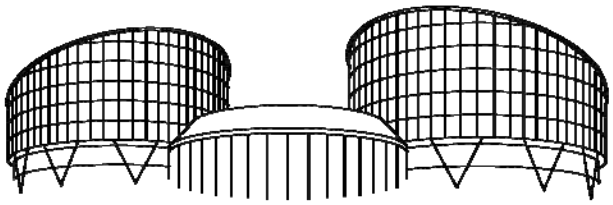

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 26771/07
by Agnes GERA DE PETRI TESTAFERRATA BONICI GHAXAQ
against Malta

The European Court of Human Rights (Fourth Section), sitting on 3 November 2009 as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges*

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 28 June 2007,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Agnes Gera de Petri Testaferrata Bonici Ghaxaq, is a Maltese national who was born in 1949 and lives in Balzan, Malta. She is represented before the Court by Dr I. Refalo, a lawyer practising in Valletta.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background of the case

The applicant is the owner of a property, known as Palazzo Bonici, in Valetta. The property had been damaged during the Second World War and the applicant's ancestors, from whom she inherited the property, had at the time applied to the Damage Commission to obtain the necessary funding to have the property restored.

In 1958 the then Colonial Government issued an order taking control of the property under title of possession and use, that is, a forced temporary taking of property subject to the payment of annual compensation, known as a "recognition rent", to the owners.

Despite this order, the property was left unused until 1972, during which time it deteriorated considerably.

In 1972 the Government commenced works to repair the property with a view to using it in conjunction with the Manoel Theatre situated nearby.

On 5 August 1976 the Government issued a "notice to treat" by which the owner was informed that the compensation offered by way of recognition rent amounted to 210 Maltese Liras (MTL – approximately 490 euros (EUR)). The applicant rejected the offer and in the same year proceedings were initiated before the Land Arbitration Board ("LAB"). These proceedings were suspended *sine die* on 10 October 1996 and were never concluded (see annex for a detailed chronological list of hearings in the proceedings). The applicant submitted that even if these proceedings had been concluded, the LAB would have been unable to establish a fair rent reflecting market values, since it was bound by the law to assess rent on the basis of 1914 rental values.

After repairing the property the Government allocated it and entrusted its management to the Manoel Theatre Management Committee ("MTMC"), the organ of the Ministry of Culture and Education which administers the Manoel Theatre. The latter leased out the property to a number of commercial entities, including offices, cafeterias, reception halls, a restaurant and a publishing house, which paid rent to the MTMC.

2. Proceedings before the Civil Court in its constitutional jurisdiction

In 1996 the applicant instituted constitutional redress proceedings complaining under Articles 6 and 14 of the Convention and Article 1 of Protocol No.1 to the Convention. She complained that the property, estimated at the time to be worth MTL 880,000 (approximately EUR 2,050,000), was not used for a public purpose, that she had not been offered fair compensation, that the proceedings pending before the LAB

were taking an unreasonably long time to be decided and that she had been discriminated against *vis-à-vis* other property owners who, unlike her, had their properties expropriated by outright purchase and not subject to the less favourable forced rents. She requested the court to grant adequate redress and to pay damages.

On 18 January 1999 the Civil Court (First Hall) found for the applicant. It declared the taking null and void, as the property was not being used for a public purpose, and therefore contrary to the Convention. It further found a violation of the applicant's right to a fair hearing within a reasonable time. It considered that the period to be taken into account started running on 25 February 1958, the date when the applicant's right to compensation arose, and had not yet ended 40 years later. It noted that it took the Government 18 years to issue a "notice to treat" without which compensation proceedings could not be initiated. This, together with the lack of initiative of the Commissioner of lands to pursue those proceedings, was enough to consider that the applicant had suffered a serious prejudice, incompatible with Article 6 of the Convention, over the forty years she had been left without compensation. It declared that it was not necessary to examine the Article 14 complaint. The issue of payment of damages in respect of the violation of Article 6 (which depended on the value of the property, the estimated value of which was not contested by the Government) was reserved.

3. Proceedings before the Constitutional Court

The Government appealed against the above-mentioned judgment.

The applicant submitted that during those proceedings, lasting 8 years, the judges were replaced several times and there had been numerous adjournments.

On 8 January 2007 the Constitutional Court upheld the first-instance judgment in part. It held that there had been a violation of Article 1 of Protocol No.1 to the Convention, in that a proper balance had not been reached between the private interest and the public need, particularly in view of the use that was being made of the building. In the light of the compensation being received by the applicant and the fact that she had been deprived of her property for nearly fifty years, the applicant had been made to bear a disproportionate burden. It declared the Governor's declaration of 1958 null and void and ordered the Government to release the property. The Constitutional Court, however, found that there had not been a violation of Article 6 in respect of the length of the proceedings. It was true that the proceedings had been lengthy, the "notice to treat" having been issued only 18 years after the taking of the property and the proceedings before the LAB having not yet been concluded. However, the court noted that the time to be considered was that after the Convention took effect in respect of Malta, namely on 30 April 1987 (when Malta introduced the right of individual

petition) and the applicant had failed to submit evidence of what caused the delay after 1987. As to the Article 14 complaint, the court held that it had been misconceived, since the first-instance court had not examined it. As to the adequacy of compensation, it confirmed that the release of the property was an adequate remedy for the upheld violation of Article 1 of Protocol No.1 to the Convention, and the reservation of the issue of compensation by the first court was related to the Article 6 complaint, which had not been upheld on appeal.

4. The circumstances after the Constitutional Court judgment

On an unspecified date following this judgment, the applicant obtained an eviction order, against the Government. However, prior to its enforcement, on 22 January 2007, the Government issued a fresh order, this time under title of public tenure in accordance with the Land Acquisition (Public Purposes) Ordinance ("the Ordinance"). Included in the taking were a number of shops and offices adjacent to Palazzo Bonici, of which the applicant owned an undivided share together with third parties. The Government offered an annual recognition rent of MTL 21,000 (approximately EUR 49,000), basing it on section 22 (11) (c) of the Ordinance (see "Relevant Domestic Law" below), without indicating what portion of this amount was due for the applicant's house of which she was the sole owner.

According to an architect's valuation, the present day rental value of Palazzo Bonici, excluding the other adjacent property, amounted to MTL 110,000 (approximately EUR 256,000) per year. The market value in the case of sale is MTL 2,200,000 (approximately EUR 5,125,000), but the Government estimate it to be only MTL 1,500,000 (approximately EUR 3,494,000).

5. Ordinary Proceedings

On an unspecified date, the applicant lodged ordinary proceedings (327/07-ATB 10) complaining that the new taking of the property under public tenure had been unlawful, as it was not permissible under the Land Acquisition Ordinance to take property by means of public tenure, if it was not already being used by the Government.

At the request of the Government the eviction order was suspended pending the outcome of those proceedings.

On the date of introduction of this application the proceedings were still pending. Although the Court has not been informed of this by the applicant, it appears from the Maltese Courts' website that the Civil Court, in its ordinary jurisdiction, gave judgment in the case on 11 November 2008. The latter held that the taking of the property by public tenure had been

ultra vires and was therefore null and void. An appeal was lodged on 19 November 2008 and therefore the case is still pending.

6. The second Constitutional Proceedings

On an unspecified date the applicant lodged further constitutional redress proceedings (23/07 - ATB 10 A) claiming that the taking of the property under public tenure breached Articles 6 and 14 of the Convention and Article 1 of Protocol No.1 to the Convention.

She claimed that the taking had not been in the public interest as the property was mainly being used for commercial purposes in relation to the Theatre, even though the Government had at its disposal other properties in the vicinity which could have served the same purpose. She also claimed that the inadequate compensation offered by the Government was arbitrary and not in accordance with the law. Compensation for the taking of a property under public tenure had to be calculated on the basis of section 27 (13) of the Ordinance and not section 22 (11) (c), which applied where property taken under "public tenure" was converted by absolute purchase (see the relevant domestic law part). Although it could be supposed that the Government's offer amounted to more than what was applicable by law, it did not reflect the real current market value, since calculations were restricted to rental values applicable in 1939. Even assuming that the offer reflected compensation for Palazzo Bonici alone and not the adjacent properties, it still represented a fifth of its real value on the market; therefore, it did not constitute adequate compensation and the applicant was being made to bear an excessive burden. She further claimed that the decision to take her property under public tenure had been arbitrary and discriminatory. At the time only four other properties had been taken under this title, as opposed to outright purchase. All these properties had already been in the possession of the Government under a different title and were all related to slum clearance and housing projects, unlike the applicant's. Finally, she complained that the taking was in breach of Article 6, in that she was not given a fair hearing within a reasonable time, as she had no real and effective possibility of having the value of her property determined by a court. Notwithstanding the Constitutional Court judgment in her favour, in these circumstances the applicant remained without an effective remedy.

At the time of lodging the application the proceedings were still pending. It appears from the Maltese Courts' website that these proceedings are to date still pending at first instance.

7. The compensation proceedings

Meanwhile, on 3 April 2007, the applicant filed an application (537/1996) before the Civil Court (First Hall) for determination of the compensation owed to her as a result of the judgment of 8 January 2007.

During these proceedings the Government argued that the case had now been closed and no compensation was due.

At the date of introduction of this application these proceedings were still pending.

B. Relevant domestic law

Section 22 (11) of the Land Acquisition (Public Purposes) Ordinance, Chapter 88 of the Laws of Malta, reads as follows:

> "The compensation due for the acquisition by absolute purchase of any land, and the sum to be deposited in accordance with this article shall be:
>
> ...
>
> (c) in the case of conversion from public tenure into absolute purchase a sum arrived at by the capitalisation at the rate of one point four *per centum* of the annual recognition rent due under the provisions of this Ordinance."

Section 27 of the Ordinance relates to the assessment of compensation by the Land Arbitration Board. Subsection 13, reads as follows:

> "The compensation in respect of the acquisition of any land on public tenure shall be equal to the acquisition rent assessable in respect thereof in accordance with the provisions contained in subarticles (2) to (12), inclusive, of this article, increased (*a*) by forty *per centum* (40%) in the case of an old urban tenement and (*b*) by twenty *per centum* (20%) in the case of agricultural land."

COMPLAINTS

1. a. The applicant complained under Article 6 of the Convention that the LAB proceedings, which had not been concluded, followed by the proceedings regarding her initial application before the constitutional jurisdictions, which lasted another eleven years, had not been decided within a reasonable time.

b. She further complained that she had been denied access to a court to assess the amount of compensation due to her for the second taking of the property by the Government.

2. Relying on Article 1 of Protocol No.1 to the Convention the applicant complained that the second taking of her property did not serve a public purpose and that the compensation offered, which was also meant to cover other property, was not fair or adequate.

3. Relying on Article 14 in conjunction with Article 1 of Protocol No.1 to the Convention, she complained that the decision to take her property for the first time had been discriminatory. She also complained that the subsequent decision to take her property a second time under public tenure had also been arbitrary and discriminatory.

4. a. Under Article 13 impliedly in conjunction with Article 1 of Protocol No.1 to the Convention, she complained that she did not have an effective remedy in respect of her property rights, since no compensation was granted in respect of the first taking. Even assuming that the pending proceedings had come to an end, 50 years to obtain a remedy could not be deemed effective.

b. She further complained that the taking of the property for the second time suspended the enforcement of the judgment in her favour.

c. Lastly, the applicant complained that the second taking of the property under public tenure deprived her of a remedy which could grant her adequate compensation, the latter having been established in an allegedly capricious manner unrelated to the parameters set by the law for determining rental values.

THE LAW

1. The applicant complained that the sets of proceedings related to the first taking of her property had not been heard within a reasonable time. She further considered that she had been denied access to a court to assess the amount of compensation due to her for the second taking by the State. She relied on Article 6 of the Convention, which, in so far as relevant, reads as follows:

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

a. As to the complaint that the proceedings related to the first taking of the applicant's property had not been heard within a reasonable time, the Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

b. In respect of the applicant's complaint that she had been denied access to a court, the Court notes that the complaint is related to the lack of ordinary remedies that would have allowed her to contest the amount of compensation awarded, particularly in that, even if such remedies were provided, they would still not provide her with adequate compensation. The Court notes that the substance of this complaint has been brought before the domestic constitutional jurisdictions in the applicant's second set of constitutional proceedings. As stated by the applicant, these proceedings are still pending.

It follows that this complaint is premature and must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

2. The applicant complained that the second taking of her property did not serve a public purpose and that the compensation offered, which was also meant to cover other property, was not fair or adequate, in violation of Article 1 of Protocol No.1 to the Convention, which reads as follows:

> "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."

The Court notes that on an unspecified date the applicant filed her second set of constitutional proceedings which consisted, *inter alia,* of the complaint put before this Court. As stated by the applicant, these proceedings are still pending.

It follows that this complaint is also premature and must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

3. The applicant complained that the decision to take her property for the first time and the decision to take it under public tenure, for the second time, had been discriminatory and arbitrary, contrary to Article 14 of the Convention which reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

As the facts at issue fall within the ambit of Article 1 of Protocol No. 1, Article 14 is applicable in the instant case.

The Court reiterates that as provided in the first Protocol of the Convention, a State has a right to enforce such laws as it deems necessary to control the use of property. Moreover, Contracting States should enjoy a wide margin of appreciation in order to implement their town and country planning policies (see *J. Lautier Company Limited v. Malta* (dec.), no. 37448/06, 2 December 2008). In the present case, the Court observes that although the applicant raised the complaint before them, the domestic courts did not express themselves on this matter. However, the Court notes that the applicant failed to substantiate her claim before this Court. She failed to provide evidence that she was in an analogous situation to that of others - that her property was comparable in size, prominence or venue, to adjacent properties or any other properties. Moreover, she failed to explain the ground for any alleged discrimination. The Court considers that in these circumstances there is no indication that the applicant was discriminated against on the first occasion that the property was taken.

It follows that this part of the complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

As to the second part of her complaint, namely, that the second taking of the property was discriminatory, the Court notes that this complaint also forms part of the claims she put forward in her second set of constitutional proceedings, which are still pending.

It follows that this part of the complaint is premature and must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

4. The applicant complained that she did not have an effective remedy in respect of her property rights, since no compensation was granted in respect of the first taking in breach of Article 1 of Protocol No.1 to the Convention. Even assuming that the pending proceedings had come to an end, 50 years to obtain a remedy could not be deemed as effective within the meaning of Article 13 of the Convention. She further complained that the taking of the property for the second time suspended the enforcement of the judgment in her favour. Lastly, she complained that the second taking of her property under public tenure deprived her of a remedy which could provide her with adequate compensation. She relied on Article 13 of the Convention and, impliedly, Article 1 of Protocol No.1 to the Convention. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

a. As to the complaints that the applicant did not have an effective remedy in respect of the violation of her property rights, the Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

b. As to the complaint that the taking of the property for the second time suspended the enforcement of the judgment in her favour, the Court considers that this complaint falls to be examined under Article 6 § 1. Execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 (see *Hornsby v. Greece*, judgment of 19 March 1997, *Reports* 1997-II, p. 510, § 40). While it may be accepted that Contracting States may, in exceptional circumstances and, by availing themselves of their margin of appreciation to control the use of property, intervene in proceedings for the enforcement of a judicial decision, the consequence of such intervention should not be that execution is prevented, invalidated or unduly delayed or, still less, that the substance of the decision is undermined (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999-V).

The Court notes in this connection that on 8 January 2007 the Constitutional Court held that there had been a violation of Article 1 of Protocol No.1 to the Convention, it declared the Governor's declaration of 1958 null and void and ordered the Government to release the property. The applicant obtained an eviction order. However, before the State ceded possession, on 22 January 2007, the Government issued a fresh order for the taking of the property and the applicant did not regain possession.

The Court notes that the matters of which complaint is made are indissociably linked to the applicant's complaints currently pending before the Constitutional Court in which she contests the second taking of her property**.** It follows that this complaint is premature and must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

c. As to the complaint that the taking of the property under public tenure deprived her of a remedy which could provide her with adequate compensation, the Court reiterates that, in such cases, Article 6 § 1 constitutes a *lex specialis* in relation to Article 13. It further notes that this complaint is, in substance, the same as that aired above under Article 6 which the Court has declared inadmissible. It follows that for the same reasons, this complaint is premature and must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the length of proceedings, the applicant's property rights in respect of the first taking and the lack of an effective remedy in respect of the first taking of the applicant's property;

Declares the remainder of the application inadmissible.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President

ANNEX

List of hearings before the Land Arbitration Board

Application number 27/1976

Commissioner of Lands vs. Lino Testaferrata Bonici et

1	12/04/1976	originating application	
2	11/03/1976	official letter	
3	14/09/1972	president's declaration	
4	11/03/1976	official letter	
5	12/08/1972	architect's valuation	
6	31/08/1976	official letter	
7	17/05/1976	first hearing	decided to wait for appeal decision
8	13/05/1976	reply	
9	11/10/1976	case postponed by court order	
10	08/11/1976	case postponed by court order	
11	10/01/1977	case postponed by court order	
12	15/04/1977	case postponed by court order	pending appeal decision
13	03/06/1977	case postponed by court order	
14	20/06/1977	case postponed by court order	
15	02/12/1977	case postponed by court order	pending appeal decision
16	07/04/1978	case postponed by court order	technical member of Board could not attend
17	30/06/1978	case postponed by court order	technical member of Board could not attend
18	01/12/1978	case postponed by court order	technical member of Board could not attend
19	05/02/1979	case postponed by court order	Board not constituted
20	05/03/1979	case postponed by court order	technical member of Board could not attend
21	12/03/1979	case postponed by court order	decided to wait for appeal decision
22	28/05/1979	case postponed by court order	decided to wait for appeal decision
23	08/10/1979	case postponed by court order	decided to wait for appeal decision
24	10/12/1979	case postponed by court order	decided to wait for appeal decision
25	14/04/1980	case postponed by court order	decided to wait for appeal decision
26	01/12/1980	case postponed by court order	
27	06/10/1980	case postponed by court order	decided to wait for appeal decision
28	02/03/1981	case postponed by court order	decided to wait for appeal decision
29	13/07/1981	case postponed by court order	
30	11/01/1982	case postponed by court order	technical member of Board could not attend
31	16/04/1982	case postponed by court order	
32	04/06/1982	case postponed by court order	
33	04/10/1982	case postponed by court order	Chairman could not attend/technical member of Board could not attend

33A	07/01/1983 renunciation by respondents' lawyer	
34	07/01/1983 lawyer renouncing to defendants' brief	
35	25/02/1983 case postponed by court order	Chairman could not attend due to other commitments
36	27/05/1983 case postponed by court order	decided to wait for appeal decision
37	04/11/1983 case postponed by court order	
38	23/03/1984 case postponed by court order	
39	22/06/1984 case postponed by court order	
40	26/10/1984 case postponed by court order	
41	25/01/1985 case postponed by court order	
42	26/04/1985 case postponed by court order	
43	11/10/1985 case postponed by court order	
44	10/01/1986 case postponed by court order	Chairman could not attend due to other commitments
45	06/06/1986 case postponed by court order	Court room not available
46	10/10/1986 case postponed by court order	technical member of Board could not attend
47	19/01/1987 case postponed by court order	technical member of Board could not attend
48	06/05/1987 case postponed by court order	
49	08/10/1987 case postponed by court order	technical member of Board could not attend
50	11/02/1988 case postponed by court order	technical member of Board could not attend
51	23/06/1988 case postponed by court order	postponed for defendant's evidence
52	10/11/1988 case postponed by court order	defendant's lawyer could not attend sitting; postponed for legitimation of acts
53	16/03/1989 case postponed by court order	
54	30/03/1989 case postponed by court order	
55	20/04/1989 case postponed by court order	technical member of Board could not attend
56	08/05/1989 case postponed by court order	decided to wait for appeal decision
57	02/10/1989 case postponed by court order	
58	09/10/1989 case postponed by court order	
59	27/11/1989 case postponed by court order	defendant's lawyer requested case to be postponed
60	27/11/1989 case postponed by court order	defendant's lawyer requested case to be postponed
61	19/02/1990 case postponed by court order	defendant's lawyer could not attend sitting
62	07/05/1990 case postponed by court order	Board not constituted
63	09/07/1990 case postponed by court order	Board not constituted
64	12/11/1990 case postponed by court order	presiding judge could not attend as he was attending a Criminal Court sitting
65	04/03/1990 case postponed by court order	statement by respondent that his Human Rights are being violated.
66	06/05/1991 case postponed by court order	presiding judge could not attend as he was attending a Criminal Court sitting
67	24/06/1991 case postponed by court order	presiding judge could not attend due to other commitments
68	25/11/1991 case postponed by court order	technical member of Board could not attend
69	17/02/1992 case postponed by court order	at request of respondent
70	18/05/1992 case postponed by court order	due to constitutional cases which were pending, defendant's lawyer requests more time.
71	12/10/1992 case postponed by court order	
72	07/12/1992 case postponed by court order	
73	08/02/1993 case postponed by court order	Board not constituted
74	12/04/1993 case postponed	Court building closed
75	26/04/1993 case postponed by court order	Chairman could not attend
76	38/06/1993 case postponed by court order	
77	02/11/1993 case postponed	
78	05/11/1993 case postponed by court order	case postponed at request of respondent
79	06/12/1993 case postponed by court order	
80	20/12/1993 case postponed by court order	case postponed for legitimation of acts
81	25/02/1994 case postponed by court order	attempt at amicable settlement
82		
83	10/06/1994 case postponed	postponed for legitimation of acts
84	13/10/1994 case postponed by court order	Board not constituted
85	09/02/1995 case postponed by court order	postponed for legitimation of acts
86	06/04/1995 case postponed by court order	postponed for legitimation of acts
87	30/06/1995 case postponed by court order	postponed for legitimation of acts
88	09/10/1995 case postponed by court order	postponed for legitimation of acts
89	05/02/1996 case postponed by court order	chairman of board made judge
90	11/04/1996 case postponed by court order	postponed for legitimation of acts
91	09/05/1996 case postponed by court order	for parties to bring forward evidence
92	27/02/1996 case postponed by court order	for parties to bring forward evidence
93	10/10/1996 case postponed sine die	to await decision of the Consitutional case