TESTO INTEGRALE

THIRD SECTION

CASE OF MAGHERINI v. ITALY

(Application no. 69143/01)

JUDGMENT

STRASBOURG

1 June 2006

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 Magherini v. Italy,

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

Mr B.M. ZUPANČIČ, *President*,
Mr J. HEDIGAN,
Mr C. BÎRSAN,
Mr V. ZAGREBELSKY,
Mrs A. GYULUMYAN,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. ZIEMELE, *judges,*

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 11 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 69143/01) 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") by two Italian nationals, Mrs Antonella Magherini and Mr Fiorenzo Magherini ("the applicants"), on 6 March 2001.

2. The applicants were represented by Mr A. Arena, a lawyer practising in Florence. The Italian Government ("the Government") were represented by their Agent, Mr I.M. Braguglia, and by their co-Agent, Mr F. Crisafulli.

3. The applicants complained under Article 1 of Protocol No. 1 that they had been unable to recover possession of their flat within a reasonable time. Invoking Article 6 § 1 of the Convention, they further complained about the length of the eviction proceedings.

4. On 18 March 2004 the Court (First Section) declared the application admissible.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1957 and 1955 respectively and live in Florence.

A. The eviction proceedings

7. E.M., the applicants' father, was the owner of a flat in Florence, which he had let to G.B.

8. In a registered letter of 10 October 1988, the applicants' father informed the tenant that he intended to terminate the lease on expiry of the term on 23 May 1989 and asked him to vacate the premises by that date.

9. The tenant told the owner that he would not leave the premises.

10. In the meanwhile, on 22 February 1989, the applicants' father died and the applicants inherited the flat.

11. In a writ served on the tenant on 12 December 1990, they reiterated their intention to terminate the lease and summoned the tenant to appear before the Florence Magistrate.

12. By a decision of 12 February 1991, which was made enforceable on the same day, the Florence Magistrate upheld the validity of the notice to quit and ordered that the premises be vacated by 31 January 1992.

13. On 30 January 1992, the applicants served notice on the tenant requiring him to vacate the premises.

14. On 11 March 1992, they informed the tenant that the order for possession would be enforced by a bailiff on 24 April 1992.

15. On 4 April 1992, the applicants made a statutory declaration that they urgently required the premises as accommodation for themselves.

16. Between 24 April 1992 and 28 September 2000, the bailiff made fifteen attempts to recover possession. Each attempt proved unsuccessful, as the applicants were never granted the assistance of the police in enforcing the order for possession.

17. On 12 October 2000, the applicants recovered possession of the flat.

B. The proceedings to seek compensation for damage under Article 1591 of the Civil Code

18. On 19 January 2001 the first applicant sued the tenant before the Florence District Court seeking damages for the loss she had sustained as a result of the tenant's refusal to quit the flat and because of the flat's bad condition on restitution. On 11 February 2003 the second applicant sold his share in the flat to the first applicant.

19. During the preparation of the case for trial expert evidence was filed and witnesses were heard.

20. In a judgment of 28 May 2003, the text of which was deposited with the registry on 4 June 2003, the Florence District Court allowed the applicant 2,241.47 euros (EUR) for the works to be carried out in the flat

and EUR 25,045.89 for the damage sustained on account of the flat's unavailability, plus interest and the reimbursement of the costs and expenses.

21. On 7 June 2003 the applicant discovered that the former tenant (G.B.) had sold all his real property to members of his family in 2002. On 11 September 2003, the applicant served notice on G.B. to pay the amount owed. On 14 November 2003 the bailiff made a seizure of G.B.'s goods, but only up to an amount of EUR 1,500 because there was nothing more to be seized.

22. On 21 November 2003 G.B. notified the applicant that he had lodged an appeal with the Florence Court of Appeal. On 25 March 2004 the Court of Appeal rejected G.B.'s claim and ordered him to pay the costs and expenses of the proceedings.

23. On 8 October 2004 the company in charge of the auction by order of the Court ("*Istituto Vendite Giudiziarie s.r.l.*") informed the judge that it could not have access to the goods seized because the door of G.B.'s flat was closed or he refused to give the goods and asked the judge to grant the assistance of the police on 16 November 2004. The judge granted the assistance on 11 October 2004.

24. On 30 June 2005 the applicant informed the Court that because of G.B.'s insolvency he had managed to recover only the sums G.B. owed him for the costs and expenses.

II. RELEVANT DOMESTIC LAW

25. The relevant domestic law and practice is described in the Court's judgments in the cases of *Mascolo v. Italy*, (no. 68792/01, §§ 14-44, 16.12.2004) and *Lo Tufo v. Italy* (no. 64663/01, §§ 16-48, ECHR 2005-...).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-exhaustion of the Pinto remedy

26. In their observations on the merits, the Government reiterated their objection on grounds of non-exhaustion of domestic remedies. They contested the conclusion of the Court in the *Mascolo* decision (*Mascolo v. Italy* (dec), no. 68792/01, 16 October 2003), which was also applied in the present case, and maintained that the Court of Cassation's judgment of 18 June 2002 proved that a remedy under the Pinto Act was also available in respect of eviction proceedings. The success of other applicants who had

used that remedy showed that it was an effective one. In support of their submission, they relied on the above-mentioned judgment of 18 June 2002.

27. The Court notes that it has already dismissed the Government's objection concerning the existence of a domestic remedy in its admissibility decision of 18 March 2004.

It also points out that in the *Mascolo* case the Court noted that even for the Government the fact that the Pinto remedy was available for eviction proceedings did not seem to be so obvious, as they had only raised that issue after the judgment of 18 June 2002. Moreover, as in the *Mascolo* case, in the present case the time-limit for introducing such a remedy expired on 18 April 2002.

28. Therefore, the Court confirms that in those circumstances the applicants were exempted from the obligation to exhaust remedies.

29. The Court considers that the Government based their objection on arguments that were not such as to call into question its decision on admissibility. Accordingly, the objection must be dismissed.

B. Non-exhaustion of the remedy under Article 1591 of the Civil Code

30. In their observations on the merits, the Government argue that domestic remedies had not been exhausted on the grounds that the applicants had failed to seek compensation for damage before the national courts under Article 1591 of the Civil Code.

31. In so far as the Government's arguments have to be regarded as a preliminary objection, the Court notes that the first applicant did use this remedy and that in any case the objection was not raised, as it could have been, before the admissibility decision. That being the case, the Government are estopped from raising it (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II).

32. This objection should accordingly be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 AND OF ARTICLE 6 § 1 OF THE CONVENTION

33. The applicants complained that they had been unable to recover possession of their flat within a reasonable time owing to the lack of police assistance. They alleged a violation of Article 1 of Protocol No. 1 to the Convention, which provides:

> "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."

34. The applicants also alleged a breach of Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

35. The Court has on several previous occasions decided cases raising similar issues as in the present case and found a violation of Article 1 of Protocol No. 1 and Article 6 § 1 of the Convention (see *Immobiliare Saffi*, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, §§ 46-75, ECHR 1999-V; *Lunari v. Italy*, no. 21463/93, §§ 34-46, 11 January 2001; *Palumbo v. Italy*, no. 15919/89, §§ 33-48, 30 November 2000).

36. The Court has examined the present case and finds that there are no facts or arguments from the Government, which would lead to any different conclusion in this case. The Court refers to its detailed reasons in the judgments cited above and notes that in this case the applicants have had to wait for eight years and five months before repossessing the flat.

Consequently, there has been a violation of Article 1 of Protocol No. 1 and of Article 6 § 1 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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. Pecuniary damage

38. In their submissions of 2004, the applicants sought reparation for the pecuniary damage they had sustained, which they put at 40,000 euros (EUR), i.e. the amounts awarded by the national court for the renovation works, for the conduct of the tenant, for the national costs and expenses and the interests.

They produced the fee notes for the proceedings under Article 1591 of the Civil Code. They consider that when the tenant is insolvent the damage due to the length of the non execution should be sustained by the Government.

39. The Government contested the claim. They stressed that the national courts have redressed the material damages sustained by the applicants. The

insolvency of the tenant is irrelevant and the Government cannot be responsible for it. Accordingly, their claim must be rejected.

40. The Court observes that the Government have not put forward any argument regarding the possibility that appears to have been developed in the case-law of the Court of Cassation of suing the State for damages following an unjustified lack of police assistance (see *Mascolo* cited above § 34-44, and *Lo Tufo* cited above, §§ 37-48).

41. First of all the Court observes that in their letter of 30 June 2005 the applicants admitted that the tenant had paid for the costs and expenses, so this part of their claim must be rejected.

As regards the costs for the renovation works in the flat after possession was recovered, the Court considers that they are not related to the alleged violations. Therefore the Court rejects this part of the applicants' claim.

42. As regard the other claim, the Court notes that the first applicant has brought an action in the civil courts under Article 1591 of the Civil Code claiming compensation from her former tenant for the loss incurred as a result of the property being returned late. The second applicant has sold his share of the flat to the first applicant, so nothing should be awarded under this head to the second applicant.

The issue in the present case is the damage arising from the unlawful conduct of the tenant, who, irrespective of the State's cooperation in enforcing the court-ordered eviction, had a duty to return the flat to its owner. The breach of the applicants' right to peaceful enjoyment of their possessions is above all the consequence of the tenant's unlawful conduct. The breach of Article 6 § 1 of the Convention committed by the State and found by the Court is a procedural one that occurred after such conduct on the part of the tenant. The Court accordingly notes that the Italian domestic courts have awarded compensation for the material consequences of the breach.

43. Furthermore the Court considers that the insolvency of the tenant cannot be regarded as attributable to the State. Therefore this part of the claim should be dismissed.

B. Non-pecuniary damage

44. The applicants claimed EUR 25,000 for the non-pecuniary damage.

45. The Government submitted the amount claimed was excessive.

46. The Court considers that the applicants must have sustained some non-pecuniary damage which the mere finding of a violation cannot adequately compensate. Therefore, the Court decides, on an equitable basis, to award to each applicant EUR 9,000 under this head.

C. Costs and expenses

47. The applicants sought reimbursement for their costs and expenses before the Court.

48. The Government admitted that the applicants should be granted a reasonable amount for their costs and expenses before the Court.

49. According to the Court's case-law, an award can be made in respect of costs and expenses only in so far as they have been actually and necessarily incurred by the applicant and are reasonable as to quantum (see *Bottazzi v. Italy* [GC], no. 34884/97, § 30, ECHR 1999-V). In the present case, on the basis of the information in its possession and the above-mentioned criteria, the Court considers that EUR 3,000 is a reasonable sum and awards each applicant EUR 1,500.

D. Default interest

50. The Court considers it appropriate that the default interest 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* that there has been a violation of Article 1 of Protocol No. 1;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 9,000 (nine thousand euros) for non-pecuniary damage;
      (ii) EUR 1,500 (one thousand five hundreds euros) for legal 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 1 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER Registrar	BOŠTJAN M. ZUPANČIČ President