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**Author:** Leijten, A.E.M.

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## 8 | Housing

### 8.1 INTRODUCTION

In the previous part of this book a ‘core rights perspective’ has been outlined for the protection of socio-economic interests under the ECHR. This perspective evolved from insights on the notion of core rights protection in combination with what was said on the role and position of the Court (Chapter 2) and the structure of fundamental rights adjudication (Chapter 3). It presented concrete suggestions for how the Court could deal with complaints related to economic and social rights in a more principled manner. Yet in order to conclude that the notion of core rights would actually have added value, it is necessary to have a closer look at the case law as it stands today. In this part of the book an overview is given of the Court’s practice in relation to cases concerning housing, health and health care, and social security. The aim thereby is to see whether the ECtHR provides ‘effective’ as well as ‘indivisible’ protection in the respective fields, while not losing sight of its supranational role and providing the necessary guidance by means of transparent and consistent reasoning. Importantly, moreover, it will be seen whether the Court already makes use of the notion of core rights, or whether there would be room for doing so.

This first case law chapter concerns the Court’s protection in the field of housing. Housing issues come before the Court in many varieties, and concern for example evictions or the demolition or restitution of houses. Other cases deal with the need for adequate housing, while there are also examples concerning rent levels and conflicts between landlords and tenants. On the one hand, it is natural that the Convention is engaged in the area of housing. Especially in the context of state interferences with an individual’s home or house the link with the right to respect for the home (Article 8) or property protection (Article 1 of Protocol No. 1) is readily apparent. On the other hand, the relation with the Convention is less obvious when positive claims to housing are made. When an individual demands adequate housing meeting his specific needs, or alternative housing when he is evicted, the social dimension of the Strasbourg housing case law becomes visible.

For the purposes of this chapter, especially this positive, social dimension is important. It is asked here to what extent the ECtHR offers protection to social housing needs, *i.e.*, to the interests of those not owning a house or lacking the means or possibilities for finding a (suitable or alternative) place to live. It

is in the context of these kinds of issues that the tension between effective and indivisible fundamental rights protection and the necessary leeway to the budgetary and planning policies of the states is most evident. It will be assessed how the Court handles this tension and confronts – or instead tries to avert – the social questions presented to it. In particular, this case law analysis aims to discover if the Court has developed a principled approach to social housing complaints that provides the guidance Member States need in order to deal with this issue in a way that is in compliance with the Convention. In this regard, it is not only the *overtly social* housing complaints that deserve attention. In addition, it is worthwhile to highlight some more classical housing cases, as also these may provide for insights on how a state, according to the Court's interpretation of the Convention, is required to deal with housing needs.

Thus, Chapter 8 aims at presenting an overview of the case law of the Court that either directly or more indirectly involves social housing issues. Section 8.2 starts from the different Convention norms and shows the way(s) in which these link up with the issue of housing. It illustrates the natural connection between for example Article 8 and Article 1 P1 and (negative) housing concerns, but especially also focuses on the more unexpected, social aspects of the Court's protection. Questions to be addressed in this section are: What does effective protection of 'respect for the home' and 'private life' entail? To what extent do property rights protect more than just the interests of those who actually own a place? How can the non-discrimination provision of Article 14 ensure social protection and what has the Court said on housing rights in relation to Article 3 ECHR, the prohibition of inhuman and degrading treatment? It will be examined whether the Court provides for a transparent interpretation of what is and what is not (*prima facie*) protected, and whether it has reviewed the different housing issues in an unambiguous manner. In doing so it also will be analysed whether the ECtHR provides for a certain 'minimum level' of social protection, or whether it would be possible for it to do so.

Subsequently, Section 8.3 zooms in on the issue of Roma housing. Cases concerning this topic have come up regularly in Strasbourg and provide for a fitting example of how the Court has to navigate between precarious social realities and costly policy preferences. What is more, together the Roma housing cases provide an interesting case study of the Court's social role and the development thereof, including the remaining shortcomings. This section in particular aims to illustrate how the Court pays explicit attention to the housing needs of vulnerable groups and does so by recognising procedural requirements. Section 8.4 concludes with some final remarks.

## 8.2 (SOCIAL) HOUSING INTERESTS AND THE ECHR

In order to illuminate the social dimension of the Court's case law on issues related to housing, this section addresses several developments related to the different Convention articles relevant in this context. It shows the ways in which the different ECHR-provisions allow for a move from more classical, negative protection in the field of housing, to more positive and social protection. First, attention is given to Article 8 and the different aspects thereof (8.2.1). Especially the 'respect for the home' limb of this provision is clearly connected to the topic of housing. Yet whereas the Court could have insisted on limited *prima facie* protection on the basis of this provision, its interpretation of 'home' explicitly creates room for more indivisible Convention protection. Moreover, also the right to respect for private and family life has proven increasingly relevant in the (social) housing sphere. It will be illustrated that there lies great 'social potential' in the Court's recognition of positive obligations in relation to private and family life, even though thus far it has refrained from clarifying what exactly these positive duties entail. Turning to Article 1 P1, it will be shown that this provision mainly protects the interests of those who own a home, yet also here social housing concerns seem to be increasingly taken into account (8.2.2). Also the protection against discrimination deserves attention, and it will be explicated how Article 14 can bring about social effects by demanding that housing assistance is provided in a non-discriminatory manner (8.2.3). Finally, it is worth paying attention to the prohibition of inhuman and degrading treatment enshrined in Article 3 of the Convention (8.2.4). Although the absolute protection offered by this provision at first glance seems to have little to do with social housing concerns, there is interesting case law on the link between both. In fact, it appears that Article 3 provides a kind of minimum protection in the field of housing, although the Court refrains from clearly indicating so.

### 8.2.1 Article 8 ECHR: Private and Family Life, Home and Housing

In *Chapman v. the United Kingdom*, in 2001, the Grand Chamber held that

'Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States

many persons who have no home. Whether the State provides funds to enable everyone a home is a matter for political not judicial decision.<sup>1</sup>

Indeed, according to the wording of Article 8 ECHR, this provision grants on the individual only 'a right to *respect for his home*'. To benefit from this right, thus, it appears that one already needs to have a home. When this is the case, protection will be granted against unjustified interferences by the state. Nevertheless, the Convention, and Article 8 in particular, protects more than just the classical, negative aspects of individual housing interests. In this regard it is worth illuminating, first, that the Court has interpreted 'respect for the home' in a broad manner. Second, the recognition of possible positive obligations in relation to the 'private and family life' limb of Article 8 underlines that the social potential of this article is everything but exhausted.

#### 8.2.1.1 Interpreting 'Home' as a Question of Fact

The right to respect for the home (Article 8) would be seriously limited if the Court would only understand as 'home' a legally owned house or apartment that is permanently occupied. Instead of a narrow interpretation, however, the Court has opted for a rather broad reading of this term. The 1986 case of *Gillow v. the United Kingdom* has been important in this regard.<sup>2</sup> The case concerned a family that had built a house on the island of Guernsey. They had lived there for two years until Mr Gillow in 1960 took up employment overseas. When they wanted to return in 1978 they were notified that they could only do so once a license had been granted under the applicable housing law. Eventually, the Gillow family returned to Guernsey in 1979, hoping to

1 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 99. This case will be further discussed in, *infra*, S. 8.3. Similar phrasing has been used in many more (recent) cases. *Cf., e.g., Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05 (where the complaint of a Roma person who was offered bricks and mortar accommodation instead of another site for her caravan was held inadmissible, see, *infra*, Sections 9.2.2 and 9.3.1 as well); *Bleyova v. Slovakia*, ECtHR 17 October 2006 (dec.), appl. no. 69353/01 (complaint about the temporary character of the applicant's legal stay in a flat held inadmissible); *Makuc a. O. v. Slovenia*, ECtHR 31 May 2007 (dec.), appl. no. 26828/06, para. 171 (complaint about not having a home held inadmissible); *Velizhanina v. Ukraine*, ECtHR 27 January 2009 (dec.), appl. no. 18639/03 (complaint concerning deprivation of specially protected tenancy held inadmissible); *Yordanova a.O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 130 (yet, 'an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases', see further, *infra*, S. 8.3); *Dukic v. Bosnia and Herzegovina*, ECtHR 19 June 2012, appl. no. 4543/09, para. 40 (complaint about not having been allocated a replacement flat inadmissible; according to the Court, '[t]he interests protected by the notion of a "home" within the meaning of Article 8 include the peaceful enjoyment of one's existing residence'); and *Lazarenko a. O. v. Ukraine*, ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 60 (complaint about losing right to occupy a flat after it was not occupied for six months held inadmissible).

2 *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80.

receive a long-term license, but their application was rejected. Could 'Whiteknights', as their house was called, be considered their 'home' for the purposes of Article 8 of the Convention? In answering this question, the Court stressed that the applicants

'had retained ownership of the house, to which they always intended to return, and had kept their furniture in it ... [I]n 1956 the applicants had sold their former home in Lancashire and moved with their family and furniture to Guernsey ... Furthermore, the Court is satisfied that they had not established any other home elsewhere in the United Kingdom. Although the applicants had been absent from Guernsey for almost nineteen years, they had in the circumstances retained sufficient continuing links with 'Whiteknights' for it to be considered their "home", for the purposes of Article 8 of the Convention, at the time of the disputed measures.'<sup>3</sup>

The applicants had lost their residence qualifications and due to alterations in the legislation were now required to obtain a license. This, as well as the refusal of the license combined with the eventual institution of criminal proceedings for unlawful occupation, the conviction of Mr Gillow and the imposition of a fine, constituted an interference with the applicants' right to respect for their home.<sup>4</sup>

The *Gillow* reasoning makes clear that for determining the scope of the right to respect for the home the Court takes into account different aspects of the applicants' situation. And although the circumstances in *Gillow* were very particular, it has referred to its interpretation in this case in many of its housing judgments.<sup>5</sup> Noteworthy in this regard is that in *Gillow*, the Court seemingly also attached weight to the legal situation by stressing that the applicants still owned the house and had sold the one they owned before moving to Guernsey.<sup>6</sup> However, this legal component – which arguably underlines the 'classic' character of the issue at stake in *Gillow* – has not turned out to be decisive, in the sense that it has become clear that even when there is no legal link whatsoever, the respect for the home limb of Article 8 can be engaged.

Indeed, in the 2008 case of *McCann v. the United Kingdom* the Court defined the notion of 'home' in explicitly *factual* terms.<sup>7</sup> Mr McCann and his wife had been joint and secure tenants until they divorced and the applicants' ex-wife eventually gave up the tenancy. Mr McCann had continued living in the house although he was no longer legally entitled to do so. The Court stressed that

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3 *Ibid.*, para. 46.

4 *Ibid.*, para. 47.

5 See, for some recent examples, *Zrlic v. Croatia*, ECtHR 3 October 2013, appl. no. 46726/11, para. 57; *Škrtić v. Croatia*, ECtHR 5 December 2013, appl. no. 61982/12, para. 21.

6 *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 46.

7 *McCann v. the UK*, ECtHR 13 May 2008, appl. no. 19009/04, para. 46.

‘whether a property is to be classified as a “home” is a *question of fact* and does not depend on the lawfulness of the occupation under domestic law’.<sup>8</sup> This can also be seen in different Roma housing cases. In most of these cases the applicants had resided on a plot of land or site for a significant period of time – and with the intention to stay permanently – without initially establishing their home in a legal manner. Generally, this does not prevent the conclusion that the right to respect for the home is engaged.<sup>9</sup>

What is decisive in the end is the ‘the existence of sufficient and continuous links with a specific place’.<sup>10</sup> This link may be met in case of ‘temporary stays’ or ‘frequent absence’,<sup>11</sup> or indeed in case of unlawful occupation. When a stay is interrupted *and* illegal, however, it is less likely that the Court nevertheless accepts that the ‘sufficient and continuous link’ requirement is met.<sup>12</sup>

The question that remains is: what if one does not have a place to stay in the first place? In a case concerning the allocation of a replacement flat in lieu of one that had been destroyed during the war, the Court’s answer was that ‘[t]he interests protected by the notion of a “home” within the meaning of Article 8 include the peaceful enjoyment of one’s *existing* residence’.<sup>13</sup> The complaint was declared inadmissible *ratione materiae*,<sup>14</sup> thereby showing that there are limits to the application of Article 8. The Court apparently sticks

8 *Ibid.* [emphasis added]. Therefore, ‘the local-authority house which the applicant formerly occupied as a former tenant with his wife and where he lived on his own from November 2001 continued to be his “home”, within the meaning of Article 8 § 1, despite the fact that following service by his wife of notice to quit he had no right under domestic law to continue in occupation’.

9 See, for the Court’s interpretation of Art. 8 in Roma housing cases, *infra*, S. 8.3.1.

10 *Cf.*, for a recent example, *Lazarenko a. O. v. Ukraine*, ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 53, referring to *Propkopovich v. Russia*, ECtHR 18 November 2004, appl. no. 58255/00, para. 36.

11 The Court has held that ‘the length of temporary or permanent stays ..., frequent absence ... or ... use on a temporary basis, for the purposes of short-term stays or even keeping belongings in it, do not preclude retention of sufficient continuing links with a particular residential place, which can still be considered ‘home’ for the purposes of Article 8 of the Convention’. See *Lazarenko a. O. v. Ukraine*, ECtHR 11 December 2012 (dec.), appl. no. 27427/02, para. 53, referring to *McKay-Kopecka v. Poland*, ECtHR 19 September 2006 (dec.), appl. no. 45320/99.

12 *Cf. Yordanova a.O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06 (discussed in, *infra*, S. 8.3.1), where it was argued that some applicants had resided elsewhere for a while. The Court emphasised that they had eventually returned and thus Art. 8 applied. But had they not, or had the period of absence been significant, it is likely that the Court would have concluded differently.

13 *Dukic v. Bosnia and Herzegovina*, ECtHR 19 June 2012, appl. no. 4543/09, para. 40 [emphasis added].

14 *Cf. also Loizidou v. Turkey*, ECtHR 18 December 1996, appl. no. 15318/89, para. 66, where the Court held that ‘it would strain the meaning of the notion of “home” in Article 8 (art. 8) to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives’.

to a predominantly negative interpretation of this Convention right, at least where it concerns the 'home' aspect.<sup>15</sup>

Regardless of the provision's limits, however, the fact that the Court looks at a combination of the relevant factors for concluding whether something is to be considered a 'home' has at least created some *prima facie* room for review of social housing issues. As a result the right to respect for the home does not only provide *prima facie* protection to homeowners, or those legally residing in a house or a flat: a 'home' can also be the place where someone has been living for some time and where he wants to stay, not seldom because of a lack of alternatives.

Whether the interests of the individuals concerned obtain eventual protection depends on whether there was a 'pressing social need' and in particular on the proportionality of the interference.<sup>16</sup> In *Gillow*, for example, this meant that

'the economic well-being of Guernsey must be balanced against the applicants' right to respect for their "home", a right which is pertinent to their own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.'<sup>17</sup>

Eventually, in this case the Court concluded that the decision to refuse the applicants permanent and temporary licences to occupy 'Whiteknights', as well as the conviction and the fining of Mr Gillow, constituted disproportionate interferences with the applicants' right to respect for their home.<sup>18</sup>

The fact that respect for the home is considered an important right relating to someone's 'personal security' and 'well-being', however, does not mean that this right will (almost) always prevail. A recent example of where the opposite conclusion was reached is the case of *Berger-Krall and Others v. Slovenia*.<sup>19</sup> This case concerned the privatisation of social dwellings and more particularly the Slovenian Housing Act, which had replaced specially-protected tenancies – which had allowed for lifelong use of the flats concerned against the payment of a fee covering maintenance costs and depreciation – with normal lease contracts. Former holders of these tenancies could continue to occupy their flats for a non-profit rent or buy the place against favourable conditions. For those whose dwellings had been expropriated after the Second World War the new system meant that they could only buy the flats when

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15 Yet see, e.g., the case of *Loizidou v. Turkey*, ECtHR 18 December 1996, appl. no. 15318/89, where the applicant could instead of on Art. 8 rely on Art. 1 P1.

16 E.g., *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 55.

17 *Ibid.*

18 *Ibid.*, para. 58.

19 *Berger-Krall a.O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04.



the previous owners would agree within a year from the moment restitution had taken place. Three of the applicants could be considered ‘victims’ of an alleged violation with their right to respect for their homes under Article 8, because as a result of the changes in the system they eventually had to leave their homes involuntarily.<sup>20</sup> Reviewing the proportionality of the interference, however, the Court eventually concluded that their rights had not been violated. In doing so it had regard to the fact that the new rents were significantly lower than free-market rents. Moreover, as to the new grounds for eviction, as well the exclusion of the possibility to transmit the right to a lease for a non-profit rent *mortis causa*, the Court held that this ‘was aimed at ensuring a fair balance between the protection of the rights of the tenants on the one hand and those of the “previous owners” on the other’.<sup>21</sup>

Compared to *Gillow*, the Article 8 issue in *Berger-Krall* was of a more clearly social kind. It concerned the sensitive housing position of those who had formerly held specially-protected tenancies, while the countervailing interests related to the rights and needs of the persons who had previously owned the premises concerned. Yet even though the Court’s reasoning suggests that it is willing to take the (potential) social hardship of the applicants into account,<sup>22</sup> in cases like this it is likely that the balance struck by the national authorities is left intact. However, in an effort to ensure effective protection, also when the issue concerned is of a precarious, social kind, the Court has held that in any case, the procedural safeguards provided to the individual(s) concerned must be adequate.<sup>23</sup> This also implies that

‘a person at risk of losing his or her home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation had come to an end.’<sup>24</sup>

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20 *I.e.*, the first was evicted, while against the second an eviction order was issued. The third applicant that could be considered a ‘victim’ for the purposes of Art. 8, decided to vacate his flat after a judgment of the Supreme Court from which it followed that he was not entitled to continue the lease contract signed by his late father and thus had no title to occupy the premises. See, *ibid.*, para. 256.

21 *Ibid.*, para. 274.

22 In this regard it noted that ‘none of the applicants has shown that the level of the non-profit rent was excessive in relation to his or her income’, suggesting that this could be a relevant consideration. *Ibid.*, para. 208. Moreover, it considered relevant that rent subsidies were available for persons in financial difficulties (para. 210).

23 *Cf. Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 85 (see also, *infra*, S. 8.3.2).

24 *Berger-Krall a. O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04, para. 270, referring to *Cosic v. Croatia*, ECtHR 15 January 2009, appl. no. 28261/06, paras. 21-23. See also, *e.g.*, *McCann v. the UK*, ECtHR 13 May 2008, appl. no. 19009/04, para. 50.

In the case of *McCann*, for example, the Court did not so much conclude that the measure McCann was confronted with as such was disproportional. Rather, it found a violation of the Convention because in reaching the decision to evict him the national authorities had failed to consider his needs.

Altogether, it can be said that by means of a broad interpretation of the right to respect for the home the Court has opted for a certain degree of indivisible protection. At the same time, when assessing the proportionality of sensitive housing complaints involving multiple social interests, the position of the Court generally demands that leeway is granted to the decisions made by the national authorities. The point that in such cases procedural requirements can be a feasible means for ensuring that basic needs are protected is further illustrated in Section 8.3, where the various Roma housing cases are discussed.

#### 8.2.1.2 *Private Life and Positive Obligations*

Next to the right to respect for the home also the other aspects of Article 8 are relevant in the housing sphere. In this regard it is especially worth noting that the Court has recognised that also when it comes to housing issues the protection of ‘private and family life’ entails more than just negative obligations. Of particular importance in this regard is the case of *Marzari v. Italy*, which concerned a severely disabled person’s request for adequate accommodation.<sup>25</sup> The applicant suffered from a rare illness of metabolic myopathy, was often forced to use a wheelchair and recognised as 100% disabled. After the building in which he lived had been expropriated, he had moved to another accommodation that in his view was inadequate to meet his special needs. He stopped paying his rent, which led to an eviction order. Eventually Mr Marzari lived in a camper for a while and was then hospitalised, but he refused to accept another apartment that was allocated to him. Marzari complained before the Court about the authorities’ failure to provide him with adequate accommodation, notwithstanding a local law-based obligation to do so. The Court held that

‘although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such

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25 As will become apparent in the sections to follow, Article 8’s private and family life limb as well as Article 3 and Article 1 of Protocol No. 1 have provided alternative routes towards protection under the Convention. See, e.g., *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.

interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life.<sup>26</sup>

Nevertheless, in the case of *Marzari* the Court concluded that the complaint was inadmissible. It stressed that it is not for the Court to review the decisions taken by the local authorities with regard to (the adequateness of) the housing that had become available. In this regard 'no positive obligation for the local authorities can be inferred from Article 8 to provide the applicant with a specific apartment'.<sup>27</sup>

It may be inferred from *Marzari* that while the right to respect for the home demands that there is an existing home,<sup>28</sup> respect for private life may demand positive state action even if – or especially when – someone does not have a place to live.<sup>29</sup> For this to be the case it is required that there is a 'direct and immediate link' between the latter provision and the housing measures an applicant demands.<sup>30</sup> However, the Court's conclusion in *Marzari* that the refusal of housing assistance to persons suffering from a severe disease *may* raise an issue under Article 8 does not provide much guidance as to what this more concretely entails. It fails to provide content to the positive obligations that apparently follow from this article by not explaining what should at minimum be done or guaranteed. The Court's final conclusion that in *Marzari* there is no obligation to provide the applicant with a specific apartment is not very helpful either.<sup>31</sup> One might cautiously infer from the Court's decision that instead of a specific apartment, at least some – according to the authorities

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26 *Ibid.* [emphasis added], referring to *Botta v. Italy*, ECtHR 24 February 1998, appl. no. 21439/93, paras. 33-34. *Botta* concerned disabled persons who, during their vacation, could not access the sea. The Court also there made mention of possible positive obligations in this sphere once there is a direct link with someone's private life, but concluded that the case was inadmissible. According to the Court, the case 'concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the state was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life' (para. 35).

27 *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.

28 Indeed, as was noted above, 'home' refers to an existing home, see *Dukic v. Bosnia and Herzegovina*, ECtHR 19 June 2012, appl. no. 4543/09, para. 40.

29 Even though in *Marzari* there existed an obligation under provincial law to offer adequate accommodation to persons recognised as 100% disabled, the Court's wording does not suggest that this was material in recognising the possibility of a positive obligation. It explicitly stated that an issue may be raised 'under Article 8 of the Convention', without referring to the provincial statute. See, *Marzari v. Italy*, ECtHR 4 May 1999 (dec.), appl. no. 36448/97.

30 *Botta v. Italy*, ECtHR 24 February 1998, appl. no. 21439/93, paras. 33-34.

31 Cf. Frohwerk 2012, p. 134, who notes that the negative determination of the Court – that the state had fulfilled its positive obligations – does not further clarify the applicable requirements and criteria.

appropriate – housing should be offered. Yet as the Court is not explicit, this merely remains a matter of guessing.

Also the case of *O'Rourke v. the United Kingdom* signals the potential of Article 8 for positive, indivisible protection, although the conclusion again was that the case was inadmissible.<sup>32</sup> After having been released from prison, O'Rourke had applied for accommodation. Due to his health condition he had a priority need and accommodation was offered in a hotel, until O'Rourke was evicted after complaints had been made about his behaviour. Several other (bed-sit and temporary) accommodations were suggested, but the applicant refused the offers and became homeless. With regard to Article 3 ECHR, the Court stated that the applicant's situation had not attained the requisite level of severity to engage this article.<sup>33</sup> Moreover, even if this had been the case, the applicant was 'largely responsible for his own deterioration following his eviction'.<sup>34</sup> The Court repeated, however, that an issue under Article 8 might arise when housing assistance to an individual suffering from a serious disease is refused, because of the impact of such refusal on his private life. In this context it was considered important that Article 8 does not lay down a right to be provided with a home, and that therefore 'the scope of any positive obligation to house the homeless must be limited'.<sup>35</sup> In *O'Rourke*,

'to the extent that there was any positive obligation to accommodate the applicant when he first contacted CLBC [the Camden London Borough Council] in early 1991, this was discharged by the provision of temporary hotel accommodation to the applicant pending the statutory inquiries into whether or not he was homeless, and thus entitled to permanent accommodation.'<sup>36</sup>

Like *Marzari*, *O'Rourke* suggests that states have a (limited) duty to do at least 'something' in case a seriously ill person is in need of a home.<sup>37</sup> Again, however, this must read between the lines of the decision, let alone that it becomes clear when exactly this obligation is triggered and what it more concretely entails.

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32 *O'Rourke v. the UK*, ECtHR 26 June 2001 (dec.), appl. no. 39022/97.

33 See, for some examples of where the protection of Art. 3 was triggered, *infra*, S. 8.2.4.

34 *O'Rourke v. the UK*, ECtHR 26 June 2001 (dec.), appl. no. 39022/97. Homelessness as such, it can be argued, does not reach the level of severity needed in order to trigger the application of the prohibition of inhuman treatment.

35 *Ibid.*

36 *Ibid.*

37 *Ibid.* Cf. Frohwerk 2012, p. 132: 'Der Fall ermöglicht mit der Anknüpfung an den individuellen Gesundheitszustand des Beschwerdeführers eine Konkretisierung des Anspruchs auf eine Wohnung: Im Vordergrund der Entscheidung steht kein "Recht auf Wohnung", sondern eine konventionsrechtliche Bewertung des staatlichen Verhaltens im Umgang mit der konkreten Situation. Diese bewusst offen und unbestimmt formulierte Entscheidung präzisiert jedoch erneut keine Anforderungen an einen konventionsrechtlich geforderten Umgang mit sozialen Notlagen.'

The recognition of potential positive requirements under Article 8 in the housing sphere is not limited to situations involving persons who are suffering from a serious disease. Further potential positive obligations might for example be found in cases concerning restitution issues.<sup>38</sup> Moreover, also for the protection of other vulnerable individuals and groups the doctrine of positive obligations has proven relevant. For example, in *Codona v. the UK*<sup>39</sup> the Court stated that it 'does not rule out that, in principle, Article 8 could impose a positive obligation on the authorities to provide accommodation for a homeless gypsy which is such that it facilitates their "gypsy way of life"'.<sup>40</sup> As will be further illustrated in Section 8.3, however, also in cases concerning Roma it can be seen that the Court generally does not say more than that a positive obligation *might* arise, to then jump to the specific circumstances of the case in order to decide whether these do or do not amount to a breach of Article 8.

Altogether, thus, it appears that the Court does not treat the issue of positive obligations as a matter of interpretation (or standard-setting) in the sense that it has clarified what the Convention *prima facie* demands, to then see whether an omission by the state (in the light of this standard) was justified. Instead, it determines the admissibility of a case with the help of a relatively amorphous 'threshold requirement', namely the requirement of a 'direct and immediate link'. However, it can be asked whether this requirement, together with a vague notion of positive obligations, can form a sufficient starting point for reviewing the proportionality of the broad variety of cases it potentially brings within the scope of the Convention.

## 8.2.2 Homeowners, Leaseholders, Landlords, and Article 1 P1 ECHR

A great bulk of the ECtHR's case law concerning housing relates to Article 1 of Protocol No. 1 ECHR, which contains the right to protection of property. However, in this chapter this article is given only limited attention as most of the issues concerned involve negative protection and 'naturally' fall within the scope of the Convention.<sup>41</sup> 'Classical' interferences with the rights of house owners generally fail to illustrate the type of tension this chapter – or in fact this entire book – is about, namely the tension between the limited role of the

38 Cf. *Čović v. Croatia*, ECtHR 26 February 2004, appl. no. 71549/04. However, this positive obligation was of a rather different, less 'social' kind, as it concerned the obligation to execute court judgments in this context. See also Buyse 2008, p. 60ff. See also *Pibernik v. Croatia*, ECtHR 4 March 2004, appl. no. 75139/01.

39 *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05.

40 *Ibid.* (where the complaint of a Roma person who was offered bricks and mortar accommodation instead of another site for her caravan was held inadmissible).

41 After all, it is the case of homeowners interferences with their property rights which will be reviewed *qua* interferences with their property rights (and not housing interests) under Art. 1 P1 of the Convention.

Court and the need for effective and indivisible, but also principled social protection. This notwithstanding, it is interesting to highlight a few property rights cases that, although in a more indirect manner, leave some room for social housing concerns. First of all, the Court in some instances has been willing to review the cases of lessees and of formerly protected tenants, rather than only those of house owners. Second, social interests can be said to play a background role in determining whether a fair balance has been struck between the rights of the individual and the general interest.

What can be considered a 'possession' for the purposes of Article 1 P1 of the Convention is explained by the Court in an autonomous matter. As will be elaborately discussed in Chapter 10, this has the important effect that also social benefits, regardless of whether these are based on prior payments, are covered by the scope of this article.<sup>42</sup> In the context of housing, whereas normally only those who own a house or flat appear to profit from the protection of article 1 P1, the broad interpretation of the Court has also created some possibilities for those who do not own such rights. The case of *Stretch v. the United Kingdom*, for example, concerned a lessee who had contracted to lease 22 years ago and had erected a number of buildings on the land concerned.<sup>43</sup> When he was deprived of the benefit of a renewal option on his lease it was not his ownership of the land, but rather the fact that he had 'at least a legitimate expectation of exercising the option to renew' that made that the protection of property applied.<sup>44</sup>

A more interesting example regarding the applicability of Article 1 P1, however, is the recent case of *Berger-Krall and Others v. Slovenia*, which has also been mentioned in discussing the relevance of Article 8 of the Convention in the housing sphere.<sup>45</sup> In this case the applicants complained that in the process of the privatisation of social dwellings they had been deprived of their specially protected tenancy without receiving adequate compensation. The question was hence whether this tenancy – allowing for lifelong use of the flats concerned against the payment of a fee covering maintenance costs and depreciation, and which also entailed possibilities for transferring the right to lease *inter vivos* and *mortis causa* – could be considered a possession obtaining *prima facie* protection under Article 1 P1. In this regard the government stated, amongst other things, that '[e]ven though it might be difficult to compare anachronistic concepts of socially-owned property with traditional property in a democratic society, it was clear that the occupancy right was, *mutatis mutandis*, more akin to a tenancy'.<sup>46</sup> Nevertheless, the Court refrained from

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42 *Infra*, Ch. 10, and especially S. 10.3.1 and 10.4.1.

43 *Stretch v. the UK*, ECtHR 24 June 2003, appl. no. 44277/98.

44 *Ibid.*, para. 35.

45 *Berger-Krall a.O. v. Slovenia*, ECtHR 12 June 2014, appl. no. 14717/04. See, *supra*, S. 8.2.1.1.

46 *Ibid.*, para. 121.

answering the interpretation question and held that it 'does not consider it necessary to examine the government's objection of incompatibility *ratione materiae* since it has come to the conclusion that, even assuming Article 1 of Protocol No. 1 to be applicable, the requirements of this provision were not violated'.<sup>47</sup> What then followed was a discussion of the interference with the applicants' interests, although it was not clear whether these were in fact protected under the Convention and accordingly allowed for such review in the first place.

The two judges who wrote a separate opinion in *Berger-Krall* (one concurring and one dissenting) consider the approach taken by the Court far from ideal. At least, this is what can be inferred from the fact that both make a serious effort to answer the 'possessions question'. In brief, Judge Yudkivska distils from previous case law the rule that a special tenancy constitutes a property right as long as it entails a reasonably practical possibility of acquiring an apartment.<sup>48</sup> As such a possibility did not exist in *Berger-Krall*, there had not been a reason for the Court to review the issue. On the other hand, Judge Zupancic argued that when considering the situation as a whole, *i.e.*, by combining the different (factual) elements of the case at hand, the Court should have held that Article 1 P1 applied.<sup>49</sup> Arguably, the latter option is the more social one, allowing the Court to take into account the severity of the applicant's loss for deciding whether a tenancy was protected *qua* property right under the Convention. Judge Yudkivska's approach, however, would be the more principled one, in the sense that it lays down a general rule allowing for a more transparent decision on whether or not a property right is concerned. Arguably, indeed, for determining what amounts to 'property' – and this may be different when the interpretation of 'home' or 'private life' is concerned – not all considerations related to situation of the applicants seem to be relevant. In any case, it seems important that the Court provides some more clarity on this matter.

Next to its interpretation, it can be asked whether also the Court's review of cases under Article 1 P1 in any way signals protection of housing needs. When the Court reviews an issue concerning an interference with the rights of a landowner or homeowner, or the expropriation of a house, the question it asks is whether a fair balance has been struck between the different interests concerned. When property rights are interfered with by means of social housing legislation that for example sets a ceiling on rent levels, the state will in prin-

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47 *Ibid.*, para. 135.

48 *Ibid.*, concurring opinion of Judge Yudkivska.

49 *Ibid.*, dissenting opinion of Zupancic.

ciple be granted a wide margin of appreciation.<sup>50</sup> Indeed, the paradoxical effect of this is that the housing needs of those who benefit from this legislation thereby obtain (indirect) Strasbourg protection. Sometimes, however, the Court is willing to let the rights of landowners and homeowners prevail. This can be the case when they only receive a very low level of rent, which can potentially be said to cause financial hardship.<sup>51</sup> Also when house owners need their property for housing themselves and their families, but are prevented from evicting their tenants, their needs may play an indirect role in assessing the proportionality of the interference with Article 1 P1.<sup>52</sup>

A final example that can be given of the social housing dimension of the right to protection of property is the case of *Gladysheva v. Russia*.<sup>53</sup> This case concerned an applicant whose title to her flat was invalidated because of fraud in the procedures in which the flat was privatised by a third party, following the discovery of forged documents. In discussing the proportionality of this interference, the Court had regard to the fact that 'the applicant has been stripped of ownership without compensation, and that she has no prospect of receiving replacement housing from the State'.<sup>54</sup> Besides the errors made by the state, this played a role in finding a violation of her right to respect for her property. However, by discussing the social effects of the interference in *Gladysheva* primarily in relation to the applicant's complaint under Article 8,<sup>55</sup> the Court's reasoning in this case also confirms that that is in fact the most appropriate place for dealing with housing needs. Altogether, thus, as the focus logically lies on property rights review, there is little reason for applicants concerned about their housing situation, to (only) rely on Article 1 P1 of the Convention.

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50 Cf. *James a. O. v. the UK*, ECtHR 21 February 1986, appl. no. 8793/79, para. 46. Also, the Court held that '[t]he margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large' (para. 47). Cf. also *Mellacher a. O. v. Austria*, ECtHR 19 December 1989, appl. nos. 10522/83, 11011/84 and 11070/84, and *Nobel a. O. v. the Netherlands*, ECtHR 2 July 2013 (dec.), appl. nos. 27126/11, 28084/12, 81046/12 and 81049/12.

51 See *Hutten-Czapska v. Poland*, ECtHR (GC) 19 July 2006, appl. no. 35014/97; *Lindheim a. O. v. Norway*, ECtHR 12 June 2012, appl. nos. 13221/08 and 2139/10.

52 Cf. *Velosa Barreto v. Portugal*, ECtHR 21 November 1995, appl. no. 18072/91 (concerning an applicant who had inherited property he wanted to use to house his family); *Scollo v. Italy*, ECtHR 28 September 1995, appl. no. 19133/91 (In this case the applicant was jobless and 71% disabled, and wanted to evict his tenant so that he could use his property for himself. In this case the Court found a violation of Article 1 P1, although the reason for this was in fact that although there had been a 'declaration of necessity', the authorities had taken no action to evict the tenant.)

53 *Gladysheva v. Russia*, ECtHR 6 December 2011, appl. no. 7097/10.

54 *Ibid.*, para. 80.

55 *Ibid.*, paras. 90-97.



### 8.2.3 Social Protection Through Article 14 ECHR

Besides the Court's interpretation of 'home' and the (other) developments under Articles 8 and 1 P1 there is more that illustrates the 'socialisation' of the Convention in relation to housing issues. What cannot go unnoticed here is the role of Article 14 ECHR. As was explained in Chapter 2, this article provides for non-self-standing protection against discrimination, *i.e.*, it can only be invoked together with another substantive article of the Convention.<sup>56</sup> However, it does go further than these substantive articles, in the sense that even when a complaint does not fall within the 'scope' of for example the right to respect for private life, it might still fall within its broader 'ambit' and thereby trigger the applicability of Article 14. This allows for the recognition of 'social' Convention requirements in the housing sphere: even when there is no obligation under Article 8 or Article 1 P1 to provide for certain housing arrangements, once such arrangements have been created they must be provided in a non-discriminatory fashion.<sup>57</sup>

A clear example of how this 'socialisation' via the non-discrimination principle works is the 1999 Grand Chamber judgment in *Larkos v. Greece*.<sup>58</sup> The issue at stake concerned a civil servant who was a tenant of the state. When he retired, Mr Larkos' tenancy agreement was terminated and his eviction was ordered. He complained that he had been confronted with unjustified discrimination in the enjoyment of his right to respect for his home as he did not obtain the protection of the Rent Control Law 1983 that 'private' tenants received. Although the Convention does not require such protection, the Court held that the issue fell within the ambit of Article 8 and that therefore, Article 14 applied. It concluded that the applicant was in a similar situation to that of private tenants.<sup>59</sup> His tenancy agreement resembled a normal landlord and tenant agreement; it had not been argued that he paid less than the market rate and the state had rented out the property in a private law capacity.<sup>60</sup> The agreement moreover did not mention that it was dependent on Mr Larkos' capacity as a civil servant or that his retirement would mean the end of his lease. Discussing the possible justification for the difference in treatment made, the Court noted that 'the Government have not provided any convincing explanation of how the general interest will be served by evicting the applicant'.<sup>61</sup> Regardless of the margin of appreciation in the area of the

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<sup>56</sup> *Supra*, Ch. 2, S. 2.4.2.2.

<sup>57</sup> Van Dijk et al. 2006, p. 1051; Arnardóttir 2014.

<sup>58</sup> *Larkos v. Greece*, ECtHR (GC) 18 February 1999, appl. no. 29515/95.

<sup>59</sup> *Ibid.*, para. 30.

<sup>60</sup> *Ibid.* *Cf.*, in contrast, *J.L.S. v. Spain*, ECtHR 27 April 1999 (dec.), appl. no. 41917/98.

<sup>61</sup> *Larkos v. Greece*, ECtHR (GC) 18 February 1999, appl. no. 29515/95, para. 31.

control of property, it found a violation of Article 14 in conjunction with Article 8.<sup>62</sup>

Another interesting case that illustrates the socialising potential of Article 14 is *Karner v. Austria*.<sup>63</sup> In Austria, under certain conditions a 'life companion' was entitled to succeed the tenancy after the death of his partner. However, the Austrian Constitutional Court had found that this possibility did not apply in the case of same-sex partnerships, because at the time the Rent Act was enacted, the legislator's intention was not to include homosexuals. The third parties intervening in this case, the non-governmental organisations ILGA-Europe, Liberty and Stonewall, had submitted that a strong justification was required when the ground for a distinction was sex or sexual orientation. The Court went along with this argument and held that even when the aim could be understood to be the protection of the family, no arguments had been advanced that excluding homosexuals was necessary to achieve that aim.<sup>64</sup> For complying with the Convention, thus, entitlements to succession had to be extended to this group.

Both *Larkos* and *Karner* show that protection against discrimination on the basis of Article 14 can be important when it comes to the fragile position of (certain groups of) tenants. Koch has noted, however, that *Larkos* and *Karner* also have in common that they both concern situations in which the applicants were already living in the flats in question.<sup>65</sup> For this reason the cases can be seen as merely involving 'negative' protection.<sup>66</sup> At the same time, it is obvious that there is a more positive aspect involved as well because the state is required to extend the protection offered by the relevant laws. Although the respective legal entitlements cannot be said as such to be required under the Convention, their provision is demanded in order for the state to comply with the non-discrimination requirement. Moreover, on the basis of the Court's reasoning it can be argued that also measures of a distinctively positive kind, *e.g.*, (access to) social housing or housing benefits, must meet the requirement

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62 *Ibid.*, paras. 31-32. The applicant had also invoked Art. 14 in conjunction with Art. 1 P1 because according to him the protection against evictions amounted to 'possessions'. The government argued that there was no link with the protection of property whatsoever. The Court, finally, concluded that because of its decision concerning Art. 14 and Art. 8 there was no need to give separate consideration to this complaint.

63 *Karner v. Austria*, ECtHR 24 July 2003, appl. no. 40016/98.

64 *Ibid.*, paras. 37-41. See also *Kozak v. Poland*, ECtHR 2 January 2010, appl. no. 13102/02. Cf. also *Korelc v. Slovenia*, ECtHR 15 December 2009, appl. no. 28456/03. In this case the complaint of the applicant, that for discriminatory reasons he could not succeed the tenancy as there had not been a 'long-lasting life community', was held manifestly ill-founded. He was not in a homosexual relationship with his former housemate, and the application was not dismissed on the basis of gender, but because this relation was not characterised as a 'long-lasting life community'.

65 Koch 2009, p. 127.

66 *Ibid.*

of non-discrimination.<sup>67</sup> This was confirmed in the case of *Bah v. the United Kingdom*, about a woman who had been denied priority treatment under the housing legislation because of her son's conditional immigration status.<sup>68</sup> Here the Court held that 'there is no right under Article 8 of the Convention to be provided with housing', but if a state provides benefits, 'it must do so in a way that is compliant with Article 14'.<sup>69</sup> Thereby it underlined that the potential of the principle of non-discrimination in terms of social protection cannot be overlooked.<sup>70</sup>

However, in determining whether in *Bah* the Convention was violated, the ECtHR took a cautious stance. It emphasised that 'any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need',<sup>71</sup> and that states may justifiably 'limit the access of certain categories of aliens to "resource-hungry" sources', amongst which social housing can be counted.<sup>72</sup> The Court held that the fact that Bah was not granted priority need because of the presence in her household of her son, whose leave to enter the United Kingdom was granted expressly conditional upon his having no recourse to public funds, was not arbitrary.<sup>73</sup> Important was also that in case Ms Bah's risk of becoming homeless would have materialised, the applicable legislation would have required assistance from the local authorities.<sup>74</sup> Finally, because her situation in fact did not seem to have turned out worse than in case she would have been given priority need, the Court concluded that the interference had not been disproportionate and that Article 14 in conjunction with Article 8 had not been violated.<sup>75</sup>

What the judgment in *Bah* shows is that regardless of the broad applicability of Article 14, the non-discrimination principle by no means always provides an easy route towards eventual protection under the Convention. Phrased differently, according to the Court unequal treatment in the field of housing frequently does not amount to discrimination prohibited under the Convention. This has to do with the fact that housing laws will always distinguish between different groups of persons, and often these distinctions cannot be called arbitrary. Especially when costly social measures are concerned, moreover, the subsidiary role of the Court makes that it is hesitant to interfere with decisions made at the national level. This may be different when a distinction

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67 *Ibid.*, who refers to *Petrovic v. Austria*, ECtHR 27 March 1998, no. 156/1996/775/976, that dealt with a right to parental leave under Art. 8 ECHR.

68 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07.

69 *Ibid.*, para. 40.

70 Consider moreover also the potential of Protocol No. 12, see, *supra*, Ch. 2, Sections 2.4.2.2 and 2.6.1.

71 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07, para. 49, referring to *Runkee and White v. the UK*, ECtHR 10 May 2007, appl. nos. 42949/98 and 53134/99, para. 39.

72 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07, para. 49.

73 *Ibid.*, para. 50.

74 *Ibid.*, para. 51.

75 *Ibid.*, paras. 51-52.

is made on a 'suspect ground', which requires 'very weighty reasons' as a justification.<sup>76</sup> However, as *Bah* shows, grounds of distinction in the field of social policy are by no means always 'suspect'.<sup>77</sup> Therefore, but also because 'the provision of housing to those in need ... is predominantly socio-economic in nature',<sup>78</sup> a wide margin of appreciation will generally be granted, which in turn means that a violation is often unlikely to be found.

#### 8.2.4 Minimum Protection Under Article 3 ECHR?

Finally, before moving to a case study of Roma housing and the role of the Convention therein, it is useful to highlight the relevance of Article 3 ECHR in relation to housing rights. At first glance, the 'prohibition of torture, inhuman and degrading treatment or punishment' has little to do with a socio-economic issue like housing. This is because, first, the term 'treatment' suggests that the state should be actively engaged in order for the protection of this article to be triggered. Second, the terms 'torture', 'inhuman' and 'degrading', combined with the absolute character of Article 3 ECHR, indicate that only a very small subset of complaints will actually be serious enough for even coming close to being protected. As was already indicated in Chapter 2, only when a situation reaches a 'minimum level of severity', protection under Article 3 can be granted.<sup>79</sup> Nevertheless, there are several judgments that show that this provision in some circumstances can be relevant also when housing issues are concerned.

Firstly, Article 3 has played a role in the housing sphere where homes were destroyed and the state could be held responsible. In *Selçuk and Asker v. Turkey* a violation of this provision was found where, as part of a security operation, the security forces had destroyed the home and property of the applicants.<sup>80</sup> This was done in a contemptuous manner, in the presence of the applicants, and without having sufficient regard to their safety.<sup>81</sup> The special circumstances, including the age of the applicants and the fact that they had been living in the village all their lives, played an important role in concluding that

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76 Cf. *Karner v. Austria*, ECtHR 24 July 2003, appl. no. 40016/98.

77 However, also in *Bah* the applicant had held that the distinction concerned was based on the ground of nationality. The Court instead held that the relevant ground was 'immigration status', thereby allowing for a less rigid test that could lead to the conclusion that there had not been a violation.

78 *Bah v. the UK*, ECtHR 27 September 2011, appl. no. 56329/07, para. 47.

79 *Supra*, Ch. 2, S. 2.4.3.2 (see also, *infra*, Ch. 9, S. 9.2.2; Ch. 10, S. 10.2.2) (see *Ireland v. the UK*, ECtHR 18 January 1978, appl. no. 5310/71, para. 162).

80 *Selçuk and Asker v. Turkey*, ECtHR 24 April 1998, appl. nos. 23184/94 and 23185/94.

81 *Ibid.*, para. 77.

in this instance the minimum level of severity threshold was met and that there had hence been a breach of Article 3.<sup>82</sup>

It must be noted that the case of *Selçuk and Asker* can be considered a 'classic' rights issue, concerning an interference – or indeed 'treatment' – by the state with the personal sphere of the applicants. The truly 'social' housing dimension of this case is hence negligible. Interesting is, however, that it has become clear that not only the actual destroying of houses in cases like this can lead to a finding of a violation of Article 3. The case of *Moldovan and Others v. Romania* also involved applicants whose houses and property had been burned.<sup>83</sup> The result of this was that for years they had no choice but

'to live in hen-houses, pigsties, windowless cellars, or in extremely cold and deplorable conditions: sixteen people in one room with no heating; seven people in one room with a mud floor; families sleeping on mud or concrete floors without adequate clothing, heat or blankets; fifteen people in a summer kitchen with a concrete floor ... etc.'<sup>84</sup>

Importantly, while the Court in *Moldovan* could not review the actual destruction of the homes, because at the time this happened Romania had not yet ratified the Convention,<sup>85</sup> the living conditions of the applicants formed the reason why Article 3 had been violated.<sup>86</sup> In other words: rather than the actual 'interference' (the destruction of homes), the 'social' results thereof triggered the application of 'the prohibition of inhuman and degrading treatment'. Albeit in a very case-specific manner, this Article 3 case thereby clearly shows the socialising potential of the Convention.

Also in a different context the ECtHR's case law shows that matters concerning living conditions and housing can raise an issue under Article 3 ECHR. It was already briefly mentioned in Chapter 2,<sup>87</sup> and will be further elaborated in

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82 *Ibid.*, para. 78. Cf. also the cases of *Bilgin v. Turkey*, ECtHR 16 November 2000, appl. no. 23819/94 and *Dulas v. Turkey*, ECtHR 30 January 2001, appl. no. 25801/94, both of which dealt with similar fact patterns and in which the Court also concluded on violations of Art. 3. In *Orhan v. Turkey*, ECtHR (GC) 18 June 2002, appl. no. 25656/94, para. 362, the Court however did 'not find ... distinctive elements concerning the age or health of the applicant or the Orhans or specific conduct of the soldiers vis-à-vis either of those persons which could lead to a conclusion that they had suffered treatment contrary to Article 3 of the Convention'.

83 *Moldovan a.O. v. Romania*, ECtHR 12 July 2005, appl. nos. 41138/98 and 64320/01.

84 *Ibid.*, para. 69.

85 *Ibid.*, para. 102.

86 More precisely, 'the Court finds that the applicants' living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which, in the special circumstances of this case, amounted to "degrading treatment" within the meaning of Article 3 of the Convention'. *Ibid.*, para. 113.

87 See, *supra*, Ch. 2, S. 2.5.2.1.

Chapter 10 on social security,<sup>88</sup> that cases like *Laroshina v. Russia*, *Budina v. Russia* and *M.S.S. v. Belgium and Greece* highlight that when someone is dependent on state support and faces ‘serious deprivation or want incompatible with human dignity’, a responsibility for the state *could* arise.<sup>89</sup> In the case of *M.S.S.*, the Court concluded that although there is no general obligation to give refugees financial assistance,<sup>90</sup> in this case the applicant refugee was confronted with such deplorable circumstances that Article 3 had nevertheless been breached. After having been sent back to Greece, he had spent months in extreme poverty, while being unable to cater for his most basic needs, like a place to stay. What can be inferred from this is that when someone lacks the means for providing basic shelter and the authorities are unwilling to respond to this situation, the prohibition of inhuman treatment may be violated. Phrased differently, the Convention seemingly entails some kind of minimum socio-economic protection – at least when vulnerable, dependent individuals are concerned.

Recently the Court has confirmed that this line of reasoning is relevant when in particular the right to housing or to appropriate accommodation is concerned. In the 2014 case of *Tarakhel v. Switzerland*, the Court held that returning an Afghan family to Italy without individual guarantees concerning their accommodation would be in violation of Article 3 of the Convention. The Court repeated that the Convention does not oblige the Member States to provide everyone within their jurisdiction with a home,<sup>91</sup> and that Article 3 does not entail ‘any general obligation to give refugees financial assistance to enable to maintain a certain standard of living’.<sup>92</sup> At the same time it placed particular weight upon the fact that the applicant belonged to a ‘particularly underprivileged and vulnerable population group in need of special protection’.<sup>93</sup> Moreover, the requirement of special protection for asylum seekers ‘is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability’.<sup>94</sup> In line with this,

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88 See, *infra*, Ch. 10, S. 10.2.2, respectively.

89 *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 253; *Budina v. Russia*, ECtHR 18 June 2009 (dec.), appl. no. 45603/05 and *Laroshina v. Russia*, ECtHR 23 April 2002 (dec.), appl. no. 56869/00. On *M.S.S.* see, e.g., Clayton 2011 and (critically) Bossuyt 2012.

90 See *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 249.

91 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 95, referring to *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 95.

92 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 95, referring to *Muslim v. Turkey*, ECtHR 26 April 2005, appl. no. 53566/99, para. 85; *M.S.S. v. Belgium and Greece*, ECtHR (GC) 21 January 2011, appl. no. 30696/09, para. 249.

93 *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 97.

94 *Ibid.*, para. 119: ‘This applies even when, as in the present case, the children seeking asylum are accompanied by their parents’ (cf. *Popov v. France*, ECtHR 19 January 2012, appl. nos. 39472/07 and 39474/07, para. 91).

‘the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not “create ... for them a situation of stress and anxiety, with particularly traumatic consequences” ... Otherwise the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention.’<sup>95</sup>

Switzerland did not possess sufficient assurances regarding the adequacy of the specific facility of destination, and sending the applicant family back to Italy would hence be in violation of Article 3 of the Convention.

The judgment in *Tarakhel* has not been received with much enthusiasm. It confirms, however, that especially when vulnerable individuals and groups are concerned, a failure to provide an absolute *minimum* level of social provision seems to be contrary to Article 3 ECHR. Indeed, the Court does not say this in so many words, and it can be asked whether more clarity in this regard could not enhance the transparency as well as the acceptability of its reasoning.

### 8.3 HOUSING AND ROMA: A CASE STUDY

It is well-known that Roma form a vulnerable group in need of special protection. According to the Parliamentary Assembly of the Council of Europe ‘[t]he Roma people are still regularly victims of intolerance, discrimination and rejection based on deep-seated prejudices in many Council of Europe member states’. For that reason,

‘[t]he situation of Roma with regard to education, employment, housing, health care and political participation is far from satisfactory. The Assembly is convinced that effective and sustainable access to education and decent housing are the first decisive steps towards breaking the vicious circle of discrimination in which most of the Roma are locked.’<sup>96</sup>

The lack of housing or access thereto for Roma – whether or not caused by discrimination – has been and remains one of the critical problems concerning this group. Because of the precarious housing situation of great numbers of Roma, combined with the fact that their particular way of settling is integral to their identity, this issue is intimately linked to their fundamental rights and dignity.

This section presents a case study of the Strasbourg cases that explicitly deal with Roma housing. The reason why particularly this subset of the Court’s housing case law was selected for in-depth analysis, is that it brings together various developments discussed in the previous part of this chapter, thereby

<sup>95</sup> *Tarakhel v. Switzerland*, ECtHR (GC) 4 November 2014, appl. no. 29271/12, para. 119.

<sup>96</sup> Resolution 1740 (2010) of the Parliamentary Assembly of the Council of Europe on ‘The situation of Roma in Europe and relevant activities of the Council of Europe’.

allowing a good insight in the Court's approach as well as the shortcomings of its reasoning. As most cases relating to housing, the Roma housing cases generally are of a more 'negative' or 'classic' kind, involving claims to avoid or redress evictions. Most of them, however, also contain a more 'positive', or 'social' aspect. This is the case because what underlies the negative issue is frequently the question whether the state should provide for (suitable) alternative housing or other solutions when it wants to evict Roma illegally residing on a plot of land. It will become clear that the different Roma cases concern complex social policy and planning matters. This is one of the reasons why the Court does not always allow the applicants' claims, even when they live in conditions of severe distress. At the same time, it can be noted that, more recently, the Court seems to have started to accord more weight to the specific interests of the vulnerable group of Roma.

Below it will be asked how the Court's 'effectiveness' and 'indivisibility' approaches play out in its dealing with Roma housing issues at the different adjudicational stages. Article 8, protecting the right to respect for the home, private and family life, most of the time forms the starting point for a Roma housing complaint. How does the Court, in this context, explain this right and does it provide for a definition of any positive aspects thereof? How does it balance the general interests at stake against the fundamental interests of the applicants? These questions and the issues mentioned in the introduction to this chapter, *i.e.*, transparency, consistency, and the room for minimum core protection, will be central to this section. First, the question regarding the Court's interpretation will be answered (8.3.1). Thereafter, attention is had to the way the Court approaches the matter of proportionality, with a particular focus on the role accorded to the social interests of the Roma people concerned (8.3.2). Finally, the role and the scope of the margin of appreciation in Roma housing cases will be illuminated (8.3.3).

### 8.3.1 Article 8 ECHR and Roma Housing

For obtaining a fair picture of the interpretation of the Convention in the context of Roma housing cases, three issues must be noted. First, in most of the Roma housing cases land was occupied without the individuals involved having any legal permission to do so. This triggered the question whether the right to 'respect for the home' also involves respect for an 'unlawful' home, or applies when a caravan is placed on land belonging to someone else. As was already indicated in Section 8.2.1.1, whether something can be called 'home' depends on the factual links a person has with his place of residence,<sup>97</sup> and the cases discussed below indeed confirm that the legality of the occupa-

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97 See, *infra*, S. 8.2.1.



tion is anything but decisive. Secondly, a question has been whether also the private and family life limb of Article 8 should apply to Roma housing cases. This is especially relevant because next to the loss of one's home, the removal of Roma mostly also affects their lifestyle and frequently has the effect that long time communities are being broken down. Finally, it appears that sometimes not just the prohibition or disapproval of a (future) removal is requested, but indirectly also the provision of alternative housing, *i.e.*, of housing suited to the customs and traditions of Roma. To what extent does a right to respect for one's home or private and family life include positive aspects concerning the provision of 'suitable' Roma housing? And importantly, to what extent is the Court clear about this at the interpretation stage, when it discusses the *prima facie* content of these rights?

The first Roma housing case the Court had to deal with was the 1996 case of *Buckley v. the United Kingdom*.<sup>98</sup> This case concerned the complaint of an applicant who was not given a planning permission and as a result was not allowed to stay in the caravan she had stationed on a piece of land she owned. Instead, Mrs Buckley was requested to apply for a spot at the official site designated for Roma nearby, a site she claimed was unsuitable for a single woman with children because of the crime and violence occurring there. The applicant had submitted that 'there was nothing in the wording of Article 8 or in the case law of the Court or Commission to suggest that the concept of "home" was limited to residences which had been lawfully established'.

The Court referred to the case of *Gillow v. the United Kingdom* discussed in Section 8.2.1.1. In this case it had held that the right to respect for the home was involved, even though the applicants had not lived in their house on Guernsey for quite a while. Important was that they had returned to live there with a view to taking up permanent residence.<sup>99</sup> Contrary to that of the Gillow family, in *Buckley* the applicant's home had not initially been established legally. Regardless of this fact, however, the Court held that similar factual considerations were relevant. As Mrs Buckley had lived on her land almost continuously since 1988 and was not planning to move elsewhere, the right to respect for her home was involved.<sup>100</sup>

This line of reasoning was confirmed four years later in *Chapman v. the United Kingdom*. This case was one in a series of five that concerned complaints of Roma who had bought a piece of land in a district without a Roma site,

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98 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92.

99 *Ibid.*, para. 54, referring to *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 46: '[T]he applicants had established the property in question as their home, had retained ownership of it intending to return there, had lived in it with a view to taking up permanent residence, had relinquished their other home and had not established any other in the United Kingdom. That property was therefore considered their "home" for the purposes of Article 8.'

100 *Ibid.*, para. 54.

with the aim of settling there.<sup>101</sup> Chapman was refused a planning permission and was advised to apply for a pitch for her caravan at an official site outside the district. In line with the *Buckley* judgment, the Court held that also here the right to respect for the home applied.

In fact, it seems that after *Buckley*, the only Roma housing case reviewed by the Court in which the applicability of the right to respect for the home was slightly less clear-cut, was the 2012 case of *Yordanova and Others v. Bulgaria*.<sup>102</sup> The reason for this was that four of the applicants had had their registered addresses elsewhere for unspecified limited periods. The government moreover argued that some of the applicants had aimed at obtaining municipal flats, suggesting that they were not planning to stay. However, since the Roma who had temporarily moved out had returned, and because there had not been any evidence adduced with regard to the government's assertion that the applicants had tried to obtain municipal housing, the Court sidestepped these points. It concluded that because of the factual links the applicants' houses in the Batalova Vodenitsa neighbourhood could be considered their 'homes' for the purposes of Article 8.<sup>103</sup>

In *Chapman*, the Court for the first time also discussed the right to respect for private and family life in relation to Roma housing issues.<sup>104</sup> In this case it stressed that 'the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle'.<sup>105</sup> Therefore,

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101 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95. The other four cases are *Beard v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 24882/94; *Coster v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 24876/94; *Lee v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 25289/94 and *Jane Smith v. the UK*, ECtHR (GC) 21 January 2001, appl. no. 25154/94.

102 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06. Cf. however the admissibility decision of the Court in *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05.

103 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, paras. 102-103. The fact that they – like the applicants in *Buckley* and *Chapman* – were not residing on land they at least owned themselves, was not considered material in this regard. See also *Buckland v. the UK*, ECtHR 18 September 2012, appl. no. 40060/08 (where the applicant had been legally residing on a caravan site, and the Court held that even though she intended to move anyway, the eviction order interfered with her right to respect for the home, since she wished to have the option to stay).

104 Already in *Buckley*, however, the applicant, together with the Commission, had argued that 'since the traditional Gypsy lifestyle involved living in caravans and travelling, [her] "private life" and "family life" were also concerned'. See *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 53. The Court however did not find it necessary to go into this matter.

105 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 73. According to the Court '[t]his is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence

'[m]easures affecting the applicant's stationing of her caravans ... have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition. The court finds, therefore, that the applicant's right to respect for her private life, family life and home is in issue in the present case.'<sup>106</sup>

Moreover, in *Yordanova and Others*, the Court held that

'[h]aving regard to the fact that the case concerns the expulsion of the applicants as part of a community of several hundred persons and that this measure could have repercussions on the applicants' lifestyle and social and family ties, it may be considered that the interference would affect not only their "homes", but also their "private and family life".'<sup>107</sup>

What can be inferred from this is that next to their particular lifestyle, also the community ties of Roma can add to the conclusion that in case of removal their private and family life would be affected.

In the 2013 case of *Winterstein and Others v. France*, the Court confirmed its earlier findings with regard to the applicability of the Convention.<sup>108</sup> The case concerned 25 French nationals living as travellers in the municipality of Herblay. After having lived there for many years the municipality had brought an action against them, ordering them to remove all their vehicles and caravans as well as any buildings from the site they unlawfully occupied. The judgment granting the order had not been enforced thus far, and meanwhile studies had been conducted with an eye to determining the situations of the persons concerned and assessing the options for alternative accommodation. However, no solutions had been found for the families who had requested alternative accommodation on family sites, rather than social housing. In this case, the Court straightforwardly held that the various aspects of Article 8 were engaged.<sup>109</sup>

What is notable about the Court's reasoning in *Winterstein* is its explicit discussion of whether or not there had been *an interference* with the applicants' rights. Whereas the government argued that this was not the case because of the limited effects (thus far) of the removal order, the Court had regard to fact that the eviction that was ordered concerned a community of nearly a hundred people, 'avec des répercussions inévitables sur leur mode de vie et

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and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children' (para. 73).

106 *Ibid.*, paras. 73-74.

107 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 105.

108 *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07.

109 *Ibid.*, paras. 141-142.

leurs liens sociaux et familiaux'.<sup>110</sup> This was reason to hold that there had already been an interference with their rights. Yet what it also shows is that the complaint – even though there was clearly a positive aspect to it as well – was merely labelled as one concerning negative duties. The same goes for *Buckley, Chapman* and *Yordanova*, where the Court also paid express attention to the question of 'whether there was an "interference" by a public authority'.<sup>111</sup> Because all of these cases involved the issue of eviction, it was not necessary for the Court to take any firm stance on whether Article 8 involves a *prima facie* right to adequate (alternative) housing for Roma as well.

This was different in the case of *Codona v. the United Kingdom*, which concerned the applicant's request for another site for her caravan instead of the bricks and mortar accommodation that was being offered.<sup>112</sup> Here the Court found it 'far from obvious that Article 8 is engaged'. In its decision it stated that there might be a positive obligation to provide for accommodation to homeless Roma that 'facilitates their "gypsy way of life"', but that such an obligation 'could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not "suitable" for the cultural needs of a gypsy'.<sup>113</sup> However, this was not so much an interpretive statement, but rather something the Court remarked in relation to the particular circumstances of the case and in order to conclude that because 'there is no appearance of a violation' the case was manifestly ill-founded. By mixing up the two stages and giving only one overall case-specific outcome, the Court failed to clarify whether in general, there are any *prima facie* positive rights related to Roma housing.<sup>114</sup> Arguably, its explication of the positive (minimum) guarantees that may fall within the scope of the Convention would result in a more transparent starting point for determining whether a case is admissible or whether an omission complained about is justified.<sup>115</sup>

Altogether, in its case law concerning Roma housing, the Court can be seen to have developed a consistent approach to the applicability of Article 8. Regardless of the illegality of a Roma settlement, and because of the Roma identity and lifestyle, it is clear that in case of (planned) eviction or removal the right to *respect* for the home and *respect* for private and family life are engaged. Thereby room is created for 'indivisible' review of the social housing concerns of Roma. At the same time, the Court has not dealt with the question

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110 *Ibid.*, para. 143.

111 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, paras. 56-60; *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, paras. 75-78; *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, paras. 102-106.

112 *Codona v. the UK*, 7 February 2006 (dec.), appl. no. 485/05.

113 *Ibid.*

114 See, on the importance of a 'bifurcated' approach, *supra*, Ch. 3, S. 3.2.1 and 3.3.3.

115 See also, *supra*, S. 8.2.2.

of whether the different cases are also considered to fall within the scope of Article 8 because of the positive requirements this provision brings along. However, notwithstanding the Court's 'negative' interpretation, the positive aspects of the different complaints have clearly played a role at the application stage.

### 8.3.2 Positive Obligations: Proportionality Review Demanded

The review of Roma housing issues under Article 8 ECHR takes place in a fairly *ad hoc*, case-specific fashion. That is, the Court tends to pay attention to the specific facts of the case at hand for deciding whether or not this provision had been violated. Still, the more general insights that can be distilled from the case law show some relevant trends.

The most interesting thread running through the Court's Roma housing judgments is the attention it pays to the procedural safeguards that have been available to the applicant(s). In the earlier Roma housing cases these procedural safeguards merely played a role in reviewing whether the 'negative' interference at stake was proportional. Seemingly influenced by the Court's growing recognition of the vulnerable position of Roma and the fact that this might imply positive measures, however, the procedural test has been given a 'positive twist'. In particular, procedural requirements have been linked to the issue of whether the state was required to provide for alternative, suitable housing, and have been concretised in such a way as to almost guarantee specific substantive outcomes. Thus, in discussing the review of the various Roma housing cases that were introduced in the previous section, particular attention is given to how this development concerning procedural protection in combination with positive obligations has come about. In doing so it is analysed whether and how this has added to the principledness of the Court's review.

An emphasis on procedural aspects was already visible in the first Roma housing case, *Buckley v. the United Kingdom*.<sup>116</sup> After holding that the refusal of a permit that would allow the applicant to reside on her own land was in accordance with law and served a legitimate aim,<sup>117</sup> the Court asked whether

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116 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92.

117 *Ibid.*, paras. 61-63. Especially the former requirement has proven easy to satisfy in all cases presented here. This has to do with the simple fact that the refusal of a permit as well as removal orders generally find a sufficient basis in domestic law. Also the legitimate aim requirement is generally not hard to meet. However, in the case of *Yordanova a.O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, the Court dealt more extensively with this issue. The applicants had submitted that ordered removal of the inhabitants of Batalova Vodenitsa was meant to benefit a private entrepreneur who wanted to develop the area, as well as 'to satisfy racist demands to free the area of an unwanted Roma settlement' (para. 109). In the end, the Court underlined the fact 'that there is a legitimate public interest in taking

the interference had been ‘necessary in a democratic society’. In the case of planning schemes that involve the state’s discretionary judgment ‘in the implementation of policies adopted in the interest of the community’, the ECtHR held that it cannot substitute the national authorities’ view as to what would be the best planning policy or individual measures for its own.<sup>118</sup> However,

[w]henver discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case-law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.<sup>119</sup>

The ECtHR held that in the case of *Buckley*, the procedural guarantees had been sufficient and this was reason to conclude that the interference was justified. It had been clear that the site the applicant and her children were requested to move to was not as satisfactory as the dwelling she had illegally established, yet according to the Court ‘Article 8 does not necessarily go so far as to allow individuals’ preferences as to their place of residence to override the general interest’.<sup>120</sup> Moreover, ‘[a]lthough facts were adduced arguing in favour of another outcome at national level’, the Court considered that the reasons given by the national authorities ‘were relevant and sufficient ... to justify the resultant interference with the exercise by the applicant of her right to respect for the home’.<sup>121</sup>

What the Court’s reasoning makes clear is that the requirement of procedural safeguards in *Buckley* merely served as an expression of a decidedly

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measures to cope with hazards such as those that may stem from an unlawful settlement of makeshift houses lacking sewage and sanitary facilities’ (para. 114).

118 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 75, referring to (among other cases) *Klass a. O. v. Germany*, ECtHR 6 September 1978, appl. no. 5029/71, para. 49.

119 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 76. Cf. also, on the importance of procedural safeguards in housing review under the Convention, *supra*, S. 8.2.1.1. Cf. Resolution 1740 (2010) of the Parliamentary Assembly of the Council of Europe, consideration 17: ‘As regards housing, the Assembly urges member states to ... 5. take urgent measures to prevent further forced evictions of Roma camps and settlements and – in cases of unavoidable evictions – ensure that such evictions are carried out only when all procedural protections required under international human rights law are in place, including the provision of adequate alternative housing, adequate compensation for expropriation and losses of moveable possessions damaged in the process of eviction; in the absence of such procedural protections, member states should introduce legislation on evictions, providing safeguards and remedies in accordance with international standards.’

120 *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 81.

121 *Ibid.*, para. 84.

deferential test. Since the procedural safeguards – including ‘relevant and sufficient’ reason-giving – were sufficient, the Court could more or less avoid the substantive issue of whether it was actually proportional to refuse the permit, or not.

Attached to the *Buckley* judgment were some quite strong dissenting opinions.<sup>122</sup> On the basis thereof, but also because meanwhile a number of international materials had been adopted or entered into force underlining the vulnerable position Roma and the need for addressing their situation in an adequate manner,<sup>123</sup> one could have expected the Court to take a stricter stance in the next Roma case. In *Chapman and Others v. the United Kingdom*,<sup>124</sup> the Court indeed made mention of the various international developments, and held that it was appropriate to have regard to changing conditions in the Member States.<sup>125</sup> At the same time, it was still

‘not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The framework convention [Council of Europe Framework Convention for the Protection of National Minorities], for example, sets out general principles and goals but the signatory States were unable to agree on means of implementation. This reinforces the Court’s view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection, and the interests of a minority with possibly conflicting requirements renders the Court’s role a strictly supervisory one.’<sup>126</sup>

The Court explicitly mentioned that, because of their vulnerable position, special consideration needs to be given to the needs of Roma as well as to their lifestyle and that ‘there is thus a positive obligation imposed on the

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122 Dissenting Judge Repik noted that the Court’s assessment in *Buckley* was quite formal, stressing procedural guarantees rather than the right at issue and its importance as well as the possible consequences for the applicant. He considered that in order to have fulfilled its supervisory role, the Court should have considered the proportionality of the issue. Dissenter Pettiti, on the other hand, argues that the Court did in fact take a material stance, by stating that the authority’s grounds were relevant. He stresses the ‘vicious circle’ persons like *Buckley* are caught in, because of an accumulation of all kinds of administrative rules that make it impossible to make suitable arrangements for Roma accommodation.

123 See the ‘relevant international texts’, in para. 55ff.

124 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95.

125 In the intervention by the European Roma Rights Centre, attention was drawn to a recent OSCE-report: ‘They submitted that there had emerged a growing consensus amongst international organisations about the need to take specific measures to address the position of Roma, inter alia, concerning accommodation and general living conditions. Articles 8 and 14 should therefore be interpreted in the light of the clear international consensus about the plight of Roma and the need for urgent action’ (*ibid.*, par. 89). See also para. 93.

126 *Ibid.*, para. 94.

Contracting States by virtue of Article 8 to facilitate the Gypsy way of life'.<sup>127</sup> At the same time, also in this case the Court merely paid lip service to the interests of the individuals concerned. It considered that the refusal of permitting Roma to occupy land, while there were not enough places available on authorised sites, could not in itself constitute a violation of Article 8. What also was considered relevant was that the home of the applicants had been established in an unlawful manner.<sup>128</sup> Further, the Court held that it was in principle for the national authorities to decide whether the alternative available to the applicants could be considered suitable.<sup>129</sup> Now that the applicant had not adduced any evidence regarding what would be suitable for her, the Court could not hold that the government's suggestion to move to another district where there might be places available was not a feasible one.<sup>130</sup> It concluded that

[t]he humanitarian considerations which might have supported another outcome at national level cannot be used as the basis for a finding by the Court which would be tantamount to exempting the applicant from the implementation of the national planning laws and obliging governments to ensure that every Gypsy family has available for its use accommodation appropriate to its needs.<sup>131</sup>

Indeed, this conclusion underlines that rather than looking at the needs of the individuals concerned, the Court relied on very broad reasoning and phrased the general interest in such weighty terms that it would seem to be impossible to be outbalanced by countervailing (individual) considerations.<sup>132</sup> Arguably, it thereby failed to recognise that somewhat more minimal requirements could have been demanded as well.<sup>133</sup>

In fact, it was already clear at the outset of the judgment that the case of *Chapman* would not be decided differently from *Buckley*. One of the first remarks the Grand Chamber made on the merits of the case was namely that 'while it is not formally bound to follow any of its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart without good reason, from precedents laid down in previous cases'.<sup>134</sup> Like in *Buckley*, in showing a significant degree of defer-

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127 *Ibid.*, para. 96.

128 *Ibid.*, para. 102.

129 *Ibid.*, para. 104.

130 *Ibid.*, para. 112.

131 *Ibid.*, para. 115.

132 Given that there were not enough sites available, the Court was unwilling to require states to make available an 'adequate number of sufficiently equipped sites', because it was not convinced that Article 8 implies 'such a far-reaching positive obligation of general social policy' (*ibid.*, para. 98). It thereby seemed to consider that finding a violation in this case would confer on *all* states the obligation to provide *all* Roma with adequate housing.

133 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 86.

134 *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 70.



ence the Court in *Chapman* partly relied on the fact that the regulatory framework contained adequate procedural safeguards.<sup>135</sup> Also here, thus, the requirement of procedural protection merely served as an additional ground to avoid the social housing matter concerned.

In contrast to *Buckley* and *Chapman*, in 2004 the Court in *Connors v. the United Kingdom* concluded that there had been a violation of Article 8 of the Convention.<sup>136</sup> However, this case differs from *Buckley* and *Chapman* in some important respects. First, the case concerned the withdrawal of a licence of Roma people for reasons of alleged misbehaviour. There had thus been *lawful* residence and what was at hand was the 'classical' interference as such, without there being any underlying issue concerning the state's responsibility for the provision of (alternative) housing. Secondly, in this case the Court found that the applicable procedural guarantees did not suffice. This was the case because for reasons of flexibility in the management of Roma sites, the eviction of the Connors family could be enforced without any proof of a breach of license.<sup>137</sup> Noticing that 'this case is not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of persons',<sup>138</sup> the Court could find a violation of the Convention without having to move even slightly into the direction of recognising more 'social' housing obligations.

In line with this, in *Connors* the Court explicitly narrowed the margin of appreciation, stressing that '[w]here general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant'.<sup>139</sup> If one looks at the facts of this case as well as to those of *Buckley* and *Chapman*, however, the interests of the respective applicants do not seem all that much different, though in the latter cases there was no room for narrowing the leeway granted to the state.<sup>140</sup> Arguably, therefore, it was in fact merely due to the distinctly negative character of the claim in *Connors*, rather than the individual interest at stake, that the Court was willing to overcome its normally very deferential attitude and provide for 'indivisible' fundamental rights protection. It seemed more willing to find in favour of

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135 *Ibid.*, para. 114.

136 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04.

137 Cf. also *Buckland v. the UK*, ECtHR 18 September 2012, appl. no. 40060/08, where a violation was found because the applicant had been unable to challenge the making of a possession order based on her personal circumstances.

138 *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 86.

139 *Ibid.*, para. 82.

140 See, on this point, Koch 2009, p. 124.

Connors because the implications of doing so were likely to be less far-reaching than when a violation would have been found in *Buckley* or in *Chapman*.<sup>141</sup>

Some years after *Connors*, a next step in the direction of more positive (procedural) protection for Roma housing interests was taken in the judgment in *Yordanova and Others v. Bulgaria*.<sup>142</sup> Again this case at first glance merely concerned a negative interference in the form of the planned removal of unlawfully residing Roma. Yet it seems from this judgment that the Court here eventually fully appreciated the vulnerable position of Roma, and was willing to ensure effective protection in the field of housing regardless of the demanding obligations that might evolve from this. Like in the earlier Roma housing cases the Court found that the impugned removal order concerning Yordanova and other inhabitants of the Batalova Vodenista neighbourhood had a valid legal basis. The question it had to answer was nevertheless whether the applicable domestic legal framework and the procedures available complied with the Convention.<sup>143</sup>

While reviewing the proportionality of the interference with the applicants' rights, the Court repeated that the margin of appreciation varies according to the nature of the convention right and its importance for the individual, as well as the nature of the aim pursued by the restrictions. It held that 'in this respect' the following relevant considerations could be noted:<sup>144</sup> 1) in spheres involving the application of social or economic policies the margin is wide, as is the case in the planning context; but 2) the margin might be narrower whenever what is at stake for the applicant 'is crucial to the individual's effective enjoyment of key rights'. Further, 3) procedural safeguards are 'especially material', so that 4) any person at risk of losing his home, which the Court considers the most extreme form of interference with one's right to respect for the home,

'should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation ... This means, among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant

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141 Indeed, obliging a state to ensure sensible procedural protection against arbitrary removal has less (budgetary) consequences than (indirectly) recognising the obligation to offer alternative, suitable accommodation for Roma and making sure that they do not end up in a deplorable situation.

142 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06.

143 *Ibid.*, paras. 107-108.

144 *Ibid.*, para. 118.

in domestic legal proceedings, the domestic courts should examine them in detail and provide adequate reasons.<sup>145</sup>

And finally, 5)

'[w]here the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home.'<sup>146</sup>

On the basis of these general principles, the Court concluded that the prospective removal of the applicants was not justified under Article 8. Relevant was the fact that they had been tolerated for several decades and that no alternative solutions had been sought for the risks associated with the applicants' housing lacking basic sanitary and building requirements. The authorities had not considered the risk of the applicants' becoming homeless, even though they had signed an agreement containing an undertaking to secure alternative shelter.<sup>147</sup> Moreover, they had refused to consider approaches especially tailored to the needs of Roma, arguing that this would amount to discrimination against the majority population.<sup>148</sup>

In the end, thus, the reason for finding a violation was not so much that the Court itself concluded that the measure was disproportional. Instead, it considered decisive that the proportionality of this measure had not at all been reviewed at the national level.<sup>149</sup> At first glance, this conclusion seems to fit in well with the procedural approach taken in the earlier Roma housing cases, in the sense that it helped the Court to avoid the actual, sensitive matter concerned. Yet given the substantive hints concerning what the required

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145 *Ibid.* See, for this proportionality requirement in earlier cases, e.g., *McCann v. the UK*, ECtHR 13 May 2008, appl. no. 19009/04, para. 50; *Kay and Others v. the UK*, ECtHR 21 September 2010, appl. no. 37341/06, para. 68: '[T]he loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end'. Also in *Buckland v. the UK*, ECtHR 18 September 2012, appl. no. 40060/08, the proportionality requirement was underlined. There, the applicant had no possibility to challenge the making of a possession order on the basis of personal circumstances.

146 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 118.

147 *Ibid.*, para. 126.

148 *Ibid.*, para. 128.

149 See *ibid.*, para. 144, where the ECtHR held that the enforcement of the removal order would violate Article 8, as this order 'was based on legislation which did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference but also involved a failure to consider the question of "necessity in a democratic society"'.

proportionality review should be about – the interests of and risks for the individuals at stake, possible (tailor-made) alternatives, etc. – the Court's approach can be understood as procedural review 'taken to another level'. Focusing on the fact that too little, if any, attention had been given to the individual interests at stake, as well as for example to the length of the period the applicants had lived undisturbed in *Batalova Vodenitsa*,<sup>150</sup> the requirement of proportionality review in fact becomes a requirement that is procedural in nature yet also has a clearly substantive dimension. Hence, it can be derived from the judgment the even while the complaint is presented as one concerning a negative interference, the procedural obligation imposed is anything but purely negative, and indeed quite social in kind.

Arguably, by phrasing its test in procedural terms, the Court was able to ensure transparent review that leaves the decision-making to the national authorities while guaranteeing effective social protection. What can be inferred from the judgment is that 'if forcibly removed persons do not have a self-standing right to be re-housed, they nevertheless have the right to have the state consider their risk of becoming homeless as well as their possibilities to be re-housed, potentially with the state's support'.<sup>151</sup> Seen in this way, the 'procedural breach' found in *Yordanova and Others* can be viewed as a concrete step towards actual indivisible protection of the interests of Roma under Article 8.

The 2013 judgment in the Roma case of *Winterstein and Others v. France* confirms this development.<sup>152</sup> Also in this case the ECtHR highlighted certain concrete procedural shortcomings and on the basis thereof it found a breach of the Convention. What makes this judgment especially interesting, however, is the conclusion that there had been another, separate violation of Article 8 in respect of the applicants who had not been provided with alternative accommodation. *Winterstein and Others* concerned the proceedings brought against a number of traveller families who had been living on the same spot for many years. In 2005, the domestic courts had issued orders for the families'

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150 *Ibid.*, para. 122. The Court in this context found that 'the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This has not been done in the present case.' (para. 33). This conclusion could not be altered by what the measures taken after 2005-2006, when the removal order was reviewed by the domestic courts. These could not make up for the authorities' failure to address the proportionality of the interference in the first place. See also para. 144, where it was stated that the enforcement of the removal order would violate Art. 8 because it 'was based on legislation which did not require the examination of proportionality and was issued and reviewed under a decision-making procedure which not only did not offer safeguards against disproportionate interference but also involved a failure to consider the question of "necessity in a democratic society"'.  
151 Rémiche 2012, p. 798.  
152 *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07.

eviction, on pain of penalty for non-compliance, because of the lack of the necessary permits and the resulting breach of the land-use plan. The orders were upheld by the Court of Appeal, but had not been enforced. Instead, a study was conducted in order to assess the situations of the individuals involved. For those who wished to be provided with alternative accommodation on family sites, no solution had been found and these families continued living in precarious conditions.

The Court held that the interference with the applicants' rights under Article 8 had been in accordance with the law and pursued a legitimate aim, namely the protection of 'des "droits d'autrui" par le biais de la défense de l'environnement'.<sup>153</sup> Like in *Yordanova and Others*, the Court under the heading 'Rappel des principes' summed up the considerations relevant for determining the margin of appreciation and reviewing the case at hand. The lists are very similar in both judgments, although the Court in *Winterstein and Others* provided further clarification as to the specific Roma interests a proportionality test at the national level should take into account.<sup>154</sup> In the words of the Court:

'ε) Pour apprécier la proportionnalité d'une mesure d'expulsion, il y a lieu de tenir compte en particulier des considérations suivantes: si le domicile a été établi légalement, cela amoindrit la légitimité de toute mesure d'expulsion et à l'inverse, s'il a été établi illégalement, la personne concernée est dans une position moins forte; par ailleurs si aucun hébergement de rechange n'est disponible, l'ingérence est plus grave que si un tel hébergement est disponible, son caractère adapté ou pas s'appréciant au regard, d'une part, des besoins particuliers de l'individu et, d'autre part, du droit de la communauté à voir protéger l'environnement ...;

ζ) Enfin, la vulnérabilité des Roms et gens du voyage, du fait qu'ils constituent une minorité, implique d'accorder une attention spéciale à leurs besoins et à leur mode de vie propre tant dans le cadre réglementaire valable en matière d'aménagement que lors de la prise de décision dans des cas particuliers ... ; dans cette mesure, l'article 8 impose donc aux États contractants l'obligation positive de permettre aux Roms et gens du voyage de suivre leur mode de vie.<sup>155</sup>

Moving to the facts of the case, the Court referred to *Yordanova and Others* and underlined that arguments made by the parties concerning Articles 3 and 8 of the Convention had not been considered at the national level. Moreover, the authorities had failed to provide any argument for why the removal would be 'necessary'.<sup>156</sup> This was sufficient for the Court to find a first violation of the Convention, but it did not stop here. With the help of explicit references

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153 *Ibid.*, para. 146.

154 *Ibid.*, para. 148.

155 *Ibid.*, para. 148.

156 *Ibid.*, para. 157.

to Council of Europe and other materials, the Court underlined once more the vulnerable position of Roma and the positive obligations of the state in this regard.<sup>157</sup> More precisely, the vulnerable position of Roma needed to be taken into account ‘non seulement lorsqu’elles envisagent des solutions à l’occupation illégale des lieux, mais encore, si l’expulsion est nécessaire, lorsqu’elles décident de sa date, de ses modalités et, si possible, d’offres de relogement’.<sup>158</sup> This had not been properly done by the national authorities. After the situations of the families involved had been assessed in the study conducted by the municipal authorities, some of them – in line with their wishes – had obtained social housing. With regard to these individuals, the Court held that a sufficient solution had been found.<sup>159</sup> However, those who had wanted to obtain alternative accommodation on family sites still found themselves in very difficult circumstances, since either they had stayed, continuously facing the enforcement of the order under penalty, or they had left but without finding any adequate alternative. Therefore, next to the fact that the lack of review of the proportionality of the order of itself already constituted a breach of the Convention, Article 8 had also been violated because in the context of the provision of alternative accommodation, the needs of the applicants had not been sufficiently taken into account.<sup>160</sup>

The *Winterstein and Others* judgment thus suggests that even if the national authorities have reviewed whether the interference (the (planned) removal) was proportional and have thereby taken the special interests of Roma into account, *i.e.*, even if the procedural requirements formulated in earlier judgments have been met, the Court can still conclude that their efforts in regard of the provision of alternative accommodation were insufficient. Indeed, the only thing that still seems lacking is the Court’s explicit recognition of a general positive obligation for states to provide vulnerable Roma with (suitable) alternative accommodation, at least when they would otherwise become homeless or would have to live in very severe conditions. After all, it was concluded that especially at the interpretation stage the Court still views the Roma housing cases as primarily ‘negative’, and that any concrete positive implications of Article 8 remain unnoticed. It has become clear that throughout the years the Court has come closer to recognising the protection of vulnerable groups against homelessness as an essential element of protection in the field of housing. Nonetheless, for its approach to become a truly principled one, it would be helpful for it to turn this into a transparent (minimum) standard on the basis of which it can then conduct its case-specific (procedural) review.

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157 *Ibid.*, paras. 159-160.

158 *Ibid.*, para. 160.

159 *Ibid.*, para. 161.

160 *Ibid.*, para. 167.

Finally, a few remarks can be made on the issue of discrimination in Roma housing cases. In all of the Roma cases just presented, the applicants also explicitly relied on the prohibition of discrimination (Article 14 ECHR). Especially given that discrimination is one of the most precarious issues when Roma are concerned,<sup>161</sup> it might come as a surprise that in none of these a violation of the non-discrimination principle was found. The Court seems remarkably hesitant to address this matter, stating in relatively brief terms that the discrimination complaint was not substantiated, or that it is no longer necessary to deal with the issue. In *Buckley v. the United Kingdom*, for example, the Court held that

[i]t does not appear that the applicant was at any time penalised or subjected to any detrimental treatment for attempting to follow a traditional Gypsy lifestyle. In fact, it appears that the relevant national policy was aimed at enabling Gypsies to cater for their own needs.<sup>162</sup>

In *Chapman v. the United Kingdom*, it was considered that because the interference under Article 8 was proportionate, there was no reason to conclude on a violation of Article 14.<sup>163</sup> Similarly, where there was a violation of Article 8, the Court stated that ‘no separate issue’ arose with regard to non-discrimination.<sup>164</sup>

In regard to these considerations it can be concluded that, if anything, the Court does not treat the requirement of non-discrimination as a ‘core issue’ in relation to Roma housing issues that is worth attention for reasons of its own. Although it can be argued that sometimes the Court implicitly takes into account equal treatment concerns in discussing the complaint under Article 8 – by stressing, in fact, that extra attention must be had to the needs of Roma –, Article 14 hardly plays a role in these cases. Of course, it is difficult for the Court to engage in review of often implicit or indirect unequal treatment or discrimination. Yet stating that it is ‘no separate issue’, while finding a violation foremost on the basis of procedural shortcomings, fails to explicitly address what the applicants probably consider is an essential aspect of their complaints.

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<sup>161</sup> In the introduction to this section, reference was already made to a Resolution by the Parliamentary Assembly of the Council of Europe (Resolution 1740 (2010)) that mentions ‘the vicious circle of discrimination in which most of the Roma are locked’.

<sup>162</sup> *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 88.

<sup>163</sup> *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 129: ‘Having regard to its findings above under Article 8 of the Convention that any interference with the applicant’s rights was proportionate to the legitimate aim of preservation of the environment, the Court concludes that there has been no discrimination contrary to Article 14 of the Convention.’

<sup>164</sup> *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 97; *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 149; *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07, para. 179.

### 8.3.3 Narrowing the Wide Margin in Cases Concerning Planning

The Court's use of the margin of appreciation in Roma housing cases has already been touched upon a few times in the previous subsection. Nevertheless, it is worth highlighting that the cases discussed above signal a slight move away from a wide margin of appreciation in cases concerning social and economic policy, to one that can be narrower, or is at least determined while explicitly having regard to the personal needs and interests of the applicants.

Originally, in *Buckley v. the United Kingdom* and *Chapman v. the United Kingdom* the Court accorded a wide margin of appreciation to the state. In line with other judgments dealing with socio-economic and planning matters, it there held that '[in] so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation'.<sup>165</sup> Although it also mentioned that the importance of the right at stake for the applicant and her family had to be taken into account, it concluded that the decision not to let the applicant reside on her own land did not exceed this wide margin. In *Chapman v. the United Kingdom* the Grand Chamber similarly held that in determining whether there has been a 'manifest error of appreciation', the procedural safeguards available to the individual will be 'especially material'.<sup>166</sup> 'In principle', however, the applicable margin was a wide one.<sup>167</sup> This approach was criticised by the dissenters in the case. These noted that 'a wide margin of appreciation in the choice and implementation of planning policies ... cannot apply automatically to any case which involves the planning sphere'.<sup>168</sup>

As was discussed in the previous section, the judgment in *Connors v. the United Kingdom* signalled a greater emphasis on what is at stake for the individual. The Court's reference in this case to the 'generally wide' margin in planning cases seemed somewhat reluctant: It held that 'in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide', yet it seemed unwilling to attach much weight to

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<sup>165</sup> *Buckley v. the UK*, ECtHR 29 September 1996, appl. no. 20348/92, para. 75.

<sup>166</sup> *Chapman v. the UK*, ECtHR (GC) 18 January 2001, appl. no. 27238/95, para. 92: 'In these circumstances, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.'

<sup>167</sup> *Ibid.*, para. 92.

<sup>168</sup> *Ibid.*, joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Strážnická, Lorenzen, Fischbach and Casadevall, para. 3. They referred to the fact that the Convention always needs to be interpreted and applied in the light of the current circumstances, and to the emerging consensus regarding the special needs of minorities and the obligations to protect them.



this authority.<sup>169</sup> Instead, it considered that '[t]he margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate key rights'.<sup>170</sup> Moreover, distinguishing the case at hand from issues concerning Article 1 of Protocol No. 1, it stated that

'[w]here general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.'<sup>171</sup>

Thus, in the context of Article 8, 'which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community', the Court seemed willing to overcome a 'generally wide margin' and foreground the interests of the applicant.<sup>172</sup>

However, in line with what was said before, it can be argued that the Court in *Connors* opted for a stricter form of review mainly also because of the classic character of the interference concerned. That is, it was willing to narrow the margin having regard to the individual interest concerned, because this interest was explicitly 'negative'. At least, this might explain why it did not narrow the margin in the earlier cases of *Buckley* and *Chapman*, even though all of the applicants in fact faced similar risks.

In *Yordanova and Others v. Bulgaria* and *Winterstein and Others v. France*, the Court eventually seemed to fully acknowledge that the automatic application of a wide margin of appreciation whenever a case concerns socio-economic policy does not live up to the promise of effective protection under the Convention. Even though (the potential implications of) *Yordanova* and *Winterstein* could be considered more positive in nature (than was the case in *Connors*), this was no reason for determining the margin solely on the basis of the social policy field concerned. Although the official starting point remained the wide margin applicable to issues concerning socio-economic policy, the Court repeated here that the margin can be narrowed when 'intimate key rights' are at stake or in other words 'que le droit en cause est important pour garantir

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<sup>169</sup> *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 82.

<sup>170</sup> *Ibid.*, referring to *Dudgeon v. the UK*, ECtHR 10 October 1981, appl. no. 7525/76, para. 82 and *Gillow v. the UK*, ECtHR 24 November 1986, appl. no. 9063/80, para. 55. The Court, however, does not go into the matter of what are 'intimate or key rights', and whether or not these were at stake in the present case.

<sup>171</sup> *Connors v. the UK*, ECtHR 27 May 2004, appl. no. 66746/04, para. 82. Referring to *Hatton v. the UK*, ECtHR (GC) 8 July 2003, appl. no. 36022/97, paras. 103 and 123.

<sup>172</sup> *Cf., infra*, Ch. 10, Sections 10.3.3 and 10.4.3.

à l'individu la jouissance effective des droits fondamentaux ou d'ordre "intime" qui lui sont reconnus'.<sup>173</sup>

Nevertheless, the Court's 'indivisible' use of the margin of appreciation in *Yordanova* and *Winterstein* can be criticised for not being very lucid. Next to the individual interests concerned – and the key importance thereof – the Court in these cases holds that also the availability of procedural safeguards and the question whether or not there had been a proportionality analysis at the national level are relevant as factors determining the applicable margin.<sup>174</sup> On the basis of the discussion in Section 8.3.2, however, it can be asked whether these procedural demands were in fact not more than mere indicators of the strictness of the test. For the clarity of the Court's review this is a relevant issue. Considered to be one of the factors that determine the margin, the availability of procedural safeguards is not likely to be decisive in the substantive review of proportionality. On the other hand, in the two judgments, the question of whether the national authorities conducted a proportionality test seemed to be a crucial element in the Court's review of the reasonableness of the national measures. The question is hence whether the issue of national proportionality review indeed functions as a self-standing, and moreover essential requirement not only relevant to the leeway the state should be granted, but decisive for the outcome of the case. And if this is indeed the case, what role is then left for the margin of appreciation? Especially now that the Court has moved towards a more proactive and positive rights-oriented approach to Roma housing issues, it is important that this issue be resolved.

## 8.5 CONCLUSION

In this chapter, multiple examples have been given of the Court's protection in the field of housing. Special emphasis was thereby placed on positive and/or 'social' housing issues, *i.e.*, on the way in which the Court deals with the interests of those not owning a house or lacking the means or possibilities for finding a (suitable or alternative) place to live. It is in cases concerning these issues that the tension that underlies this research, namely that between providing effective and indivisible protection while showing deference to the Member States and providing the necessary guidance, becomes most visible. Discussing the various examples, the question was asked whether the Court in cases concerning housing 'strikes a fair balance' between these different demands.

Section 8.2 started from the different Convention rights that are relevant in the housing sphere. It was shown that whereas some of these provide for

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173 *Yordanova a. O. v. Bulgaria*, ECtHR 24 April 2012, appl. no. 25446/06, para. 118, and *Winterstein a. O. v. France*, ECtHR 17 October 2013, appl. no. 27013/07, para. 148, respectively.

174 *Ibid.*

a 'natural' connection with this topic, due to the Court's interpretation of several provisions room has been created for more indivisible protection in this field. The right to respect for the home, for example, has been explained in a broad manner. It is sufficient when there are 'sufficient and continuing links' with a specific place, and a 'home' can therefore also be a flat or plot of land where someone illegally resides. In determining whether the right to respect for the home is breached, however, the Court generally grants a wide margin of appreciation, and is hesitant to interfere in the socio-economic and planning policies decided upon at the national level. Nevertheless, it is important that individuals who are confronted with an interference with their home and risk becoming homeless, are provided with adequate procedural safeguards.

The analysis made of the respect for private and family life limb of Article 8 is relevant for purposes of this chapter mainly because it disclosed the Court's recognition of positive obligations in the housing sphere. At the same time, the analysis revealed that although it regularly holds that such obligations *might* exist, the Court refrains from clarifying when exactly these apply and what they entail. That is, it deals with positive obligations in a very case-specific fashion, and it can be asked whether its reasoning thereby provides sufficient guidance.

Besides Article 8 also Articles 1 P1, Article 14, and Article 3 of the Convention have been shown to be (indirectly) relevant in relation to housing needs. Article 1 P1, first, seems to allow some room for social considerations both when it comes to the interpretation and the application of this article. However, housing needs at most play a subordinate, indirect role, and it can be said that Article 1 P1 is hence not the place for developing indivisible housing protection. Article 14 provides for protection against discrimination. It was shown that when states provide for housing assistance or other social measures, they must do so in a non-discriminatory fashion. This does not mean that differential treatment is not allowed for. Indeed, particularly in the social policy sphere distinctions must be made, and it is therefore not likely that the Court will often find a breach of the Convention in this regard. Article 3, then, at first glance may appear to have little to do with housing. Nevertheless, in several cases the Court has clarified that individual housing situations can be reason for finding that the prohibition of inhuman or degrading treatment has been violated. Arguably, this article protects a kind of 'minimum protection' in this field, yet thus far the Court has failed to indicate that this is indeed the reason for why sometimes protection is granted.

Section 8.3 concerned a case study of the Strasbourg protection offered in cases concerning Roma housing. This topic was selected because it allows for obtaining an interesting image of the development of the Court's role in relation to housing matters. The cases discussed have made clear that over the years the Court has started to provide more indivisible protection in this field. This appears from the fact that it by now clearly indicates that the wide

margin in cases concerning planning can be narrowed in case 'key' individual interests are concerned. Moreover, although it hardly says anything on the positive dimension of Article 8 in cases concerning Roma at the interpretation stage, in its review the Court pays particular attention to whether the applicants' needs were duly considered at the national level, also in regard to the provision of alternative accommodation suitable to the needs of Roma. Phrasing this in terms of procedural protection, it can be said that the Court has found a middle way that allows for providing positive, indivisible protection, while not directly substantively interfering with the decisions made at the national level. What could potentially still improve the Court's approach to housing issues concerning Roma and other vulnerable individuals and groups, would be to distil from the various judgments some general, minimum rights and duties, that could then serve as clear standards both in interpreting and applying the Convention.

