



Confiscation of land over unlawful site development: violations of Convention

In today's **Grand Chamber** judgment¹ in the case of **G.I.E.M. S.r.l. and Others v. Italy** (applications nos. 1828/06, 34163/07 and 19029/11) the European Court of Human Rights held:

- by fifteen votes to two, that there had been a **violation of Article 7 (no punishment without law)** of the European Convention on Human Rights in respect of all the applicant companies, and by ten votes to seven that there had been **no violation of Article 7** in respect of the applicant Mr Gironda;
- unanimously, that there had been a **violation of Article 1 of Protocol No. 1 (protection of property)** in respect of all the applicants;
- by fifteen votes to two, that it did not need to decide whether there had been a violation of Article 6 § 1 in respect of the company G.I.E.M. S.r.l. or of Article 13 in respect of the companies G.I.E.M. S.r.l. and Falgest S.r.l.;
- by sixteen votes to one, that there had been a **violation of Article 6 § 2 (right to be presumed innocent)** in respect of Mr Gironda;
- and, unanimously, that the question of the application of **Article 41 (just satisfaction)** was not ready for decision and should thus be reserved in its entirety.

The cases concern the confiscation of land as provided for by domestic legislation in the event of unlawful site development. The applicants alleged that this confiscation had an insufficient legal basis.

The Court observed that all the applicants had had their property confiscated even though none of them had received a formal conviction. In accordance with the [Varvara v. Italy](#) case-law, the Court reiterated that Article 7 precluded the imposition of a criminal sanction on an individual without personal criminal liability being established and declared beforehand.

Where the courts found that all the elements of the offence of unlawful site development were made out, while discontinuing the proceedings solely on account of statutory limitation, those findings could be regarded, in substance, as a conviction for the purposes of Article 7, which in such cases would not be breached. It followed that there had been no violation of Article 7 in respect of Mr Gironda.

The applicant companies had not been parties to any proceedings. Having regard to the principle that a person could not be punished for an act engaging the criminal liability of another, a confiscation measure that was applied, as in the present case, to individuals or legal entities which were not parties to the proceedings, was incompatible with Article 7.

The Court took the view that there had been a violation of Article 1 of Protocol No. 1 in respect of all the applicants on account of the disproportionate nature of the confiscation measures.

Lastly, Mr Gironda had been declared guilty, in substance, by the Court of Cassation, following proceedings in which the right to be presumed innocent had not been respected. There had thus been a violation of Article 6 § 2 in respect of Mr Gironda.

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Principal facts

The applicants are four companies, G.I.E.M. S.r.l., Hotel Promotion Bureau S.r.l., R.I.T.A. Sarda S.r.l. and Falgest S.r.l., together with Mr F. Gironda, an Italian national born in 1959 and living in Pellaro.

G.I.E.M. S.r.l.

The company G.I.E.M. S.r.l. owned land in Bari, on the coast at Punta Perotti, with a total area of 10,365 sq. m adjacent to land which at the time belonged to another company, Sud Fondi S.r.l. The land was classified as suitable for building in respect of two plots; the rest was intended for small businesses. In May 1992 Bari municipal council adopted the draft site development agreement presented by Sud Fondi. According to G.I.E.M. S.r.l., its land was automatically incorporated into this agreement.

In October 1992 the Bari municipal authority asked G.I.E.M. S.r.l. whether it wished to be party to a site development agreement so that it could build on its land. The company expressed such a wish but the authority did not follow it up. In February 1995 Sud Fondi started its building work.

In March 1997 the public prosecutor ordered a temporary measure restraining the disposal of property in respect of all the buildings concerned. He expressed the view that the locality known as Punta Perotti was a protected natural site and that the complex was therefore illegal.

In November 1997 the Court of Cassation declared the measure null and void and ordered the return of all the buildings to their owners, on the ground that it was not prohibited to build on the site according to the land-use plan. In February 1999 the Bari District Court acknowledged the illegality of the buildings erected at Punta Perotti as they had been built in breach of Law no. 431/1985, which prohibited the granting of planning permission in respect of sites of natural interest, including coastal areas. However, since in the present case the local authority had issued the building permits, and in view of the lack of coordination between Law no. 431/1985 and the regional legislation, which was incomplete, the court found that no negligence or criminal intent could be imputed to the defendants. In the same judgment the court ordered the confiscation of all the developed land at Punta Perotti, together with the buildings on it, and the incorporation of the property, without compensation, into the estate of the municipal authority of Bari.

The public prosecutor appealed against the judgment of the Bari District Court, calling for the defendants to be convicted. The Bari Court of Appeal overturned the decision of the lower court. It found that the granting of planning permission had been legal, in the absence of any ban on building at Punta Perotti, and there having been no appearance of illegality in the procedure for the adoption and approval of the site development agreements. The Court of Appeal thus acquitted the defendants and revoked the confiscation measure in respect of all the buildings and land. In January 2001 the Court of Cassation quashed the Court of Appeal's decision without remitting it. It acknowledged the material illegality of the site development plans and planning permission, acquitted the defendant and ordered the confiscation of all buildings and land².

On 3 May 2001 the applicant company applied to the Court of Appeal of Bari seeking the return of its land. The court upheld its claim. The public prosecutor appealed on points of law. In April 2009 the Court of Cassation quashed the decision of the Court of Appeal and remitted the case to the Bari District Court. The applicant company lodged an interlocutory application for review of the enforcement order, seeking the return of its land. The Bari preliminary investigations judge dismissed the application and G.I.E.M. S.r.l. appealed on points of law. The Court of Cassation noted that the confiscation of the applicant company's land had been compliant with its settled case-law that the impugned measure was a mandatory administrative sanction imposed by the criminal court on the basis of the incompatibility of the situation of the property in question with the legislation on

2. Those criminal proceedings were the subject of the case [Sud Fondi S.r.l. and Others v. Italy](#) (no. 75909/01), 20 January 2009.

unlawful site development. Property owners who claimed to have acted in good faith would be entitled to seek redress before the civil courts.

In October 2012 the Bari municipal authority, having regard to the Court's judgment in [Sud Fondi S.r.l. and Others](#), asked the Bari District Court to return the confiscated land to the applicant company. In March 2013 the preliminary investigations judge revoked the confiscation measure and the applicant company recovered its property in December 2013.

Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.

The company R.I.T.A. Sarda S.r.l. was the owner of land suitable for building with an area of about 33 hectares at Golfo Aranci. Wishing to build a hotel-type residential complex for tourists, the company submitted a site development plan to the competent authorities. In March 1991 the Sardinia Region issued its approval for building at a minimum distance of 150 metres from the sea. The municipality of Golfo Aranci approved the site development plan with final effect on 17 December 1991.

On 22 June 1992 Regional Law no. 11/1992 entered into force. It removed the possibility of derogating from the prohibition on building near the sea and fixed the minimum distance at 2 kilometres for dwellings, a category which extended to the hotel-type residential complexes for tourists in the present case.

At an unknown date, R.I.T.A. Sarda S.r.l. entered into a preliminary contract of sale with Hotel Promotion Bureau S.r.l. concerning part of the land covered by the development agreement and certain buildings erected in the meantime. In October 1997 R.I.T.A. Sarda S.r.l. sold to Hotel Promotion Bureau S.r.l. 36,859 sq. m of land and 16 units for residential-tourist use. It also assigned the construction rights.

In 1997 the public prosecutor of Olbia opened a criminal investigation in respect of the legal representatives of the applicant companies, who were suspected of a number of offences, including unlawful site development and fraud. In November 1997 a court order restraining disposal of property was imposed on the land and buildings. In a decision of January 2000 the Sassari District Court returned the land and buildings to their rightful owners. In March 2003 the Olbia District Court acquitted the defendants on the merits in respect of all the offences, with the exception of that of unlawful site development, the prosecution of which was declared statute-barred. Having regard to the entry into force of Regional Law no. 11/1992 and the new minimum distance from the sea introduced therein, the District Court took the view that the municipality of Golfo Aranci should never have issued the building permits, which were thus in breach of the law or, at least, ineffective.

In conclusion, the court ordered the confiscation of the property previously placed under a restraining order and the transfer of ownership to the municipality of Golfo Aranci. The Court of Appeal upheld the Olbia District Court's finding of dismissal in respect of the offence which was statute-barred and reiterated that the municipality of Golfo Aranci should not have issued the building permits, which were illegal and in any event ineffective. It confirmed the confiscation order. The defendants appealed on points of law but their appeal was dismissed by the Court of Cassation.

Falgest S.r.l. and Mr Gironda

The company Falgest S.r.l. and Mr Gironda were the co-owners of a plot of land at Testa di Cane and Fiumarella di Pellaro (Reggio di Calabria) with a total area of 11,870 sq. m. The land-use plan provided solely for the possibility of building hotel-type residential complexes for tourists on that land. In September 1997 the municipality of Reggio di Calabria issued a building permit. In 2002 the public prosecutor opened an investigation in respect of Mr Gironda and five others, who were suspected of committing a number of offences, in particular that of unlawful site development. In January 2007 the District Court acquitted all the defendants on the merits in respect of all the charges, except for the offence of unlawful site development, the prosecution of which it declared statute-barred. It ordered the confiscation of the land and buildings and the transfer of the property

to the municipality of Reggio di Calabria. In April 2009 the Court of Appeal revoked the confiscation of the property and ordered its return to the owners. The court found there was no evidence of any change in the purpose of the constructions and therefore no unlawful development.

The Court of Cassation quashed the judgment of the Court of Appeal without remitting it, finding that the change in purpose of the constructions was substantiated and that the offence of unlawful site development (the prosecution of which was statute-barred, entailing the dismissal of the case) was indeed made out. Consequently, the property in question again became subject to the confiscation order made at first instance and the acquittals were maintained. The complex confiscated from the applicants was said to be in a state of abandonment and neglect, as the municipal authority had failed to keep the open spaces maintained.

Complaints, procedure and composition of the Court

The applicants complained that there had been a violation of Article 6 § 1 (right of access to a court), Article 7 (no punishment without law), Article 13 (right to an effective remedy) and Article 1 of Protocol No. 1 (protection of property), on account of the confiscation of their property.

Mr Gironda further argued that his right to be presumed innocent had been breached, relying on Article 6 § 2.

The applications were lodged with the European Court of Human Rights on 21 December 2005, 2 August 2007 and 23 December 2011. On 9 December 2014 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A public hearing was held on 2 September 2015.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luis López Guerra (Spain), President,
Guido Raimondi (Italy),
Robert Spano (Iceland),
Işıl Karakaş (Turkey),
Kristina Pardalos (San Marino),
Paulo Pinto de Albuquerque (Portugal),
Erik Møse (Norway),
Helen Keller (Switzerland),
Paul Lemmens (Belgium),
Faris Vehabović (Bosnia and Herzegovina),
Egidijus Kūris (Lithuania),
Iulia Motoc (Romania),
Jon Fridrik Kjølbro (Denmark),
Branko Lubarda (Serbia),
Yonko Grozev (Bulgaria),
Khanlar Hajiyev (Azerbaijan),
András Sajó (Hungary)
and also Johan Callewaert, *Deputy Grand Chamber Registrar*.

Decision of the Court

The Court first pointed out that, in the interests of the proper administration of justice, it was appropriate to join the applications, the events giving rise to the three applications and the legislative context being the same. It noted that the applications in question concerned solely the issue of the compatibility with the Convention of non-conviction-based confiscation within the meaning of Article 30 § 1 of the Construction Code.

Article 7

The Court took the view that, in the present case, Article 7 required that the confiscations be foreseeable to the applicants and could only be imposed where an element of personal liability had been established.

It observed that all the applicants had had their property confiscated even though none of them had received a formal conviction. In accordance with the [Varvara v. Italy](#) case-law, the Court reiterated that Article 7 precluded the imposition of a criminal sanction on an individual without his personal criminal liability being established and declared beforehand. Otherwise there would also be a breach of the right to the presumption of innocence.

The applicants had complained in particular that in the absence of a formal conviction the confiscation was unlawful. The Government had taken the view that, apart from the case of G.I.E.M. S.r.l., the applicant companies and their representatives, including Mr Gironda, had clearly been found guilty of contravening planning regulations. The Court observed that, since the applicant companies had not been prosecuted themselves, and nor were they parties to the proceedings, there could not have been a prior declaration of their liability. Consequently, the question whether there had been a requisite declaration of criminal liability arose only in respect of Mr Gironda. The Court therefore had to ascertain whether, even though the offence of which Mr Gironda stood accused had become statute-barred, it could have regard to the elements of that offence in order to find that, in substance, there had been a declaration of liability capable of satisfying the prerequisite for the imposition of a sanction compatible with Article 7.

In the Court's view, it was necessary to take into account, first, the importance in a democratic society of upholding the rule of law and public trust in the justice system, and secondly, the object and purpose of the rules applied by the Italian courts. The relevant rules sought to prevent the impunity which would stem from a situation where, by the combined effect of complex offences and relatively short limitation periods, the perpetrators of such offences systematically avoided prosecution and the consequences of their misconduct. For that reason, where the courts found that all the elements of the offence of unlawful site development were made out, while discontinuing the proceedings solely on account of statutory limitation, such a finding could be regarded, in substance, as a conviction for the purposes of Article 7, which in such cases would not be breached. It followed that there had been no violation of Article 7 in respect of Mr Gironda.

The Court noted that Italian law ascribed to limited liability companies a legal personality that was distinct from that of the companies' directors or shareholders. However, under Italian law, as in force at the time, limited liability companies could not, as such, be parties to criminal proceedings, in spite of their distinct legal personality. They could not be legally represented in the context of the relevant criminal proceedings in the present case, even though the conduct of their respective legal representatives was directly attributed to them. The companies had thus remained third parties in relation to those proceedings.

Under Italian law, confiscation of property was a sanction imposed by a criminal court as an automatic consequence of a finding that the offence of unlawful site development had been committed. No distinction was drawn for the situation where the owner of the property was a company, which could not legally have committed that offence according to Italian law.

The Court confirmed its reasoning from the *Varvara v. Italy* case. The companies G.I.E.M. S.r.l., Hotel Promotion Bureau S.r.l., R.I.T.A. Sarda S.r.l. and Falgest S.r.l. had not been parties to any proceedings. Only the legal representative of Hotel Promotion Bureau S.r.l. and Falgest S.r.l., together with two shareholders in R.I.T.A. Sarda S.r.l., had been indicted in a personal capacity. Thus the authorities had imposed a sanction on the applicant companies for the actions of third parties, namely their legal representatives or shareholders acting in a personal capacity, except in the case of G.I.E.M. S.r.l.

Having regard to the principle that a person could not be punished for an act engaging the criminal liability of another, a confiscation measure that was applied to individuals or legal entities which were not parties to the proceedings was incompatible with Article 7. There had thus been a violation of Article 7 in respect of the applicant companies as they had not been parties to the criminal proceedings; but there had been no violation of Article 7 in Mr Gironda's case, as the domestic courts' findings against him could be regarded as a declaration of liability meeting the requirements of that Article.

Article 1 of Protocol No. 1

An interference with the rights provided for by Article 1 of Protocol No. 1 could not have any legitimacy in the absence of adversarial proceedings complying with the principle of equality of arms, allowing discussion on matters of importance for the outcome of the case. The automatic application of confiscation in cases of unlawful site development, as provided for by Italian legislation, did not allow the courts to weigh up the legitimate aim of the measure against the rights of those affected by the sanction.

The Court took the view that there had been a violation of Article 1 of Protocol No. 1 in respect of all the applicants on account of the disproportionate nature of the confiscation measure.

Article 6 § 1 and Article 13

The Court found that it was not necessary to examine the complaint under Articles 6 and 13 of the Convention by G.I.E.M. S.r.l. because it was covered by the complaints already examined under Article 7 and Article 1 of Protocol No. 1.

Article 6 § 2

Mr Gironda had been found guilty, but without having been formally convicted, and this in itself entailed a violation of his right to be presumed innocent. The Court reiterated that guilt could not be legally established where proceedings had been closed by a court before the gathering of evidence or the conducting of hearings that would have allowed the court to determine the case on its merits.

Mr Gironda had been acquitted on appeal and the confiscation measure had been revoked after the development plan had been found to be compatible with the land-use plan and planning regulations. Subsequently that decision had been quashed, without being remitted, by the Court of Cassation, which had found that the applicant's liability had been proved, but that the prosecution of the offence in question was statute-barred. Mr Gironda had thus been declared guilty, in substance, by the Court of Cassation – a court whose task it was to review the application of the law and not to re-examine the facts – following proceedings in which the right to be presumed innocent had not been respected. There had thus been a violation of Article 6 § 2 in respect of Mr Gironda.

Just satisfaction (Article 41)

Having regard to the circumstances, the Court found it necessary to reserve the question of just satisfaction in its entirety and to fix the subsequent procedure, bearing in mind the possibility of an agreement being reached between the respondent State and the applicants.

Separate opinions

Judge Motoc expressed a concurring opinion; Judge Pinto de Albuquerque expressed a partly concurring, partly dissenting opinion; Judges Spano and Lemmens expressed a partly dissenting, partly concurring opinion; and Judges Sajó, Karakaş, Pinto de Albuquerque, Keller, Vehabović, Kūris and Grozev expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.