Corte costituzionale

JUDGMENT NO. 181 OF 2011

Alfonso QUARANTA, President

Alessandro CRISCUOLO, Author of the Judgment

JUDGMENT NO. 181 YEAR 2011

In this case the Court considered legislation governing the payment of compensation following the expropriation of agricultural land and non-building land. The Court ruled the legislation incompatible insofar as it contrasted with the principle laid down in its prior case law applicable to building land, that compensation for exproproation must be set at a reasonable level in keeping with the value of the property seized. Compensation in this case on the other hand was determined in an abstract manner according to a procedure which hence negated any "reasonable link" with market value. In extending this interpretation to non-building land and agricultural land, the Court referred to the provisions of the ECHR as intepreted by the Strasbourg Court, noting that "the rules set forth in Article 1 of the First Protocol to the ECHR refer to possessions in a clearly general manner, without drawing any distinction in view of the *qualitas rei.* "

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 5-bis(3) and (4) of Decree-Law no. 333 of 11 July 1992 (Urgent measures for the recovery of the public finances), converted, with amendments, into Law no. 359 of 8 August 1992, and Article 16(4) and (5) (more correctly: (5) and (6)) of Law no. 865 of 22 October 1971 (Programmes and coordination of public residential housing; provisions on expropriation in the public interest; amendments and supplements to Laws no. 1150 of 17 August 1942, no. 167 of 18 April 1962, no. 847 of 29 September 1964 and authorisation of the costs of extraordinary initiatives in the sector of subsidised and social residential housing), as replaced by Article 14 of Law no. 10 of 28 January 1977 (Provisions on the eligibility of land for building), initiated by the Naples Court of Appeal by the referral orders of 7 April and 19 March 2010 and by the Lecce Court of Appeal by the referral order of 8 October 2010, respectively registered as nos. 305, 351 and 399 in the Register of Orders 2010 and published in the Official Journal of the Republic nos. 42 and 47, first special series 2010 and no. 1, first special series 2011.

Considering the entries of appearance by F. L., F. N. W., and the Municipality of Salerno, and the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Alessandro Criscuolo at the public hearing of 10 May 2011 and in chambers on 11 May 2011;

having heard Counsel Giorgio Stella Richter for F. L., Counsel Edilberto Ricciardi for the Municipality of Salerno and the State Counsel [*Avvocato dello Stato*] Giacomo Aiello for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. — By the two referral orders mentioned in the headnote, the Naples Court of Appeal (sitting as different benches from the first civil division) raised – with reference to Articles 3, 42(3) and 117(1) of the Constitution – questions concerning the constitutionality of Article 5-bis(4) of Decree-Law no. 333 of 11 July 1992 (Urgent measures for the recovery of the public finances), converted, with amendments, into Law no. 359 of 8 August 1992, and Article 16(4) and (5) (more correctly: (5) and (6)), Law no. 865 of 22 October 1971 (Programmes and coordination of public residential housing; provisions on expropriation in the public interest; amendments and supplements to Laws no. 1150 of 17 August 1942, no. 167 of 18 April 1962 and no. 847 of 29 September 1964; and authorisation of the costs of extraordinary initiatives in the sector of subsidised and social residential housing), as replaced by Article 14 of Law no. 10 of 28 January 1977 (Provisions on the eligibility of land for building).

By the further order also referred to in the headnote, the Lecce Court of Appeal raised a question concerning the constitutionality of the aforementioned Article 5-bis(3) and (4) of Decree-Law no. 333 of 1992, converted, with amendments, into Law no. 359 of 1992, and Article 40(1) and (2) of Presidential Decree no. 327 of 8 June 2001 (Consolidated text of legislative and regulatory provisions on expropriation in the public interest – Text A), with reference to Articles 3 and 117 of the Constitution.

In the opinion of the referring courts, in providing for a criterion to calculate expropriation compensation for agricultural and non-building land which is abstract and pre-determined (such as the average agricultural value of the crops currently growing or the most profitable crops in the agricultural region to which the area to be expropriated belongs) and entirely detached from any consideration as to the actual market value of the land, and which does not guarantee the entitled party the right to payment of full or at the very least "reasonable" compensation, the contested legislation breaches Article 1 of the First Protocol annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), implemented by Law no. 848 of 4 August 1955 (Ratification and implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed n Rome on 4 November 1950, and the Additional Protocol to the Convention, signed in Paris on 20 March 1952), as interpreted by the European Court of Human Rights, thereby violating Article 117(1) of the Constitution, with respect to which the Convention provision has the status of an interposed rule.

Furthermore, Article 42(3) of the Constitution is also claimed to have been violated since, whilst Parliament is not required to specify a single criterion for calculating expropriation compensation which is valid in all instances or to guarantee full redress for the loss suffered by the owner, compensation may never be symbolic or negligible, but must constitute "genuine redress". In order to achieve this result it is necessary to refer "to the value of the property in relation to its essential characteristics, as a function of its potential economic use", according to the principle asserted by this Court in judgment no. 5 of 1980 which was reasserted in judgment no. 348 of 2007 in relation to building land, but which – in the opinion of the referring courts – is also applicable to agricultural and non-building land.

Finally, Article 3 of the Constitution is also claimed to have been violated since the criterion applied to agricultural land and to non-building land allegedly results in an unjustified difference in treatment between the owners of such land and the owners of building land, for which compensation must be in line with the market (or "venal", i.e. reconstruction) value of the confiscated area.

2. — Since the three questions of constitutionality concern the same issue and the principles invoked are the same, they should be joined to be decided upon by a single judgment.

3. — The referral order from the Lecce Court of Appeal challenges (*inter alia*) Article 5-bis(3) of Decree Law no. 333 of 1992, converted, with amendments, into Law no. 359 of 1992.

The said provision provides that "In the assessment of the eligibility of land for building, it is necessary to take account of the legal and tangible possibilities for building at the time the expropriation procedure was initiated".

As is apparent from the wording of the legislation, this provision seeks to identify the criteria for assessing the eligibility of the areas for building. In the present case, it is clear – as is stated in the referral order – that the land concerned, which was voluntarily sold following a down-payment and subject to a balancing payment, was ruled to be ineligible for building by the Lecce Court of Appeal by definitive judgment no. 611 of 2010. Therefore, the referring court must not apply the aforementioned legislation, for which moreover no specific argument seeking to explain why it was invoked is provided in the referral order.

It follows that the question raised with reference to Article 5-bis(3) must be ruled inadmissible due to lack of relevance.

4. — For the purposes of identifying the *thema decidendum*, having regard to the contested provision and the principles relied on, it must be pointed out that the two referral orders from the Naples Court of Appeal challenge in their respective operative parts (*inter alia*) Article 16(4) and (5) of Law no. 865 of 1971, as replaced by Article 14 of Law no. 10 of 1977. Therefore, as is clear from the reasons contained in the referral order, the contested provisions are those laid down by Article 16(5) and (6), which were also reproduced in the referral orders, and hence there can be no doubt as to the subject matter of the questions, in accordance with the renowned principle whereby the operative part must be interpreted with reference to the reasons (judgment no. 236 of 2009).

In turn, the operative part of the referral order form the Lecce Court of Appeal raises the question of constitutionality with reference to Article 5-bis(4) and Article 40(1) and (2) of Presidential Decree no. 327 of 2001, without mentioning Law no. 865 of 1971, to Title II of which Article 5-bis refers. However, the reasons do refer to Articles 15 and 16 of Law no. 865 of 1971, as amended, "which defer to the provincial board the bask of identifying the average agricultural value", whilst the arguments

provided make it clear that the challenges relate specifically to the criterion of the average agricultural value, or "agrarian value", "which is *de facto* obtained automatically, and which as such cannot be influenced by the venal value". Also in this case therefore, according to the same principle referred to above, the subject matter of the question may easily be determined.

5. — With the exception of the reference contained in the order from the Lecce Court of Appeal, the referral orders do not raise as a matter for constitutional review Article 15 of Law no. 865 of 1971, as replaced by Article 14 of Law no. 10 of 1977, on the calculation of expropriation compensation which is not accepted within the term laid down in Article 12(1) of Law no. 865 of 1971. According to that provision, if requested by the president of the regional executive, the board with territorial jurisdiction pursuant to Article 16 shall determine compensation on the basis of the agricultural value with reference to the crops currently growing on the expropriated land, and also in relation to the operation of the farming business. Therefore, the literal wording of the provision does not refer to the average agricultural value. However, the case law of the Court of Cassation adopts an approach which may now be deemed to constitute "living law" (i.e. uniform and settled interpretation), which has repeatedly asserted that Articles 15 and 16 of Law no. 865 of 1971 (as replaced by Article 14 of Law no. 10 of 1977) are to be read in conjunction with one another, such that the agricultural value referred to in the second sentence of Article 15(1) is the average agricultural value contemplated by the combined effect of the two provisions (see *inter alia*: Court of Cassation, judgment no. 17679 of 2010; Court of Cassation, Joint Civil Divisions, judgment no. 22753 of 2009; Court of Cassation, judgment no. 17394 of 2009; and Court of Cassation, judgment no. 8243 of 2006).

Moreover, the referral orders also consider agricultural and non-building land together, and hence constitutional review must also be extended to the second sentence of Article 15(1), since the criterion for calculating expropriation compensation is the same for such land.

6. — On the merits, the questions are well-founded.

6.1. — First and foremost, it must be recalled that, pursuant to Article 57 of Presidential Decree no. 327 of 2001 "The provisions of this consolidated law shall not apply to projects which, on the date of entry into force of the decree, have been declared

to be in the public interest, non-deferrable and urgent. In such cases, all legislation in force prior to that date shall continue to apply" (set at 30 June 2003: see Article 59 of the Presidential Decree). It is clear in the cases before the lower courts from the dates of the expropriation orders and (as regards the order from the Lecce Court of Appeal) from the date on which the voluntary sale subject to a balancing payment was concluded that such declarations had been made long before, and therefore that the contested legislation applies, and not Article 40(1) and (2) of Presidential Decree no. 327 of 2001, which was invoked by the Lecce Court of Appeal but which that Court must not apply.

6.2. — The contested legislation in laid down in Article 5-bis(4) of Decree Law no. 333 of 1992, converted, with amendments, into Law no. 359 of 1992 which, for the purposes of determining expropriation compensation relating to agricultural areas and those not eligible to be classified as building land, refers to the provisions contained in Title II of Law no. 865 of 1971, as amended and supplemented. In particular, reference is made to Article 16(5) and (6) of that Law, as replaced by Article 14 of Law no. 10 of 1977.

The part of the provision which has been contested provides that expropriation compensation for areas outwith developed zones pursuant to Article 18 shall be in line with the average agricultural value calculated annually by dedicated provincial boards, which is based on the type of crops grown in the area to be expropriated (paragraph five), and it adds that, in areas falling within developed zones, compensation shall be in line with the average agricultural value of the most profitable crops out of those which occupy a surface area exceeding 5 percent of the cultivated area in the agrarian region in which the land to be expropriated is located (paragraph six).

In the opinion of the referring courts, this legislation breaches Article 1 of the First Protocol annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, ECHR), as interpreted by the European Court of Human Rights, and hence breaches Article 117(1) of the Constitution, in the version introduced by Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution).

6.3. — As a preliminary matter, it must be recalled that in judgments no. 348 and 349 of 2007, this Court clarified the relationship between Article 117(1) of the Constitution and the provisions of the ECHR, as interpreted by the European Court. The

methodological principles illustrated in the above judgments are fully endorsed in this judgment. In the light of these, it is therefore necessary to ascertain: a) whether the contested legislation breaches the provisions of the ECHR – as interpreted by the Strasbourg Court and adopted as sources supplementing the principle of constitutional law – in a manner not amenable for resolution through interpretation; and b) whether the provisions of the ECHR relied on in order to supplement that principle (known as "interposed rules") – as interpreted by the Court – are compatible with Italian law (judgment no. 348 of 2007).

In the judgment of the Grand Chamber of 29 March 2006, the European Court reasoned on the basis of the wording of Article 1 of Protocol no. 1, according to which: "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".

It then laid down the following principles (*inter alia*): a) the rules laid down in Article 1 of the First Protocol are related to one another, and hence the second and the third concerning special cases of interference with the right to respect for private property must be interpreted in the light of the principle contained in the first rule (paragraph 75); b) an interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (paragraph 93); c) in determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law on which the expropriation is based (paragraph 94); d) nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions (paragraph 94); e) as the Court has already held, the

taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances, although a right to full compensation is not guaranteed by the ECHR in all circumstances (paragraph 95); f) in cases involving "isolated expropriation", even if in the public interest, only full compensation can be regarded as reasonably related to the value of the property (paragraph 96); g) 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 (paragraph 97). The principles laid down by the Strasbourg Court in the above decision were also confirmed in the later case law of the Court referring to it (most recently, see the judgment of 19 January 2010 in *Zuccalà v. Italy*, the judgment of 8 December 2009 in *Vacca v. Italy*, and the judgment of the Grand Chamber of 1 April 2008 in *Gigli Costruzioni s.r.l. v. Italy*).

6.4. — The case law of this Court has been settled in asserting that, whilst the compensation guaranteed to the expropriated party under Article 42(3) of the Constitution need not amount to full redress for the loss suffered – since it is necessary to weigh up the right of the private individual against the general interest pursued by the expropriation – it cannot however be set at a negligible or merely symbolic level, but must constitute genuine redress (see *inter alia*: judgment no. 173 of 1991, judgment no. 1022 of 1988, judgment no. 355 of 1985, judgment no. 223 of 1983 and judgment no. 5 of 1980). This last judgment clarified that, in order to achieve this goal, "it is necessary when setting the compensation to refer to the value of the property in relation to its essential characteristics, as a function of its potential economic use, and in accordance with the law. Only in this way is it possible to ensure the reasonableness of the relief due to the expropriated individual and to avoid it being merely apparent or negligible compared to the value of the property".

Judgment no. 348 of 2007 reached a similar conclusion in reiterating that "an entirely abstract assessment that is detached from the essential characteristics of the property seized must be precluded" (a principle already asserted by judgment no. 355 of 1985).

It must be pointed out at this juncture that the above rulings only relate to building land. However, this does not mean that they cannot also apply to agricultural land and to land not eligible to be classified as building land.

Indeed, the rules set forth in Article 1 of the First Protocol to the ECHR refer to possessions in a clearly general manner, without drawing any distinction in view of the *qualitas rei*. Moreover, it was not by chance that the European Court gave prominence precisely to that general provision, ruling that the provisions of the second and third paragraphs are to be interpreted in the light of it (the first rule) (see *Scordino v. Italy*, paragraph 78). Moreover, there do not appear to be grounds for justifying different treatment in relation to the issue under examination here in cases involving expropriation of the types of land concerned (building land on the one hand and agricultural land or land not eligible to be classified as building land on the other hand). As was highlighted in judgment no. 348 of 2007, "both the case law of the Italian Constitutional Court and that of the European Court are in agreement in finding that the point of reference in determining compensation for expropriation must be the market (or venal) value of the property seized". This reference point cannot differ depending upon the nature of the property, because this would have the effect of negating the attachment with the situation on the ground which has been postulated as necessary for the purpose of setting fair compensation.

In reaching this conclusion the intention is not to reject the view that building land and agricultural land or non-building land are not homogeneous in nature, but rather to assert that, in cases involving expropriation, it is also necessary that compensation for agricultural land or for non-building land be "reasonably related to the value of the property".

The opposite view cannot be supported by reference to judgment no. 261 of 1997 of this Court, which ruled groundless a question concerning the constitutionality of the contested legislation with reference to Articles 3, 24 and 42(3) of the Constitution.

Indeed, that judgment was issued before the reform introduced by Constitutional Law no. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution), with the result that in that case the new text of Article 117(1) of the Constitution as currently in force could not be invoked as a principle of constitutional law.

7. — In the light of the said principle, having regard to Article 1 of the First Additional Protocol to the ECHR as interpreted by the European Court of Human Rights, along with Article 42(3) of the Constitution, it is now necessary to consider the criterion for calculating expropriation compensation contemplated under the contested legislation, which provides that the said compensation is to be set for agricultural land and for non-building land at the average agricultural value of the land, according to the provisions of Article 16 of Law no. 865 of 1971, as amended. This value is set before 31 January of each year for each individual agrarian region by dedicated provincial boards, according to the procedures laid down under Article 16 (and the provisions referred to above).

However, the schematic value calculated in this manner makes no reference to the area to be expropriated, disregarding any assessment as to the specific characteristics of the property. In this way the law ignores characteristics such as the position of the land, the inherent value of the land (which is not limited to the crops grown on it, but is also affected by aspects such as water supply, electricity and exposure), the greater or lesser skill in its management and any other factor liable to affect its venal value. Therefore, the criterion is inevitably abstract in nature and negates the "reasonable link" with market value "required by the case law of the Court of Strasbourg and moreover consistent with the 'genuine relief' required by the consolidated case law of this court" (judgment no. 348 of 2007, paragraph 5.7 of the Conclusions on points of law).

It may be the case that Parliament is not under any duty to set expropriation compensation at a level which perfectly matches the market value of the property seized and that the ECHR does not always guarantee full redress, as the Strasbourg Court itself has asserted, albeit adding that in cases involving "isolated expropriation", even if in the public interest, only full compensation can be regarded as reasonably related to the value of the property. However, it is precisely due to the need to assess the appropriateness of the expropriation compensation, set by applying any correction mechanisms to the market value, which requires that the market value be adopted by Parliament as the reference value (judgment no. 1165 of 1988) in order to guarantee a "fair balance" between the general interest and the need to safeguard the fundamental rights of individuals.

On the basis of the above considerations, the Court must rule the contested legislation unconstitutional due to violation of Article 117(1) of the Constitution, having regard to Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the Strasbourg Court, and Article 42(3) of the Constitution.

The further grounds raised with reference to Article 3 of the Constitution are moot.

8. — Pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), Article 40(2) and (3) of Presidential Decree no. 327 of 2001 laying down new legislation on expropriation must be ruled unconstitutional as a consequence of the above. The above provision, which opens the section governing the setting of compensation in cases involving the expropriation of non-building land, adopts the criterion of the average agricultural value corresponding to the type of crops prevalent in the area or being grown in the area to be expropriated when setting compensation, having regard to the paragraphs referred to, and therefore contains legislation which reproduces that ruled unconstitutional in this judgment.

The Court does not consider that it is necessary to extend this declaration to Article 40(1). That paragraph concerns the expropriation of non-building cultivated land (uncultivated land is governed by paragraph 2), and provides that definitive compensation shall be set according to the criterion of agricultural value, taking account of the crops actually grown on the land and the value of the buildings lawfully erected, including in relation to the operation of the farming business.

Since the provision does not stipulate that the average agricultural value be used, and refers to the crops actually grown on the land, it may be interpreted in a manner which is consistent with the Constitution, which is moreover reserved to the ordinary courts.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 5-bis(4) of Decree-Law no. 333 of 11 July 1992 (Urgent measures for the recovery of the public finances), converted, with amendments, into Law no. 359 of 8 August 1992, in conjunction with Articles 15(1), second sentence, and 16(5) and (6) of Law no. 865 of 22 October 1971 (Programmes and coordination of public residential housing; provisions on expropriation in the public interest; amendments and supplements to Laws no. 1150 of 17 August 1942, no. 167 of 18 April 1962 and no. 847 of 29 September 1964; and authorisation of the costs of extraordinary initiatives in the sector of subsidised and social residential housing), as replaced by Article 14 of Law no. 10 of 28 January 1977 (Provisions on the eligibility of land for building), are unconstitutional;

declares, pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) that Article 40(2) and (3) of Presidential Decree no. 327 of 8 June 2001 (Consolidated text of legislative and regulatory provisions on expropriation in the public interest) is unconstitutional as a consequence of the above;

rules that the question concerning the constitutionality of Article 5-bis(3) of Decree Law no. 333 of 1992, converted, with amendments, into Law no. 359 of 1992, raised by the Lecce Court of Appeal by the referral order mentioned in the headnote with reference to Articles 3 and 117 of the Constitution, is inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 June 2011.

(omitted)