that she would benefit from improvements made by the Government.

20. In reply to the parties' submissions the Court notes that in the present case the taking did not amount to an expropriation, whether lawful or not. It follows that the cases against Italy cited by the applicant are not relevant to the present case. The Court considers that the case raises similar issues to the ones dealt with in the cases against Malta cited by the Government and it is on the basis of the guidelines set out in those cases that the Court will determine the just satisfaction to be awarded in the present case. The Court notes, however, that the Government's submission that the Court should not award just satisfaction exceeding that awarded in the *Fleri Soler* judgment, which concerned a property similar to that at issue in the present case, fails to take account of the fact that the award in that case, unlike in the present one, solely reflected the rent due in the period from 1995 to 2007. Similarly, no comparison can be made between the rent for the premises at issue and the rents submitted by the Government in relation to other properties in Valletta, the dimensions and specifications of which the Government have omitted to present in detail.

21. The Court observes that there is a considerable difference between the applicant's claims and the amount offered by the Government. It notes

that the Government's submissions are based on a generous rental percentage which, however, is calculated on the basis of an extremely low value attributed to the property, namely the value of the property in 1958 brought forward to date according to one architect. The Court observes that this value amounts to less than half of what the same architect and other architects estimated the premises to be worth on the open market in the past decade. Accordingly, the Court does not consider it appropriate to work on the basis of that estimate.

22. Moreover, the Court notes that the Government objected to the rental estimates provided by the court-appointed expert and the applicant's expert on the basis that they were unrealistic. In particular, according to the Government the latter expert had considered the building to be commercial and had ignored the fact that it had been left derelict. The Court notes that in 1958 the building had already been rented both for residential and commercial purposes (see paragraph 8 of the principal judgment). After 1972 the Manoel Theatre Management Committee rented the property to a number of commercial entities, including offices, coffee shops, reception halls, a restaurant and a publishing house (see paragraph 13 of the principal judgment). It follows that the premises clearly had commercial potential. Indeed the Constitutional Court stated that the commercial purposes of the taking had superseded the original purpose. Furthermore the Court considers that the derelict state the property was left in up to 1972 (and the fact that the Government had not taken up possession of the property up until then, as noted by the Court of Appeal) can only be attributed to the Government's inactivity, the State having had legal authority to take over the property since 1958. Nor can any weight be given to the Government's submission regarding restrictions on development in Valletta, since the Government have clearly been permitted to develop the property. There is no reason to believe that such permits and concessions would not have been granted also to private persons. As to the architects' evaluations being unreasonable, the Court notes that the Government were unable to provide any comparable material. The Court considers that this would also have been problematic for the applicant, given the specific characteristics of the premises at issue, in particular their size, use and location. In such circumstances it must *per force* give weight to reports prepared by experts in the field, particularly when these are independent of the parties, as is the case with a court-appointed expert. Nevertheless, the Court points out that for the period before the year 2000, the court-appointed expert's estimates are remarkably higher than the estimates provided for the same period by both parties' experts.

In this context and in the light of the court of appeal's main argument to decrease the amount of compensation because the applicant failed to prove that she would have obtained the estimated rents, the Court finds it relevant to point out that the compensation at issue must reflect the adequate rent

which the Government should have paid for possession and use of the property. In consequence, speculation on whether or not the property would have been rented and at what amounts, had it remained in her possession, was of little relevance, given that the property had in effect been taken by the Government which in turn rented it to third parties.

23. Lastly, the Court considers that the Government's argument that in any event the property would have been subject to controlled rent according to Maltese law cannot favour the Government's case. Indeed, the Court has on various occasions held that various legislation regarding controlled rents in Malta was in breach of Article 1 of Protocol No. 1 (see *Ghigo v. Malta*, no. 31122/05, §§ 69-70, 26 September 2006; *Edwards v. Malta*, no. 17647/04, §§ 78-79, 24 October 2006; *Fleri Soler and Camilleri v. Malta*, no. 35349/05, §§ 79-80, ECHR 2006-X; and *Amato Gauci v. Malta*, no. 47045/06, § 62, 15 September 2009).

24. Bearing in mind the above considerations, in assessing the amount due to the applicant the Court has, as far as appropriate, considered the estimates provided by the different architects and had regard to the information available to it on rental values on the Maltese property market over the past years, in the light of the use actually made of the property.

25. 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 or she would have been in had the breach not occurred. It therefore considers that interest should be added to the award to reflect the fact that the applicant has been prevented from receiving an appropriate amount of compensation. However, the Court finds no reason to exempt the pecuniary award, which covers the income in rent the owners would have earned, from any applicable tax.

26. Bearing in mind the above, the fact that the Government incurred expenses amounting to EUR 735,115, as evidenced by receipts, to restore the property, that the applicant did not incur any maintenance costs throughout the period in question, and deducting the sum already awarded by the Court of Appeal, which remains payable, the Court considers that the applicant should receive a further EUR 160,000 in respect of pecuniary damage.

B. Default interest

27. 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

1. *Holds* by six votes to one
   (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, EUR 160,000 (one hundred and sixty thousand euros) in respect of pecuniary damage;
   (b) 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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 September 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the statement of dissent of Judge Zammit Mckeon is annexed to this judgment.

I.Z.
F.E.P.

STATEMENT OF DISSENT BY JUDGE ZAMMIT MCKEON

I am unable to follow the majority in respect of the award in pecuniary damage because in my view the amount awarded by the Court of Appeal consists of adequate and reasonable compensation.