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

SECOND SECTION

DECISION

Application no. 61781/08
Giuseppe TORNO and others
against Italy

The European Court of Human Rights (Second Section), sitting on 23 September 2014 as a Chamber composed of:

Işıl Karakaş, *President*,
Guido Raimondi,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges*,

and Abel Campos, Deputy Section Registrar,

Having regard to the above application lodged on 17 December 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Giuseppe Torno, Mr Ettore Giovanni Torno and Mr Alberto Torno, are Italian nationals. They were born in 1963, 1964 and 1966 respectively and live in Milan. They were represented before the Court by Mr Giorgio De Nova, Mr Daniele Maffeis and Mr Vittorio Pellegatta, lawyers practising in Milan.

A. The circumstances of the case

2. On 10 February 1981 the Ministry of Cultural Heritage and Environment brought an action before the Milan District Court against the applicants' father and his siblings, claiming that several archaeological relics – dating from Roman, Greek and Etruscan times and held in the

defendants' family house – fell within the definition of State-owned public property (*patrimonio indisponibile dello Stato*).

3. By a judgment delivered on 10 March 1986 the Milan District Court dismissed the action. The court considered that, as the principle of public ownership of items of archaeological heritage had been established for the first time by Law no. 364 of 20 June 1909, the claimant should have proved that the defendants' possession was illegitimate, namely that the archaeological material in question came from excavations carried out after the above-mentioned law had entered into force.

4. The Ministry challenged the decision, contending that the application of the general principle "*possideo quia possideo*" in the realm of items of archaeological heritage (that is to say, the recognition that the defendants' factual possession sufficed to prove their property right) amounted to a *probatio diabolica* [impossible proof] for the State, whereas for the defendants – who must have been aware of the origin of their property – the burden of adducing the proof of the lawfulness of their possession, namely that the goods in question came from excavations carried out prior to the enactment of the abovementioned law, was perfectly feasible. In any event the Ministry objected that it had produced such proof since the expert technical evidence examined at the trial had proved the unlawfulness of the applicants' possession of two archaeological pieces and it was undisputed that the defendants' father had assembled his collection between the 1930s and 1960s, well after Law no. 364 of 20 June 1909 had entered into force.

5. On 10 November 1992 the Milan Court of Appeal dismissed the Ministry's appeal, except for the two above-mentioned pieces that had undisputedly been discovered after 1909 and were thus declared to constitute public property.

6. On 2 October 1995 the Court of Cassation quashed the decision and remitted the case to the Court of Appeal for retrial. The former found that the applicable legislation (Law no. 364 of 20 June 1909, Law no. 1089 of 1st June 1939, and Article 826 § 2 and Article 840 of the Civil Code) confirmed a principle that already existed in the judicial system, namely the assumption that, in general, items of archaeological heritage fell within the realm of public property. Hence – the defendants' private property being the exception rather than the rule – pursuant to Article 2697 of the Civil Code it was up to them and not to the claimant ministry to prove their lawful possession of the goods in question, in particular their discovery and acquisition prior to the enactment of Law no. 364 of 20 June 1909. Such principle was followed in subsequent judgments on the matter (see *Domestic Law and Practice* below, paragraph 20).

7. On 18 April 1999 the applicants' father passed away and the applicants declared their intention of continuing the proceedings as heirs.

8. On 20 December 2002 the Milan Court of Appeal declared that the relics were public property and ordered the defendants to hand the archaeological goods back to the claimant.

9. The applicants lodged an appeal on points of law against the aforementioned decision, which was dismissed by the Court of Cassation on 5 August 2008. The Court observed in particular that the interpretation of the rules governing the burden of proof in the applicants' case was neither disproportionate nor unreasonable, especially in the light of public interest in the maintenance of artistic, historical and archaeological material. Moreover, contrary to the applicants' assertion, the above-mentioned interpretation did not constitute de facto expropriation without compensation since it did not breach the right of access to a court or the right of defence in proceedings concerning the goods in question.

10. In response to a request from the Court, on 15 January 2014, the applicants stated that, notwithstanding a formal notice issued on 23 January 2009 followed by an inventory of the relics in question, the Court of Cassation judgment of 5 August 2008 had not yet been enforced.

B. Relevant domestic law and practice

1. Law no. 364 of 20 June 1909

11. This law regulates the status of items of historical, archaeological, paleontological or artistic interest, stating the general principle of their inalienability if they can be classified as public property.

12. It also sets out a number of restrictions on the free use of such items when they belong to private owners in order to ensure their preservation and avoid their exportation out of the country.

13. As a general principle, this law provides that items of archaeological heritage, whether discovered by mere chance or through excavation, do not belong to the owner of the land or to the finder but to the State.

2. Law no. 1089 of 1st June 1939

14. This law reinforces the above-mentioned principle of the public ownership of archaeological material, imposes a series of restrictions on its free use, circulation and exportation, and declares all items of archaeological heritage discovered on Italian territory to be public property.

15. The appropriation of such items, and the failure to report the finding thereof, amount to criminal offences.

16. Moreover, any alienation or legal act executed in violation of the binding provisions of the above-mentioned law must be deemed null and void.

3. Article 826 § 2 and Article 828 § 2 of the Civil Code

17. Under these provisions, any item of historical, archaeological, paleontological or artistic relevance found in the subsoil by anybody whatsoever and by any means whatsoever, constitutes "a non-disposable public asset" (*patrimonio indisponibile dello Stato*) and cannot be prevented from being designated as public property except in the cases prescribed by law.

4. Article 840 § 1 and Article 932 § 3 of the Civil Code

18. These provisions – which make reference to the special laws concerning items of archaeological and artistic value – provide for exceptions, with specific regard to items of archaeological heritage, to the general principle of the extension of private ownership to any items discovered in the subsoil, and to the general rule governing rewards in the event of discovery of a treasure.

5. Article 2697 of the Civil Code

19. Under this provision the burden of proof concerning the existence of a civil law right falls on the claimant, whereas the person disputing such existence must prove the facts on which his or her objection is based.

6. Court of Cassation's judgment no. 22501 of 1st December 2004

20. Pursuant to this judgment, since private ownership of archaeological goods is the exception rather than the general rule, the burden of proving their lawful ownership falls on the defendant and not on the claimant ministry. In particular, the former must prove that the goods in question were discovered before Law no. 364 of 1909 entered into force (the same principle is expressed in the Court of Cassation's judgment no. 2995 of 10 October 2006).

COMPLAINT

21. Invoking Article 1 of Protocol No. 1 to the Convention, the applicants disagreed with the Court of Cassation's interpretation of the domestic law governing the ownership of archaeological goods. In particular they claimed that the burden of proof concerning the public ownership of the latter should fall on the State, as the first- and second-instance courts had correctly asserted. The applicants argued that the Court of Cassation's interpretation of the law amounted to *de facto* expropriation of their property without compensation.

THE LAW

22. The applicants complained of a breach of Article 1 of Protocol No. 1 to the Convention on account of the Court of Cassation's interpretation of the domestic law governing the ownership of archaeological goods. That Article 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."

23. The Court notes that the impugned judgment has not been enforced yet. Even assuming that an interference with the applicants' right to the peaceful enjoyment of their possessions did occur in this case, the application is in any event inadmissible for the following reasons.

24. The Court reiterates at the outset that, as a matter of principle, under Article 1 of Protocol No. 1 to the Convention, the Court is unlikely to review the interpretation or the application of national law by national authorities unless it has been applied "manifestly erroneously or so as to reach arbitrary conclusions" (see, among other authorities, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I).

25. The Court also reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises the deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws" (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II). This means that it must have a basis in national law and that the law concerned must be accessible, precise and foreseeable in its application (see *Carbonara and Ventura v. Italy*, no. 24638/94, § 91 and 107, ECHR 2000-VI). The Court further notes that, according to its case-law, any interference with the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interests of the community and the requirement of protecting the individual's fundamental rights (see, among other authorities, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52).

26. The Court considers that the facts at issue should be examined in the light of the general rule set out in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (see *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I).

27. In the present case, the alleged interference with the applicants' right was the result of the Court of Cassation's interpretation of the rules governing the burden of proof. The court's interpretation had in itself a sound basis in law, namely Law no. 364 of 20 June 1909, Law no. 1089 of 1 June 1939 and Article 826 § 2 and Articles 840 and 2697 of the Civil Code.

28. The Court reiterates that States enjoy a wide margin of appreciation in putting in place measures regulating the use of property, as well in ascertaining whether their consequences are justified – taking into account the general interest – for the purpose of achieving the object of the law in question. The margin of appreciation is still wider when possessions of cultural and historical value are concerned (see *Ruspoli Morenes v. Spain*, no. 28979/07, §§ 39-40, 28 June 2011) or when, as in the instant case, the aim is to preserve the archaeological heritage of a country, this being an essential value, the protection and promotion of which are incumbent on the public authorities (see *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 54, 19 February 2009; *Beyeler v. Italy* [GC], cited above § 112).

29. In that regard, the Court considers that the Court of Cassation reasonably established a presumption of public ownership of archaeological material and to that end set a cut-off date corresponding to the entry into force of Law no. 364 of 20 June 1909. As a result of this decision, on the one hand those people who possessed archaeological material at the time the law entered into force were protected and, on the other hand, clear rules were set for the future.

30. In addition, the Court notes that the applicants had the possibility of refuting the presumption of the public ownership in question by proving that the material was in their possession before 1909 (see, *mutatis mutandis*, *Papachelas v. Greece* [GC], no. 31423/96, §§ 53-54, ECHR 1999-II and *Bergsson and Others v. Iceland* (dec.), no. 46461/06, 23 September 2008). In the Court's view, the reversal of the burden of proof in this matter appears reasonable given in particular the inherent public interests underlying the recognition of public ownership of archaeological relics, as well as consideration being given to the question of which party to the proceedings – the claimant or the defendant – was in a better factual position to prove the lawful origin of such material.

31. Finally, the Court considers that the principle of the presumption of public ownership of archaeological material is established by settled domestic case-law on the matter (see *Domestic Law and Practice* above, paragraph 20).

32. Therefore the Court concludes that the alleged interference in the applicants' peaceful enjoyment of possessions was proportionate. It follows that the application must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Abel Campos Deputy Registrar	Işıl Karakaş President