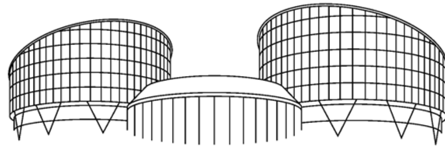

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 19049/16
Antonio MARZOCCHELLA and Maria Pia MARZOCCHELLA
against Italy

The European Court of Human Rights (First Section), sitting on 28 March 2023 as a Committee composed of:

Péter Paczolay*, President*,
Gilberto Felici,
Raffaele Sabato*, judges*,

and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 19049/16) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 22 March 2016 by two Italian nationals, Mr Antonio Marzocchella and Ms Maria Pia Marzocchella ("the applicants"), who were born in 1937 and 1940 respectively, live in Sant'Antimo and were represented by Mr G.L. Lemmo, a lawyer practising in Naples;

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns an expropriation order accompanied by a prohibition on building.

2. The applicants own two undeveloped plots of land, which together cover 4,000 sq. m, in the town centre of Sant'Antimo. In 1977 a new general development plan came into force. It set aside the land in question for public use, consequently prohibiting building on the site with a view to its expropriation. In accordance with the applicable legislation, and given that the municipality did not issue any expropriation order, the order establishing restrictions with a view to expropriation (*vincolo preordinato all'esproprio*) expired five years after the entry into force of the development plan. However, the applicable legislation also provided that, despite the expiry of

the order establishing restrictions, the municipality had to take a decision on the new designated use of the land in question, pending which the land was not unencumbered and was placed under the "white zone" regime (*zone bianche*) with accompanying prohibitions on building.

3. In 2003 a decision by the municipality discontinued the application of the "white zone" regime, but again earmarked the applicants' land for public use and expropriation, without any compensation being awarded.

4. In 2004 the applicants decided to lodge a complaint with the Regional Administrative Court ("the TAR").

5. By a judgment of 7 October 2004, the TAR found that the municipality's decision renewing the restrictions with a view to expropriation lacked sufficient reasoning and was thus unlawful.

6. Subsequent to an appeal by the municipality, the first-instance judgment was upheld on 16 May 2016 by the *Consiglio di Stato*. The applicants had in the meantime served notice on the authorities to determine the intended use of the land.

7. After serving a further notice on the municipality, the applicants lodged two applications with the TAR in 2007 and 2008 requesting that a special commissioner (*commissario "ad acta"*) be appointed to reach a decision in place of the municipality.

8. In an application of 26 May 2008 to the TAR, the applicants claimed that they had sustained damage ensuing from the unlawful behaviour of the authorities. The applicants made extensive reference to the Court's case-law finding violations of Article 1 of Protocol No. 1 in cases concerning the unlawful extension of building restrictions. As regards the ability of the TAR to award damages in the above context, they referred to developments in the domestic case-law of the Court of Cassation (judgment of the Joint Chambers of the Court of Cassation no. 500 of 1999), which was also applicable in the administrative courts after the reforms introduced by Legislative Decree no. 80 of 1998 and Law no. 205 of 2000.

9. On 15 June 2010 the special commissioner earmarked the land for a different use (development of public facilities), which allowed limited construction work.

10. By a judgment of 29 July 2010, the TAR found that the municipality had violated Article 1 Protocol No. 1 on account of the delays that had occurred. However, since the evidence submitted did not show that in the absence of the illegal restrictions the land could actually have been put to an alternative use, the request for damages was refused *in concreto.*

11. The applicants appealed against that decision, and by a judgment of 12 November 2015 the *Consiglio di Stato* considered that the Italian system had recognised the possibility of awarding full damages in the event of a wrongful delay by municipalities in earmarking land in "white zones" for new uses; it specified that the damages were to be understood as falling under the general provision of Article 2043 of the Civil Code. However, damages could

not be recognised automatically, since according to the above general rule of the Civil Code, the courts had to satisfy themselves that the owners had actually been deprived of opportunities to use the land because of the municipality's delay in acting. The *Consiglio di Stato* thus upheld the Regional Court's refusal to award damages, including for personal suffering and anxiety (*danno esistenziale*), on which the Regional Court had omitted to rule.

12. The applicants informed the Court of subsequent developments, in particular of the fact that, based on the land use determined by the special commissioner (development of public facilities), no construction on the land had hitherto been possible.

13. Relying on Article 1 of Protocol No. 1 to the Convention and on Articles 6 and 13 of the Convention, the applicants complained of the duration of the prohibition on building on their land since the date of the order establishing restrictions with a view to expropriation. They emphasised the delay on the part of the municipality (and of the special commissioner) in designating the land for a new use once the initial deadline had expired and complying with the final judgments of the national courts. They also complained of the lack of a remedy in the domestic system by which to obtain full redress for the ensuing damage, and that the new use for which the property had been designated by the special commissioner had not eliminated the violation, since no construction on the land had hitherto been possible.

THE COURT'S ASSESSMENT

14. The Court reiterates that it is master of the characterisation to be given in law to the facts of the case and that it is not bound by the characterisation given by the parties (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018). Having regard to the circumstances complained of by the applicants, it considers it more appropriate to examine the complaints under Article 1 of Protocol No. 1 alone.

15. According to the general principles established by the Court's case-law, under Article 1 of Protocol No. 1 the mere fact that a person owns a piece of land does not, *per se*, confer a right on the owner to build on that land. It is indeed permissible under this provision for the authorities to impose and maintain various building restrictions. The Court has previously examined a number of cases concerning restrictions imposed on landowners in the context of spatial planning, sometimes lasting for many years, and considered that the situation complained of by the applicants fell within the control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Scagliarini and Others v. Italy* (dec.), no. 56449/07, § 14, 3 March 2015).

16. The Court has declared inadmissible some applications concerning an absolute prohibition on building, accompanied by an inability to claim compensation, where the owners had neither manifested an intention to build nor shown that the prohibition had obliged them to alter the use to which the property was put (ibid.); or where the designated use had not been changed but the applicant had waited for a long time before applying for a building permit (see *Galtieri v. Italy* (dec.), no. 72864/01, 24 January 2006).

17. The Court notes that the relevant domestic legislation and practice has been set out in *Scordino v. Italy (no. 2)* (no. 36815/97, §§ 25-45, 15 July 2004) and more recently in *Odescalchi and Lante della Rovere v. Italy* (no. 38754/07, § 22-32, 7 July 2015). The Court considered that in those cases, although there had been no formal transfer of property, the measures imposed had ultimately been aimed at the expropriation of the land and the applicants had remained in total uncertainty as to the fate of their property for very long periods. That inaction could not be effectively challenged before the courts nor was any general compensatory remedy available because, at the time, redress was only available for the period following the renewal of the relevant restrictions (see *Scordino,* cited above, §§ 90-91 and 93-98, and *Odescalchi and Lante della Rovere,* cited above, §§ 54-56 and 59-63).

18. In the present case, by contrast, the Court observes that the applicants, who – as the *Consiglio di Stato* noted in its judgment – had not applied for any building permit or shown any interest in challenging the limitation on building before the renewal of the restrictions in 2003, obtained from the TAR the annulment of the unlawful renewal in 2004, one year after they had decided to act.

19. Therefore, although it is true in this case also that a long period had passed since the entry into force of the development plan, once the applicants decided to challenge the situation in court a remedy was actually available, following the changes in the domestic legislation and case-law.

20. The Court further notes that the applicants were able – unlike the applicants in *Scordino* and *Odescalchi and Lante della Rovere* (both cited above) – to petition both for compensation in respect of damage for the entire period in which the unlawfully extended restrictions had applied, and for the appointment of a special commissioner tasked with removing them.

21. As to the lawfulness of the interference arising from the building restrictions, the Court notes that the designation of the applicants' land for public use, before the unlawful renewal of the restrictions, and for private facilities accessible to the public, after the new designation by the special commissioner, had had a legal basis in the town planning instruments, whose purpose was to respond to the needs of the local communities and the general interest. As to the period during which the designation had been unlawful, the situation had been remedied by the domestic courts, which had annulled the relevant measure and had in principle been prepared to award damages.

22. The Court also notes that there has been a restriction of some form on the land in question since 1977. However, it is not apparent from the file that during the period prior to the adoption of the 1977 development plan the applicants had expressed an intention to build on the land or initiated administrative procedures aimed at obtaining a building permit. In addition, the applicants have not shown that there was a change in the use of the land resulting from the designation of the property for public use (and then for limited private use) (see *Scagliarini,* § 18, and *Galtieri*, both cited above).

23. Concerning the refusal of compensation, including in relation to the period in which the building restrictions had been unlawfully extended, the Court reiterates that the availability *in abstracto* of compensation in this regard was clearly stated by the domestic courts. The fact that *in concreto,* owing to the failure on the part of the applicants to provide evidence as to damage, the courts were unable to award damages in the specific case does not mean that an avenue to obtain equitable redress was not available.

24. The Court further reiterates that the classification of the land in question as an area intended for public use (and later for private use with some limitations) did not confer on the applicants a right to compensation. It considers, however, that when a measure to control the use of property is in issue, the absence of compensation is only one of the factors to be taken into account in establishing whether a fair balance has been struck and cannot, in itself, constitute a violation of Article 1 of Protocol No. 1 (see *Galtieri,* cited above). In the absence of a manifestly arbitrary or unreasonable choice concerning the lack of compensation, given the prior use and the limited size of the plot of land, the Court cannot substitute its own assessment for that of the national authorities as to the most appropriate means of achieving, at the domestic level, the results sought by their policy.

25. As regards the applicants' complaints that the new use for which the property was designated by the special commissioner had not eliminated the alleged violation, since any construction on the land had in practice to be agreed upon with the municipality, and that no remedy existed in respect of the new classification, the Court notes that the applicants themselves accept that some building activities are possible and have not shown that they have attempted to challenge the present situation before the domestic courts.

26. The Court can thus conclude that the impugned interference did not upset the fair balance which must prevail, as regards control of the use of property, between the public interest and the private interests at stake.

27. It follows from the foregoing that the application is inadmissible and must be rejected in accordance with Article 35 §§ 1, 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 20 April 2023.

Liv Tigerstedt Deputy Registrar	Péter Paczolay President