



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

GRAND CHAMBER

CASE OF GARIB v. THE NETHERLANDS

(Application no. 43494/09)

JUDGMENT

STRASBOURG

6 November 2017

This judgment is final but it may be subject to editorial revision.

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In the case of Garib v. the Netherlands,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Işıl Karakaş,
Vincent A. De Gaetano,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Jon Fridrik Kjølbro,
Georges Ravarani,
Gabriele Kucsko-Stadlmayer,
Tim Eicke, *judges*,
Egbert Myjer, *ad hoc judge*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 25 January and 6 July 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 43494/09) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Netherlands national, Ms Rohiniedevie Garib (“the applicant”), on 28 July 2009.

2. The applicant was represented by Mr R.S. Wijling, a lawyer practising in Rotterdam. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker of the Ministry of Foreign Affairs.

3. The applicant alleged that the restrictions to which she was subjected in choosing her place of residence were incompatible with Article 2 of Protocol No. 4 to the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 23 February 2016 a Chamber of that Section composed of Judges Luis López Guerra, *President*,

Helena Jäderblom, George Nicolaou, Helen Keller, Johannes Silvis, Branko Lubarda and Pere Pastor Vilanova, and also of Stephen Phillips, Section Registrar, declared the application admissible and held, by five votes to two, that there had been no violation of Article 2 of Protocol No. 4. The joint dissenting opinion of Judges López Guerra and Keller was annexed to the judgment. On 23 May 2016 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 12 September 2016 the panel of the Grand Chamber granted that request.

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. Mr Johannes Silvis, the judge elected in respect of the Kingdom of the Netherlands, having left the Court, on 15 September 2016 the President of the Court appointed Mr Egbert Myjer to sit as an *ad hoc* judge in his place (Article 26 § 4 of the Convention and Rule 29). At the final deliberations, Judge Gabriele Kucsko-Stadlmayer, substitute judge, replaced Judge András Sajó, who was unable to take part in the further consideration of the case (Rule 24 § 3). Ms Mirjana Lazarova-Trajkovska, whose term of office expired on 1 February 2017, continued to sit in the case (Article 23 § 3 of the Convention and Rule 24 § 4).

6. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits. In addition, joint third-party comments were received from the Human Rights Centre of Ghent University and the Equality Law Clinic of the Université libre de Bruxelles, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 January 2017 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr R.A.A. BÖCKER, Ministry of Foreign Affairs,	<i>Agent,</i>
Ms M.J. VAN AMERONGEN, Ministry of the Interior and Kingdom Relations,	
Mr V. MOORS, Ministry of the Interior and Kingdom Relations,	
Ms E. SCHARPHOF, Ministry of the Interior and Kingdom Relations,	
Mr M. METIN, Municipality of Rotterdam,	<i>Advisers;</i>

(b) *for the applicant*

Mr R.S. WIJLING,	
Ms K. AZGHAY,	<i>Counsel.</i>

The Court heard addresses by Mr Wijling, Ms Azghay and Mr Böcker, and also their answers to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1971 and now lives in Vlaardingen.

9. On 25 May 2005 the applicant moved to the city of Rotterdam. She took up residence in rented property at the address A. Street 6b. This address is located in the Tarwewijk district in South Rotterdam. The applicant had previously resided outside the Rotterdam Metropolitan Region (*Stadsregio Rotterdam*).

10. The applicant stated that no later than early 2007 the owner of the property asked her and her two young children to vacate the property as he wished to renovate it for his own use. He offered to let the applicant a different property at the address B. Street 72A, also in the Tarwewijk area. She further stated that, since it comprised three rooms and a garden, the property was far more suitable for her and her children than her A. Street dwelling which comprised a single room. However, whether the A. Street property was actually renovated or required renovation at all remains in dispute (see paragraph 83 below).

11. In the meantime on 13 June 2006, Tarwewijk had been designated under the Inner City Problems (Special Measures) Act (*Wet bijzondere maatregelen grootstedelijke problematiek*, see paragraph 21 below) as an area where only those households could move into housing who had been granted a housing permit (*huisvestingsvergunning*) to do so in relation to an identified property. Accordingly, on 8 March 2007 the applicant lodged a request for a housing permit with the Burgomaster and Aldermen (*burgemeester en wethouders*) of Rotterdam in order to be permitted to move to B. Street 72A.

12. On 19 March 2007 the Burgomaster and Aldermen gave a decision refusing such a permit. They found it established that the applicant did not satisfy the statutory requirements for a housing permit (see paragraph 21 below) on the basis that she had not been resident in the Rotterdam Metropolitan Region for six years immediately preceding the introduction of her request. Moreover, since she was dependent on social-security benefits under the Work and Social Assistance Act (*Wet Werk en Bijstand*), she also did not meet the income requirement that would have qualified her for an exemption from the residence requirement.

13. The applicant, who was represented throughout the domestic proceedings and before the Court by the same lawyer, lodged an objection (*bezwaarschrift*) with the Burgomaster and Aldermen.

14. On 15 June 2007 the Burgomaster and Aldermen gave a decision dismissing the applicant's objection. Adopting as their own an advisory opinion by the Objections Advisory Committee (*Algemene bezwaarschriftencommissie*), they referred to the fact that housing permits

were intended to be an instrument to ensure the balanced and equitable distribution of housing and to the possibility for the applicant to move to a dwelling not situated in a “hotspot” area.

15. The applicant lodged an appeal (*beroep*) with the Rotterdam Regional Court (*rechtbank*). In so far as relevant to the case, she argued that the hardship clause ought to have been applied. She relied on Article 2 of Protocol No. 4 of the Convention and Article 12 of the 1966 International Covenant on Civil and Political Rights. She also submitted that the requirement of six years’ residence in the Rotterdam Metropolitan Area, as applied to her, constituted discrimination based on income status contrary to Article 26 of the International Covenant on Civil and Political Rights.

16. The Regional Court gave a decision dismissing the applicant’s appeal on 4 April 2008 (ECLI:NL:RBROT:2008:BD0270). In so far as relevant to the case before the Court, its reasoning was as follows:

“Section 8(1) of the Inner City Problems (Special Measures) Act [see paragraph 21 below] provides for the possibility of temporary restrictions on freedom of residence in areas to be indicated by the Minister [sc. the Minister of Housing, Spatial Planning and the Environment (*Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*)]. The aim of these restrictions is to reverse a process of overburdening and decreasing quality of life (*leefkwaliteit*), particularly by striving towards districts whose composition is more mixed from a socioeconomic point of view. The restrictions are also intended actively to counteract the existing segregation of incomes throughout the city through the regulation of the supply of housing in certain districts and in so doing improve the quality of life of the inhabitants of those districts (Parliamentary Documents, Lower House of Parliament (*Kamerstukken II*) 2004/2005, 30 091, no. 3 [i.e. the Explanatory Memorandum (*Memorie van Toelichting*)], see paragraph 31 below], pages 11-13). In view of the aims of the law, as set out, these temporary restrictions on the freedom to choose one’s residence cannot be found not to be justified by the general interest in a democratic society. Nor can it be found that, given the considerable extent of the problems noted in certain districts in Rotterdam, the said restrictions are not necessary for the maintenance of *ordre public*. The Regional Court takes the view that the legislature has sufficiently shown that in those districts the ‘limits of the capacity for absorption’ have been reached as regards care and support for the socioeconomically underprivileged and that moreover in those districts there is a concentration of underprivileged individuals in deprived districts as well as considerable dissatisfaction among the population about inappropriate behaviour, nuisance and crime.

As regards the violation of Article 26 of the International Covenant on Civil and Political Rights posited by [the applicant], the Regional Court takes the view that sufficient reasons have been given (Parliamentary Documents, Lower House of Parliament, 2004/2005, 30 091, no. 3, pp. 18-20) that in so far as these measures constitute an indirect distinction, this distinction has sufficient objective justification.

The Regional Court observes in this connection that the restrictions based on the Inner City Problems (Special Measures) Act imposed by the 2003 Housing By-law [of the Municipality of Rotterdam] (*Huisvestingsverordening 2003*) constitute only a minimal and temporary restriction on the freedom to choose one’s residence. In so finding, the Regional Court notes that it does not appear – and [the applicant] has not made out a case – that [she] cannot obtain fitting housing elsewhere in the Municipality or the Region.”

17. The applicant lodged a further appeal (*hoger beroep*) with the Administrative Jurisdiction Division (*Afdeling bestuursrechtspraak*) of the Council of State (*Raad van State*). As she had done before the Regional Court, she invoked Article 2 of Protocol No. 4 to the Convention and Articles 12 and 26 of the International Covenant on Civil and Political Rights.

18. On 4 February 2009 the Administrative Jurisdiction Division gave a decision (ECLI:NL:RVS:2009:BH1845) dismissing the applicant's further appeal. In so far as relevant to the case before the Court, its reasoning included the following:

“2.3.2. The right freely to choose one's residence, provided by Article 2 of Protocol No. 4, may, under the fourth paragraph, be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society. The right of everyone freely to choose one's residence, laid down in Article 12 § 1 of the International Covenant on Civil and Political Rights, shall not be subject to any restrictions except those which are provided by law and are necessary to protect public order. The Administrative Jurisdiction Division observes in this connection that the concept 'public order' in the Covenant includes, in addition to the prevention of disorder, public safety, the prevention of crime and all universally accepted fundamental principles corresponding to human rights on which a democratic society is based. The arrangement set out in section 2.6(2) of the 2003 Housing By-law constitutes a restriction on Garib's free choice of a place of residence. It is not disputed that this restriction is provided for by law and is inspired by the interest that society has in [ensuring] the quality of life in districts of major cities. The Administrative Jurisdiction Division finds that, considering that the area in issue is one designated under section 5 of the Inner City Problems (Special Measures) Act, the Burgomaster and Aldermen were entitled to take the view that the restriction [on freedom to choose one's residence] is justified in the general interest in a democratic society within the meaning of Article 12 § 3 of the 1966 International Covenant on Civil and Political Rights. The area in issue is a so-called 'hotspot', where, as has not been disputed, the quality of life is under threat. The restriction resulting from section 2.6(2) of the 2003 Housing By-law is of a temporary nature, namely for up to six years. It is not established that the supply of housing outside the areas designated by the Minister in the Rotterdam Metropolitan Region is insufficient. What [the applicant] has stated about waiting times does not lead the Administrative Jurisdiction Division to reach a different finding. The Administrative Jurisdiction Division further takes into account that pursuant to section 7(1), introductory sentence and under b of the Inner City Problems (Special Measures) Act, the Minister is empowered to rescind the designation of the area if it turns out that persons seeking housing do not have sufficient possibility of finding suitable housing within the region in which the municipality is situated. In view of these facts and circumstances the Administrative Jurisdiction Division finds that the restriction in issue is not contrary to the requirements of a pressing social need and proportionality. The Administrative Jurisdiction Division therefore finds, as the Regional Court did, that section 2.6(2) of the 2003 Housing By-law does not violate Article 2 of Protocol No. 4 of the Convention or Article 12 of the 1966 International Covenant on Civil and Political Rights.

2.3.3. As to Garib's argument that section 2.6(2) of the 2003 Housing By-law violates Article 26, first sentence, of the International Covenant on Civil and Political Rights because it entails an indirect distinction, the Administrative Jurisdiction

Division holds as follows. Since a relatively large number of people are resident in the areas covered by that section who are dependent on social-security benefits under the Work and Social Assistance Act, section 2.6(2) can lead to an indirect distinction being made. Such a distinction is permitted if there is an objective and reasonable justification for that distinction and the difference in treatment that flows from it. Whether such is the case must be considered in the light of the question whether the making of the distinction serves a legitimate aim and is proportionate to the aim sought to be achieved, i.e. is a suitable means to achieve that aim and the aim cannot be achieved by other, less intrusive means. Section 2.6(2) of the 2003 Housing By-law is intended by the Local Council (*gemeenteraad*) to effect differentiation in the districts in order to increase the quality of life. Given the seriousness of the problems the solution thereof must be considered a legitimate aim. The income requirement set by section 2.6(2) of the 2003 Housing By-law is the final measure of a package of measures (*pakket van maatregelen*) introduced to meet that goal. It has not, or not sufficiently, been disputed that the other measures in themselves produce insufficient effect. Considering the fact that the measure is limited in time and it does not appear that Garib cannot obtain suitable housing elsewhere in the Municipality or the Region, the Administrative Jurisdiction Division agrees with the Regional Court that the Burgomaster and Aldermen, taking into account the fact that the legislature created the possibility to make use of this means by statute and explicitly and the legislature equally weighed the need to open this possibility in addition to the existing possibilities, had good reasons to take the view that, in addition to the measures already in existence, this measure too is necessary and proportionate.

2.3.4. Finally, Garib has submitted that the Burgomaster and Aldermen were wrong to find that the particular circumstances on which she relied did not constitute grounds to apply the hardship clauses. These particular circumstances are that her present dwelling is too small for her and her two children and that its poor state of repair causes her inconvenience (*voor overlast zorgt*). It is the policy of the Burgomaster and Aldermen to apply the hardship clauses only in untenable situations, for example in cases of violence. Like the Regional Court, the Administrative Jurisdiction Division takes the view that the Burgomaster and Aldermen were entitled to consider that there is no such situation in the present case.”

II. RELEVANT DOMESTIC LAW

A. The Housing Act

19. In so far as relevant to the case before the Court, the Housing Act (*Huisvestingswet*) provides as follows:

Section 2

“1. If the local council finds it necessary to lay down rules concerning the taking into use, or permitting the use, of housing ..., or concerning changes to the housing supply ..., it shall adopt a housing by-law (*huisvestingsverordening*).

2. For the purpose of applying the first paragraph, the local council shall investigate, in any case, the extent to which the effect can be achieved that in permitting the use of relatively low-cost housing priority is given to house-seekers who, in view of their income, are especially dependent on such housing. ...”

B. The Inner City Problems (Special Measures) Act

1. Relevant provisions

20. The Inner City Problems (Special Measures) Act applies to a number of named municipalities including Rotterdam. It empowers those municipalities to take measures in certain designated areas including the granting of partial tax exemptions to small business owners and the selecting of new residents based on their sources of income. It entered into force on 1 January 2006.

21. As in force at the relevant time, provisions of the Inner City Problems (Special Measures) Act relevant to the case were the following:

Section 5

“1. The Minister [of Housing, Spatial Planning and the Environment] can, if so requested by the local council (*gemeenteraad*), designate areas in which persons seeking housing may be made subject to requirements under sections 8 and 9 of this Act.

2. The indication referred to in the first paragraph shall be for a term of up to four years. At the request of the local council, this term can be extended once only for up to four more years. [Section 7] shall apply by analogy.”

Section 6

“1. When making the request referred to in section 5(1), the local council shall satisfy the Minister of Housing, Spatial Planning and the Environment that the intended designation of the areas mentioned in the request:

(a) is necessary and appropriate to combat inner-city problems in the municipality; and

(b) meets requirements of subsidiarity and proportionality.

2. The designation referred to in section 5(1) shall be given only if the requirements of the first paragraph have been met, and if the local council has satisfied the Minister of Housing, Spatial Planning and the Environment that persons seeking housing to whom, as a result of such designation, a housing permit for taking housing in the designated areas into their use cannot be granted retain sufficient possibility to find housing suitable for them within the region in which the municipality is situated. ...”

Section 7

“1. The Minister shall rescind the designation referred to in section 5 if it is apparent to him that:

...

b. persons seeking housing to whom a housing permit allowing them to take into use housing within the designated areas cannot be granted as a result of the designation referred to in section 5 have insufficient possibility to find housing suitable for them within the region in which the municipality is situated. ...”

Section 8

“1. The local council can, if it considers [such a measure] necessary and appropriate for combating inner-city problems (*grootstedelijke problematiek*) within the municipality and it meets the requirements of subsidiarity and proportionality, determine in the housing by-law that persons seeking housing who have been resident without interruption of the region within which the municipality is situated for less than six years can only be eligible for a housing permit allowing them to take into use housing belonging to categories designated in that by-law if they dispose of:

- (a) an income from work under a contract of employment;
- (b) an income from an independent profession or business;
- (c) an income from an early retirement pension;
- (d) an old-age pension within the meaning of the General Old Age Pensions Act (*Algemene Ouderdomswet*);
- (e) an old-age pension or survivor’s pension within the meaning of the Wages (Tax Deduction) Act 1964 (*Wet op de loonbelasting 1964*); or
- (f) a student grant within the meaning of the Student Grants Act 2000 (*Wet op de studiefinanciering 2000*).

2. The local council shall determine in the housing by-law that the Burgomaster and Aldermen can grant a person seeking housing who does not meet the requirements set out in the first paragraph a housing permit allowing them to take into use housing as referred to in that paragraph if denying them that housing permit would lead to iniquity of an overriding nature (*een onbillijkheid van overwegende aard*). ...”

Section 17

“The Minister shall send a report to Parliament on the effectiveness and effects of this Act in practice to Parliament every five years after the entry into force of this Act.”

2. *Legislative history of the Inner City Problems (Special Measures) Act*

(a) **The advisory opinion of the Council of State and the Further Report**

22. The Council of State scrutinised the Inner City Problems (Special Measures) Bill and submitted an advisory opinion to the Queen. The Government forwarded the opinion to Parliament, together with their comments (Advisory Opinion of the Council of State and Further Report (*Advies Raad van State en Nader Rapport*), Parliamentary Documents, Lower House of Parliament, 2004/2005, 30 091, no. 5).

23. The applicant, in her observations, draws attention to several remarks made by the Council of State. In so far as relevant to the case before the Court, these included, firstly, concerns about the unwanted side effects of regulating access to housing in inner-city areas on the availability of housing for low-income groups in surrounding municipalities; secondly, concerns about persons with income from sources other than social-security benefits being compelled to accept housing in depressed neighbourhoods

against their wishes; thirdly, concerns about compatibility with human rights treaties, including the International Covenant on Civil and Political Rights and Protocol No. 4 to the Convention; and, lastly, concerns about the implicit distinction based on income, which might lead to indirect distinctions on grounds of race, colour or national or ethnic origin.

24. The Government responded to these concerns. Side effects affecting surrounding municipalities were to be expected only if the municipality concerned could not guarantee the availability of alternative housing itself; at all events, other local authorities would be consulted before the Minister gave a decision and the number and extent of the urban areas to be designated were expected to be limited. It was normally left to those seeking housing whether to react to an offer of housing or not; there was thus no compulsion. Moreover, while the effect of designation under the Inner City Problems (Special Measures) Act might well be to shorten waiting lists and encourage persons with income from sources other than social-security benefits to take up residence there, this was actually an intended effect. The measures in issue were justified in terms of Article 12 § 3 of the International Covenant on Civil and Political Rights and Article 2 § 3 of Protocol No. 4 to the Convention. It could not be excluded that members of minority groups might be affected indirectly, but the aim thereby served was legitimate, the means chosen were appropriate to that aim, alternative means were not available and the requirement of proportionality had been met. In the latter connection, the Government pointed to the requirement that sufficient alternative housing had to be available within the region for those in need of it before an urban area could be designated under the Act; if after all this proved not to be the case, the Minister would withdraw the designation.

25. Changes were made to the Explanatory Memorandum (*Memorie van Toelichting*) reflecting the points raised.

(b) The Explanatory Memorandum

26. It is stated in the Explanatory Memorandum to the Inner City Problems (Special Measures) Bill (Parliamentary Documents, Lower House of Parliament 2004/2005, 30 091, no. 3) that it was enacted in response to a specific wish expressed by the authorities of the municipality of Rotterdam. The emergence of concentrations of “socioeconomically underprivileged” in distressed inner-city areas had been observed, with serious effects on the quality of life owing to unemployment, poverty and social exclusion. Many who could afford to move elsewhere did so, which led to the further impoverishment of the areas so affected. This, together with antisocial behaviour, the influx of illegal immigrants and crime, was said to constitute the core of Rotterdam’s problems. The need therefore existed to give impetus to economic improvement locally. Quick results

were not expected, for which reason the Act was intended to remain in force indefinitely; however, its effects would be reviewed in five years' time.

27. In addition to the local authorities of Rotterdam, those of other cities had been asked for their input. Interest in the aims and measures of the Act had been expressed by the remaining three of the four major cities – Amsterdam, The Hague and Utrecht, in addition to Rotterdam – and other municipalities, large towns in particular. It would, however, be left to each municipality to choose for itself the measures to adopt in response to local needs.

28. Measures available under the Act included offering tax incentives and subsidies with a view to promoting economic activity in affected areas. Other measures were aimed at regulating access to the housing market in particular areas.

29. In the longer term, measures including the sale of rental property, the demolition of substandard housing and its replacement by higher-quality, more expensive residential property were envisaged. As a short-term temporary measure, intended to offer a “breathing space” for more permanent measures to produce their effects, it was proposed on the one hand to encourage settlement by persons with an income from employment (or past employment), professional or business activity or student grants and on the other to stem the influx of socioeconomically deprived house-seekers with a view to increasing population diversity.

30. At the same time it was recognised that those denied settlement in the areas in issue should be provided with suitable housing elsewhere in the city or region concerned. If that was not secured, the areas affected would not be designated under the legislation proposed or an existing designation would have to be withdrawn as the case might be.

31. The question of compatibility with human rights treaties, including the International Covenant on Civil and Political Rights and Protocol No. 4 to the Convention, was addressed in the following terms:

“4.3 Compatibility with treaties, the Constitution (*Grondwet*) and the General Equal Treatment Act (*Algemene wet gelijke behandeling*)

The measures proposed constitute a minor restriction on the right freely to choose one's residence, as protected by Article 12 § 1 of the International Covenant on Civil and Political Rights (hereafter the Covenant), Article 2 of Protocol No. 4 to the European Convention on Human Rights (hereafter the Convention) and Articles 18 and 43 of the Treaty establishing the European Community¹.

Article 12 § 1 of the Covenant guarantees the right to freedom of settlement (*vrijheid van vestiging*) to anyone who is lawfully on Netherlands territory. The measures adopted in this Bill constitute only a minor restriction of this right to freedom of settlement. The restriction applies only to the areas designated by the Minister of Housing, Spatial Planning and the Environment on the application of the local council. It is moreover a precondition for such designation and the application of

1. As then in force.

the measures proposed that persons seeking housing who are affected by the requirements to be imposed on the basis of the proposed sections 8 and 9 should retain sufficient possibilities to find a dwelling elsewhere in the municipality or the region. If that is not guaranteed, the area shall not be designated or the designation shall be withdrawn by the Minister of Housing, Spatial Planning and the Environment. The measures proposed will therefore not result in those persons seeking housing being unable to settle in the municipality within which the measures referred to will be applied or the region within which that municipality is situated. The minimal restriction on the right to freedom of settlement that may be the consequence of the measures proposed is justified, because the measures serve to protect public order as referred to in Article 12 § 3 of the Covenant. The concept of public order includes, in addition to the prevention of disorder, public safety, the prevention of crime and all universally accepted fundamental principles corresponding to human rights on which a democratic society is based.

The measures proposed in this Bill are intended to prevent an increased concentration of socioeconomically (more) deprived groups in certain areas or districts as a result of selective migration. The measures enable the municipality to tackle the existing segregation of incomes across the city in a short time by regulating the offer of housing. The influx of socioeconomically disadvantaged does, after all, have the consequence that a correspondingly greater demand is placed on social security structures, that support for economic activities and services is reduced and that the integration of immigrant groups is hampered. This threatens social isolation for both native-born households and households of immigrant descent in those districts. To counter this development a temporary restriction of the influx of socioeconomically (more) deprived groups is required. These measures therefore serve the protection of public order as referred to in Article 12 § 1 of the Covenant. As indicated [elsewhere in the Explanatory Memorandum], a sort of breathing space is thus created for the district concerned, so that the measures generally already ongoing to provide durable improvement of the situation in those areas or districts can actually produce their effects.

Article 2 § 4 of Protocol No. 4 to the Convention guarantees the right of everyone lawfully within Netherlands territory freely to choose their residence. With regard to this right, too, there is merely a minor restriction within the meaning of Article 2. In the relevant case-law it has in any case been held that within the framework of assessments under the Convention States enjoy a certain margin of appreciation when it comes to measures in the field of socioeconomic policy, including housing policy. In the Government's considered opinion, this restriction can, as the Council of State says in its advisory opinion, be justified in reliance on Article 2 § 4 of Protocol No. 4 to the Convention. That fourth paragraph admits of restrictions on the right freely to choose one's residence if that is in the public interest in a democratic society. In the Government's considered opinion the measures proposed in this Bill are, for the reasons set out above (in relation to Article 12 of the Covenant), in the general interest.

...

In addition, the measures affect the right to equal treatment, as protected by, among other provisions, Article 1 of the Constitution, Article 26 of the Covenant, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention. Based on income, a person seeking housing who has been resident in the region for less than six years either qualifies or does not qualify for a housing permit for a dwelling in the designated area. In addition, a person seeking housing may

qualify to be granted a housing permit for a dwelling in the designated area with priority, based on socioeconomic characteristics. A distinction based on income must be objectively justified pursuant to Article 1 of the Constitution and the international treaties mentioned. As has been remarked above, within the framework of assessments under the Convention, States enjoy a certain margin of appreciation when it comes to housing policy.

The question whether objective justification exists for the measures proposed, in so far as these measures give rise to an indirect distinction on one of the grounds aforementioned, must be answered with the assistance of the following four questions.

1. Is the distinction made to further a legitimate aim?
2. Is the distinguishing measure appropriate; can the legitimate aim be met by means of the distinction made?
3. Is the requirement of subsidiarity met; can the legitimate aim not be achieved by other means which impinge on the principle of equality less?
4. Is the requirement of proportionality met; is there a balance between the legitimate aim and the interests impinged on?

Legitimate aim

The powers granted by sections 8 and 9 can be applied to support measures in districts that are under severe stress aimed at improving the position of those districts. The aim is to ‘assist the recovery’ of districts that have to contend with a cumulation of problems of a social, economic and physical nature. Moreover, it concerns a temporary restriction of the influx of persons seeking housing whose socioeconomic position is relatively weak. The Government are of the opinion that in this case the aim is a legitimate one. The powers set out in sections 8 and 9 of this Bill may therefore be used only in districts that are under very serious stress. This is a measure that may not and will not be resorted to lightly.

Appropriate

The aforementioned aim will be achieved by not admitting persons seeking housing who have completed less than six years’ residence in the region to dwellings in the designated areas. The result will be that the pressure on those areas will be reduced as a consequence of the reduced inflow of persons seeking housing who are in a socioeconomically weaker position. To ensure that the measure does not impact (too) negatively on the regional housing market and the necessary flexibility within the region, the said requirements are not set to persons seeking housing who have been resident in the region for six years or longer.

Subsidiarity

The Major Cities Policy is intended to keep middle and higher incomes in the city and prevent the concentration in certain districts of low-income groups. As remarked [elsewhere in the Explanatory Memorandum], this is a long-term process. In the short term additional measures will therefore be needed to prevent the situation from deteriorating further.

When the Minister of Housing, Spatial Planning and the Environment considers whether designation of areas in which requirements based on sections 8 and 9 may be imposed on persons seeking housing is justified, it will also be weighed to what extent the instruments provided by the Housing Act, as already in force, have made enough of a difference. The Government are accordingly of the opinion that the aim cannot be achieved by other means in respect of these areas.

Proportionality

The aim is to improve the situation in areas that are under severe stress. The interest that is (partially) affected is the interest that persons seeking housing who do not qualify for a housing permit in the designated areas but who are dependent on the supply of low-cost housing have in being able to find housing suited to their needs. The precondition that is posed explicitly as regards designation of areas and use of the powers granted by sections 8 and 9 is that the persons seeking housing who are not granted a housing permit as a result of that designation retain sufficient possibilities elsewhere in the region to find a dwelling suited to their needs. Their interest in finding a dwelling suited to their needs is to some extent impinged on; they are (temporarily) unable to settle in particular areas within the municipality. Since they (must) have possibilities elsewhere in the municipality and the region, this restriction is proportionate to the aim pursued by it.

The requirement that persons seeking housing who do not qualify for a housing permit in the designated areas should have sufficient possibilities elsewhere in the municipality or the region to find a dwelling suited to their needs will in practice limit the maximum size of areas that can be designated. After all, if too many areas, or too large a part of the area of the municipality, is proposed by the local council for designation, then the chance for these persons seeking housing to find a dwelling will be significantly reduced, the result being that this necessary precondition will no longer be met.

The Government consider that adopting the powers provided for by sections 8 and 9 of the Act is necessary to achieve a legitimate aim, namely relieving the pressure on urban areas that are under severe stress, and also that these powers are suited to that aim. Moreover, the Government are of the opinion that adopting the powers provided for by sections 8 and 9 of the Act meets the requirements of subsidiarity and proportionality. The procedure for designating specific areas includes a number of (procedural) safeguards. Thus, the local council must, when applying for designation of a specific area, satisfy [the Minister] that the designation proposed is a necessary and appropriate measure for countering inner-city problems and that the designation proposed meets the requirements of proportionality and subsidiarity (section 6(1)). In addition, it is set out in section 7 that the Minister of Housing, Spatial Planning and the Environment shall rescind the designation of an area if the requirements aforementioned are no longer met.”

(c) Parliamentary discussions

32. The Lower House of Parliament discussed the Bill on 6, 7 and 15 September 2005. Members proposed numerous amendments. In so far as relevant to the case before the Court, amendments adopted included a provision requiring that, before designating an area within which the housing permit requirement would apply, the Minister of Housing, Spatial Planning and the Environment had to ascertain that persons refused a housing permit retained adequate access to suitable housing elsewhere in the region (see section 6(2) of the Act, as adopted); and requiring municipalities introducing a housing permit system to adopt a hardship clause in every case (see section 8(2) of the Act, as adopted).

33. The Lower House of Parliament adopted the Act by 132 votes to 12 of the members present and voting.

34. In the Upper House of Parliament, concern was expressed about the compatibility of the Act with internationally guaranteed human rights, Article 2 of Protocol No. 4 to the Convention and Article 12 of the International Covenant on Civil and Political Rights in particular. In reply, the Government stressed the supervisory role of the Minister of Housing, Spatial Planning and the Environment and drew attention to the legal remedy constituted by proceedings before the competent administrative tribunals (Memorandum in Reply (*Memorie van Antwoord*), Parliamentary Documents, Upper House of Parliament (*Kamerstukken I*) 2005/2006, 30 091, C).

35. On 20 December 2005, after discussion, the Upper House of Parliament adopted the Act by 60 votes to 11 of the members present and voting.

C. The Housing By-law of the municipality of Rotterdam

1. 2003 version

36. Before the entry into force of the Inner City Problems (Special Measures) Act, the 2003 Housing By-law of the municipality of Rotterdam set rules for, among other things, the distribution of low-rent housing to low-income households by empowering the Burgomaster and Aldermen to issue housing permits. In designated areas it was forbidden to take up residence without a housing permit if the rent was lower than a specified amount. The By-law set out criteria for the Burgomaster and Aldermen to apply in granting such housing permits; these criteria included a correlation between rent and income levels and another between the number of rooms in particular dwellings and the number of persons comprising a household.

37. On 1 October 2004 the municipality of Rotterdam introduced, on an experimental basis, a by-law under which only households with an income between 120 per cent of the statutory minimum wage and the upper limit for compulsory public health insurance (*ziekenfondsgrens*; approximately double the statutory minimum wage at the time) were entitled to a housing permit allowing them to take up residence in moderate-cost rented housing.

2. 2006 version

38. In January 2006 the 2003 Housing By-law of the municipality of Rotterdam was amended to introduce detailed rules implementing the Inner City Problems (Special Measures) Act locally. As relevant to the present case, these rules echoed section 8(1) and (2) of the Inner City Problems (Special Measures) Act (section 2.6 of the 2003 Housing By-law).

39. The 2003 Housing By-law was replaced, with effect from 1 January 2008, by a new Housing By-law (Designated Areas (Rotterdam)) (*Huisvestingsverordening aangewezen gebieden Rotterdam*). This by-law,

which remains in force, includes provisions corresponding to those outlined in the preceding paragraph.

D. The designation decisions

40. On 13 June 2006 the Minister of Housing, Spatial Planning and the Environment, acting under section 5 of the said Act, designated four Rotterdam districts, including Tarwewijk, and several streets for an initial period of four years. These designated areas are generally referred to using the English-language expression “hotspots”.

41. In 2010 the designations were extended for a second four-year term and a first designation was made for a fifth district.

E. The opinion of the Equal Treatment Commission

42. The Equal Treatment Commission (*Commissie Gelijke Behandeling*) was a Government body set up under the General Equal Treatment Act (*Algemene wet gelijke behandeling*). Its remit was to investigate alleged direct and indirect distinctions (*onderscheid*) between persons. It existed until 2012 when it was absorbed by the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*).

43. In December 2004 the Equal Treatment Commission was approached by *Regioplatform Maaskoepel* (“Maas Delta regional coordinating platform”), a federative organisation comprising social housing bodies active in the Rotterdam area, with the request to consider the experimental Rotterdam by-law then in force (see paragraph 37 above).

44. The Equal Treatment Commission decided to include in its examination of the request the Inner City Problems (Special Measures) Bill, which at that time was still pending in the Lower House of Parliament. While recognising that the Bill did not apply to certain categories of cases covered by the experimental by-law, the Equal Treatment Commission found it relevant given that it could be applied to entire areas of the city.

45. The Equal Treatment Commission gave its opinion on 7 July 2005. In relation to the operation of the 2003 Housing By-law prior to the entry into force of the Inner City Problems (Special Measures) Act, it expressed the view that persons with non-Western European immigrant roots, such as persons of Turkish, Moroccan, Surinamese or Netherlands Antilles descent (*afkomst*) and single-parent families (i.e. working mothers and mothers on social security) were overrepresented among the unemployed and among those earning less than 120 % of the statutory minimum wage. For that reason the measures in issue constituted an indirect distinction based on race in the case of persons of non-European immigrant descent and on gender in the case of working mothers. It further concluded that these distinctions were not justified given the availability of alternative policy choices, such as

demanding testimonials of prospective tenants; regular checks by officials; improving the quality of housing; expropriating or purchasing low-quality housing from private landlords; suppressing illegal tenancy and sub-tenancy; and actively pursuing antisocial tenants.

46. Commenting on the Inner City Problems (Special Measures) Bill, the Equal Treatment Commission added that it failed to address the said indirect distinctions and the justification given in the Explanatory Memorandum was too general.

47. The Equal Treatment Commission wrote to the Lower House of Parliament in what the Government describe as “more nuanced” terms on 5 September 2005. Its comments were taken into account when the Bill which ultimately became the Act was debated in parliament. However, a copy of this document has not been submitted.

III. OTHER FACTS

A. The designated areas as proportions of the municipality of Rotterdam

48. According to figures published by the Municipality of Rotterdam, there were 289,779 dwellings in the municipality in 2010, of which 5,954 or 2.05% were situated in Tarwewijk. The total number of dwellings in the four districts designated in 2006 – Carnisse, Hillesluis, Oud-Charlois and Tarwewijk – was 23,449, i.e. 8.01% of the total for the municipality. With the addition of Bloemhof (designated on 1 July 2010), the total came to 29,759 or 10.27%.

49. On 1 January 2010 the population of the municipality of Rotterdam stood at 587,161. Of these, 11,690 or 1.99% were resident in Tarwewijk. The total number of inhabitants of the four districts designated in 2006 was 45,654, i.e. 7.77% of the total for the municipality. With the addition of Bloemhof, the total for the designated districts came to 59,367 or 10.11%.

B. Subsequent developments concerning the city of Rotterdam

1. The 2007 evaluation report

50. An evaluation report, commissioned by Rotterdam’s own City Construction and Housing Service (*Dienst Stedebouw en Volkshuisvesting*) after the first year following the introduction of the housing permit in Rotterdam, was published on 6 December 2007 by the Centre for Research and Statistics (*Centrum voor Onderzoek en Statistiek*), a research and advice bureau collecting statistical data and carrying out research relevant to developments in Rotterdam in areas including demographics, the economy and employment (hereafter “the 2007 evaluation report”).

51. The report noted a reduction of the number of new residents dependent on social-security benefits under the Work and Social Assistance Act in “hotspot” areas, though not, of course, a complete stop because Rotterdam residents of six years’ standing were not prevented from moving there.

52. From July 2006 until the end of July 2007 there had been 2,835 requests for a housing permit. Of these, 2,240 had been granted; 184 had been refused; 16 had been rejected as incomplete; and 395 were still pending. The hardship clause (section 8(2) of the Inner City Problems (Special Measures) Act) had been applied in 38 cases.

53. Three-quarters of the housing permits granted concerned housing let by private landlords; the remainder – 519 – had been granted through the intermediary of social housing bodies (*woningcorporaties*). The latter selected their tenants with due regard to the official requirements, so that refusals of housing permits with regard to social housing were unheard of.

54. Of the persons refused a housing permit, 73 (40% of all those who met with a refusal) were known to have found housing elsewhere relatively quickly.

55. The 2007 evaluation report was presented to the Local Council on 15 January 2008. On 24 April 2008 the Local Council voted to maintain the housing permit system as was and have a new evaluation report commissioned for the end of 2009.

2. *The 2009 evaluation report*

56. A second evaluation report, also commissioned by Rotterdam’s City Construction and Housing Service, was published by the Centre for Research and Statistics on 27 November 2009. It covered the period from July 2006 until July 2009 (“the 2009 evaluation report”), during which the events complained of took place.

57. During this period, the social housing bodies had let 1,712 dwellings in the areas concerned. Since the social housing bodies could only accept tenants who qualified for a housing permit, no applications for such a permit had been rejected in this group.

58. Out of 6,469 applications for a housing permit relating to privately-let housing, 4,980 had been accepted (77%); 342 had been refused (5%); and 296 had been pending at the beginning of July 2009. Examination of a further 851 had been discontinued without a decision being taken (13%), generally because these applications had been withdrawn or abandoned; the assumption was that many of these applications would in any case have been rejected. It followed, therefore, that if the pending cases were not taken into account, approximately one-fifth of this category of applications had been either refused or not pursued to a conclusion.

59. The reason to reject an application for a housing permit had been related to the income requirement in 63% of cases, sometimes in

combination with another ground for rejection; failure to meet the income requirement had been the sole such reason in 56% of cases.

60. Of 342 persons refused a housing permit, some two-thirds were known to have managed to find housing elsewhere, either in Rotterdam (47%) or elsewhere in the Netherlands (21%).

61. The hardship clause had been applied 185 times – expressed as a percentage of applications relating to privately-let housing, 3% of the total. These had been cases of preventing squatters from taking over housing left empty (*antikraak*), illegal immigrants whose situation had been regularised by a general measure (*generaal pardon*), assisted living arrangements for vulnerable individuals (*begeleid wonen*), cooperative living arrangements (*woongroepen*), start-up enterprises, the re-housing (*herhuisvesting*) of households forced to clear substandard housing for renovation, and foreign students. In addition, in one-third of cases the hardship clause had been applied because a decision had not been given within the prescribed time-limit.

62. The effects of the measure were considered based on four indicators: proportion of residents dependent on social-security benefits under the Work and Social Assistance Act, corrected for the supply of suitable housing; perception of safety; social quality; and potential accumulation of housing problems:

(a) It had been observed that in the areas where the housing permit requirement applied, the reduction of the number of new residents dependent on social-security benefits under the Work and Social Assistance Act had been more rapid in “hotspot” areas than in other parts of Rotterdam. In addition, the number of residents in receipt of such benefits as a proportion of the total population of those areas had also declined, although it was still greater than elsewhere.

(b) In two of the areas where the housing permit requirement had been introduced, the increase in the perception of public safety had been more rapid than the Rotterdam average. Tarwewijk had shown an increase initially, but was now back to where it had been before the measure was introduced. One other area had actually declined significantly in this respect. All of the areas where the housing permit requirement applied were still perceived as considerably less safe than Rotterdam as a whole.

(c) In terms of social quality, there had been improvement in most of the parts of Rotterdam where problems existed, Tarwewijk among them. It was noted, however, that the effect of the housing permit in this respect was limited, since it only influenced the selection of new residents, not that of residents already in place.

(d) Housing problems – defined in terms of turnover, housing left unused, and house price development – had increased somewhat in the affected areas including Tarwewijk, though on the whole at a slower rate there than elsewhere. Reported reasons for the increase were an influx of

immigrants of mostly non-European extraction (*nieuwe Nederlanders*, “new Netherlands nationals”) and new short-term residents from Central and Eastern Europe; the latter in particular tended to stay for three months or less before moving on, and their economic activity was more difficult to keep under review as many were self-employed.

63. Social housing bodies tended to view the housing permit requirement as a nuisance because it created additional paperwork. They perceived the measure rather as an appropriate instrument to tackle abuses by private landlords, provided that it be actively enforced and administrative procedures be simplified. Others with a professional involvement in the Rotterdam housing market mentioned the dissuasive effect of the measure on would-be new residents of the affected areas.

64. The report suggested that the housing permit requirement might no longer be needed for one of the existing “hotspots” (not Tarwewijk). Conversely, five other Rotterdam districts scored high for three indicators, while a sixth exceeded critical values for all four.

3. *The 2011 evaluation report*

65. A third evaluation report, this time commissioned by Rotterdam’s City Development Service (Housing Department), was published by the Centre for Research and Statistics in August 2012 (second revised edition). It covered the period from July 2009 until July 2011 (“the 2011 evaluation report”).

66. The social housing bodies had let 1,264 dwellings in the areas concerned; as during the previous period, no applications for housing permits had been rejected in this group because the social housing bodies could only accept qualifying tenants.

67. There had been 3,723 applications for a housing permit relating to privately-let housing. Of these, 3,058 had been accepted (82%); 97 had been refused (3%); and 282 had been pending on 1 July 2011. Examination of 286 had been discontinued without a decision being taken (8%), generally because they had been withdrawn or abandoned. This meant that, if the pending cases were not taken into account, approximately one-tenth of applications were either rejected or not pursued to a conclusion because the household concerned had reconsidered its decision to move.

68. The reasons to reject an application for a housing permit had included failure to meet the income requirement in 81% of cases, sometimes combined with other reasons. In the remaining cases the decision to reject had been based on the excessive number of persons wishing to take up residence in a particular dwelling; the unlawful sub-letting of rooms; the absence of valid residence rights; or the fact that the person making the application was underage.

69. The individual hardship clause had been applied in 93 cases; as a proportion of successful applications for a housing permit, this amounted

to just under 3%. In addition, in 55 cases objections had been lodged against refusals; of these, 5 had been successful and had resulted in the grant of a housing permit. The grounds on which the hardship clause was applied were the same as those stated in the 2009 evaluation report (see paragraph 61 above).

70. In terms of social index, Tarwewijk continued to score lowest of all the Rotterdam districts. Social cohesion was very weak, which was explained by the number of house moves but also by a general lack of participation in social life. In terms of residential environment (*leefomgeving*), the district was vulnerable, the problem being a lack of suitable housing.

71. Based on the same indicators and methodology as the previous report, the 2011 evaluation report concluded that the housing permit system should be continued in Tarwewijk and two other areas (including one in which it had been introduced in the meantime, in 2010); discontinued in two others; and introduced in one area where it was not yet in force.

4. Evaluation of the Inner City Problems (Special Measures) Act

72. On 18 July 2012 the Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*) sent a separate evaluation report assessing the effectiveness of the Inner City Problems (Special Measures) Act since its inception and its effects in practice to the Lower House of Parliament, as required by section 17 of that Act (Parliamentary Documents, Lower House of Parliament, no. 33 340, no. 1). The Minister's covering letter stated the intention of the Government to introduce legislation in order to extend the validity of the Inner City Problems (Special Measures) Act. Requests to that effect had been received from a number of affected cities. It was noted that not all of the cities concerned had made use of all of the possibilities offered by the Act; in particular, only Rotterdam used housing permits to select new residents for particular areas. Appended to the Minister's letter was a copy of the 2009 evaluation report and a letter from the Burgomaster and Aldermen of Rotterdam in which they, *inter alia*, confirmed the desirability of extending the indication of particular areas for applying the housing permit requirement beyond the first two four-year periods: the measure was considered a success, and a twenty-year programme involving the large-scale improvement of housing and infrastructure (the "National Programme Quality Leap South Rotterdam" (*Nationaal Programma Kwaliteitssprong Rotterdam Zuid*, see below)) had been started in the southern parts of Rotterdam in 2011.

5. *The Amsterdam University report*

73. Both the applicant and the Government have submitted a report entitled “Evaluation of the effects of the Inner City Problems (Special Measures) Act”, by the Amsterdam Institute for Social Science Research (University of Amsterdam; the report is referred to hereafter as the “Amsterdam University report”). This report was commissioned by the Minister of the Interior and Kingdom Relations, who published it in November 2015, to be put before Parliament.

74. The report comprises 16 pages of introduction, 116 pages of analysis and 40 more pages of references and appendices (tables, methodology, list of interviewees). Its conclusion reads, *inter alia*, as follows:

“8. Conclusion

[...]

In the study we have distinguished between two groups: the potentially refused and the reference group. The potentially refused are members of households without any income from work who have been living in the metropolitan area for less than six years. On this basis they are not eligible for a housing permit in the designated districts of Bloemhof, Carnisse, Hillesluis, Oud-Charlois and Tarwewijk. The reference group also has no income from work, but satisfies the residence requirement.

8.1. Findings

The excluded group: the potentially refused

More often than the reference group, the potentially refused are young, male and live alone. More often than the reference group, the potentially refused are of non-European foreign origin, and much more often, they are from the European migrant population. Trends between 2004 and 2013 show a strong increase in the proportion of persons among the European migrant population, principally from Eastern European countries like Poland, Bulgaria and the Czech Republic.

[...]

Effect on the position of the potentially refused on the housing market

[...]

The group of the potentially refused tends to move house relatively frequently and during the period covered by this research their mobility increased (from 34.5% in 2004 to 38.1% in 2013). This high rate of mobility would appear to be a consequence of the composition of the group (relatively young persons and small households, often without children). After correction for background characteristics, it turns out that new arrivals tend to move more often, and continue to do so after the year in which they arrive.

[...]

Effect on the designated districts: house-moving flows and population composition

[...].

Changes in the Rotterdam housing market, including as a result of the Act, have led to new patterns of spatial distribution of new arrivals without income from work. An

analysis of population dynamics confirms that the increase in the proportion of potentially refused is generally the consequence of changed house-moving flows (and not of any other dynamic such as downward social mobility of the resident population).

[...]

Designated districts: quality of life and security

3a. Has the application of the measure under Chapter 3 of the Act had any actual effect on the quality of life and security in the designated areas?

Based on a (modified) Security Index we find that during the period 2006-2013 the designated districts have shown a more negative development in their scores than the other districts of the city. This interrelation has been examined more closely by comparing the development trend in all Rotterdam districts, taking into account the district status and other changes in the housing markets. After these checks have been carried out it still appears that the districts covered by the Act display a significantly worse development than the other districts of Rotterdam.

[...]

In so concluding it must be observed that the Act is not necessarily the cause of these lagging developments. Changes in city policy, police and justice, education, social assistance, etc. at the neighbourhood, municipal and national level are beyond the scope of this evaluation. These findings do however suggest that the Act has not contributed to any improvement.

Quality of life elsewhere

[...]

3b. What development is seen in districts with a considerable influx of house-movers who do not qualify for a housing permit as regards quality of life and security?

[...]

In sum, it can be stated that there is a slight negative interrelation between changes in the influx of the potentially refused and the quality of life and security of the neighbourhoods. This interrelation is, however, not uniform and the causal link is not firmly established. Although the potentially refused can cause a deterioration of the quality of life and security in a neighbourhood, the interrelation may also point the other way. Because of their weak and deteriorating position on the housing market, the potentially refused will generally be limited to districts where there is a relative decline in quality of life and security.”

6. The National Programme “Quality Leap South Rotterdam”

75. On 19 September 2011 the Minister of the Interior and Kingdom Relations (on behalf of the Government), the Burgomaster of Rotterdam (on behalf of the municipality of Rotterdam), and the presidents of a number of South Rotterdam boroughs (*deelgemeenten*), social housing bodies and educational institutions signed the National Programme “Quality Leap South Rotterdam”. This document noted the social problems prevalent in South Rotterdam inner-city areas, which it was proposed to address by providing improved opportunities for education and economic activity and

improving, or if need be replacing housing and infrastructure. It was intended to terminate the programme by the year 2030.

76. On 31 October 2012 the Minister of the Interior and Kingdom Relations, Rotterdam's Alderman for housing, spatial planning, real property and the city economy (*wethouder Wonen, ruimtelijke ordening, vastgoed en stedelijke economie*) and the presidents of three social housing bodies active in Rotterdam signed an "Agreement concerning a financial impulse for the benefit of the Quality Leap South Rotterdam (2012-2015)" (*Convenant betreffende een financiële impuls ten behoeve van de Kwaliteitssprong Rotterdam Zuid (2012-2015)*). This agreement provided for a review of priorities in Government financing of housing and infrastructure projects in the South Rotterdam area within existing budgets and for a once-only additional investment of 122 million euros (EUR). Of the latter sum, EUR 23 million had been reserved by the municipality of Rotterdam until 2014; another EUR 10 million would be added for the period starting in 2014. These funds would be used to refurbish or replace 2,500 homes in South Rotterdam. A further EUR 30 million would be provided by the Government. The remainder would be spent by the social housing bodies on projects within their respective remit.

C. Subsequent legislative developments

1. *The Inner City Problems (Special Measures) (Extension) Act*

77. On 19 November 2013 the Government introduced a Bill proposing to amend the Inner City Problems (Special Measures) Act (Parliamentary Documents, Lower House of Parliament 2013/2014, 33 797, no. 2). The Explanatory Memorandum stated that its purpose was to empower municipalities to tackle abuses in the private rented housing sector, give municipalities broader powers of enforcement and make further temporal extension of the Act possible.

78. The Inner City Problems (Special Measures) (Extension) Act (*Wet uitbreiding Wet bijzondere maatregelen grootstedelijke problematiek*) entered into force on 14 April 2014, enabling the designation of particular areas under section 8 of the Inner City Problems (Special Measures) Act to be extended the day before it was due to expire. It makes further extensions of the designation possible for successive four-year periods (section 5(2) of the Inner City Problems (Special Measures) Act, as amended).

2. Amendment of the Inner City Problems (Special Measures) Act in connection with the selective allotment of housing in order to limit nuisance and criminal behaviour

79. With effect from 1 January 2017 the Inner City Problems (Special Measures) Act was amended further to enable the selective allotment of housing in order to limit nuisance and criminal behaviour.

D. Subsequent events concerning the applicant

80. On 27 September 2010 the applicant moved to housing in the municipality of Vlaardingen. This municipality is part of the Rotterdam Metropolitan Region. She rents her dwelling from a Government-funded social housing body.

81. The applicant states that she has found paid work.

82. As of 25 May 2011 the applicant had been resident in the Rotterdam Metropolitan Region for more than six years. She therefore became entitled to reside in one of the areas designated under the Inner City Problems (Special Measures) Act regardless of her sources of income.

E. Other information submitted by the parties

83. The Government state that no renovation or building permits were sought for the dwelling in A. Street inhabited by the applicant at the time of the events complained of between 2007 and 2010 and that no such permit was applied for in the period prior to 2007 either.

84. Until 2015 only the municipality of Rotterdam made full use of the possibilities which the Inner City Problems (Special Measures) Act offered. In 2015 and 2016, three other municipalities followed suit (Nijmegen, Capelle aan den IJssel and Vlaardingen, the latter two being part of the Rotterdam Metropolitan Region).

IV. DRAFTING HISTORY OF ARTICLE 2 OF PROTOCOL No. 4

85. The following is taken from the Article-by-Article commentary contained in the Committee of Experts' report to the Committee of Ministers²:

“16. The third amendment consists in the fact that the Committee's text makes no express provision for restrictions founded on what is necessary for the economic welfare of the country.

At the outset, two different positions were taken in the Committee.

2. Report H (65) 16, 18 October 1965.

Some experts thought that considerations of economic welfare should not justify any restrictions, even if these were confined to the rights referred to in paragraph 1, except insofar as they arose from the need to safeguard *ordre public*.

Others considered that the rights defined in paragraph 1 of Article 2 should be subject to restrictions which, when provided for by law, constitute measures necessary in a democratic society for the economic welfare of the country. They agreed, however, that the right to leave a country, provided under paragraph 2, could not be subject to restrictions of this nature.

The following arguments were advanced in support of the first view:

(a) the inclusion of a provision for restrictions on the ground of economic welfare would permit of abuse by States in the imposition of restrictions on the exercise of the rights enunciated in paragraphs 1 and 2.

(b) to prevent such abuse, the exercises of these rights should be subject to restrictions in the interests of economic welfare only when the restrictions were in accordance with law and justified by the need to safeguard *ordre public*.

(c) according to Article 2, paragraph 1, only persons lawfully within the territory of a State have the right to move freely in that territory and choose their residence freely; this does not prevent the State from making regulations for the admission of aliens which take account of the economic welfare of the country;

(d) Article 2, paragraph 1 does not guarantee a work permit to aliens lawfully within the territory of a State, nor does it assure them of a free choice of place of work. The State is entitled to control the issue of work permits in the light of the economic and social situation.

(e) The inclusion of a restriction relating to economic welfare would constitute a retrograde step in relation to the now commonly accepted principles regarding the movements of foreigners. Recent international agreements on the movement of persons contain no clauses restricting movement in the interests of economic welfare (cf. Article 1 of the European Convention on Establishment signed in Paris on 13th December 1955 [ETS 19]; Article 48 of the Treaty setting up the European Economic Community³, signed at Rome on 25th March 1957; Article 12 (3) of the United Nations draft Covenant).

(f) the adoption of the other view would allow States to restrict the freedom of movement not only of aliens but also of their own nationals on economic grounds and this would be a retrograde step rather than a step forward in the protection of individual rights.

(g) Furthermore, it was illogical to provide for restrictions of an economic nature on freedom of movement and choice of residence while at the same time rejecting any such restrictions on the freedom to leave one's country.

(h) Article 8, paragraph (2) of the Convention should not be regarded as a precedent. The fact that the Convention contains no general restrictive clauses but that each Article carries its own restrictions shows that the nature of such clauses has to be determined in relation to the subject-matter of the particular Article.

3. Freedom of movement of workers. For the current text, see Article 45 of the Treaty on the Functioning of the European Union.

(i) One expert stated that under his country's Constitution restrictions on freedom of movement and choice of residence could not be based on purely economic considerations and that therefore he could not accept the other view.

Supporters of the other view argued as follows:

(a) It is difficult to define the conditions in which 'economic welfare' is covered by the concept of *ordre public*.

(b) With regard to the reference to recent international agreements, and particularly to the European Convention on Establishment, it should be remembered that in Article 2 of that Convention, each Contracting Party undertakes to facilitate the prolonged or permanent residence in its territory of nationals of the other Parties 'to the extent permitted by its economic and social conditions'.

(c) There is every reason to keep to the restriction provided for in Article 8 (2) of the Convention since the right to respect for the home with which it is concerned is very close to the freedom of choice of residence, which is the subject of Article 2 of the Assembly's draft.

(d) The powers of the European Court and Commission of Human Rights and the Committee of Ministers constituted a strong safeguard against any possible abuse of such a restriction.

(e) One expert also invoked, where his country was concerned, reasons of a constitutional nature making it impossible to agree to a text which did not contain clauses authorising some restrictions based on considerations of economic well-being.

The Committee finally decided to delete all reference in paragraph 3 to considerations of economic welfare and to add a new paragraph relating to this question (see below paragraph 18).

17. The fourth amendment concerns the English translation of the expression 'ordre public'.

The Committee decided to replace 'law and order' by the French words 'ordre public' written within inverted commas (cf. Article 2, para. 3 of the draft United Nations Covenant).

Furthermore, the Committee intended, for the purpose of this Article, that the notion of 'ordre public' should be understood in the broad sense in general use in continental countries.

18. The fifth amendment concerns the French version in which the expression '*prévention des infractions pénales*' was found preferable to '*prévention du crime*'. (Cf. Art. 5, para. 1 (c), Art. 6, paras. (2), [Article 7 and Article 8] of the Convention; contra Arts. 10 and 11 of the Convention).

In this connection, one expert asked whether provision should not be made for a restriction for the purposes of the punishment of crime (and not merely for its prevention).

The Committee thought that the need to punish crime was covered by the notion of the maintenance of 'ordre public'.

Paragraph 4 of the Committee's draft

18. The majority of the Committee was against the inclusion of a provision permitting restrictions on the ground of economic welfare. In view, however, of the possibility that in particular areas it might be necessary, for legitimate reasons, and

solely in the public interest in a democratic society, to impose restrictions which it might not always be possible to bring within the concept of 'ordre public', the Committee decided to insert an additional paragraph providing that the rights set forth in paragraph 1 might also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

The term 'area', as used in this Article, does not refer to any definite geographical or administrative unit. The meaning of this provision is that the restrictions in question must be localised within a well-defined area."

86. The Committee of Ministers laid the Protocol open for signature and ratification, unaltered, on 16 September 1963. The Protocol entered into force on 2 May 1968, after it had received five ratifications. The Kingdom of the Netherlands ratified it on 23 June 1982.

V. PRACTICE ELSEWHERE

87. In Denmark, the Social Housing Act (*Lov om Almene Bolinger*) restricts access to housing in certain residential areas where a proportion of the residents are out of work.

88. Section 51b(1) provides that the municipal council (*kommunalbestyrelsen*) may refuse to place new residents on the waiting list for dwellings in social housing areas with "a high percentage of residents outside the labour market" (*en høj andel af personer uden for arbejdsmarkedet*) if they, and their spouse or cohabitant partner, are on public early retirement or in receipt of social security benefits. A social housing area with "a high percentage of residents outside the labour market" is defined as an area with at least 1,000 inhabitants, at least 40% of those aged between 18 and 64 being "outside the labour market" (section 51b(3)), or with at least 5,000 inhabitants, at least 30% of those aged between 18 and 64 being outside the labour market (section 51b(4)). However, the municipal council shall be obliged to assign other suitable housing elsewhere to such persons (section 51b(9)).

89. Section 59(1) provides, *inter alia*, that social housing organisations shall make at least every fourth vacant social dwelling available to the municipal council in order for the latter to solve urgent social housing needs. Assignment shall take place after an assessment of the needs of the prospective new resident and the composition of the population in the district at the time of assignment.

90. Section 59(6) lays down that vacant housing available to the municipal council under other provisions including section 59(1), if situated in a social housing areas with "a high percentage of residents outside the labour market" (section 51b(3) and (4)) or a "ghetto area" within the meaning of section 61a shall not be assigned to a prospective resident if he or she, or a member of their household

(a) has been convicted of a crime, or released from a penal institution, within the previous six months;

(b) has not reached the age of 18 and has been convicted of a crime, or released from a penal institution, within the previous six months;

(c) has been evicted, or had his or her lease terminated, within the previous six months as a result of serious misconduct (*grove overtrædelser af god skik og orden*); or

(d) is not a national of a member State of the European Union, the European Economic Area or Switzerland, unless he or she is a student registered with an accredited educational institution.

91. Section 61a defines a “ghetto area” as an area of social housing with at least 1,000 inhabitants, where at least three of the following criteria are fulfilled:

“1. The proportion of immigrants from non-Western countries and their descendants exceeds 50 per cent;

2. The proportion of 18–64-year-olds without any link to the labour market or education exceeds 40 per cent (average for the last two years);

3. The number of people convicted under the Penal Code (*straffeloven*), the Firearms Act (*våbenloven*) or the Narcotics Act (*lov om euforiserende stoffer*) per 10,000 inhabitants aged 18 or over exceeds 2.7 per cent (average for the past two years);

4. The proportion of persons aged between 30 and 59 who do not have an education beyond compulsory school [i.e. 9 years of basic education] exceeds 50 per cent;

5. Average income for residents aged between 15 and 64 (excluding those attending schools or other educational programmes) is less than 55 per cent of the average income of the same group in the whole region.”

According to figures published by the Danish Government there are 25 such areas in Denmark as of December 2016, down from 33 in 2012.

92. Since the early years of the present century, policies have been developed by the Danish government to counter the emergence of “ghetto areas”. Investment in higher-quality housing and the refurbishment of substandard housing have gone hand in hand with measures resulting in the rejection of prospective new residents who are out of work.

VI. RELEVANT INTERNATIONAL LAW

93. Article 12 of the International Covenant on Civil and Political Rights provides as follows:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order

(*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.”

94. In its relevant part, Article 22 of the American Convention on Human Rights provides as follows:

Article 22
Freedom of Movement and Residence

“1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

...

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest. ...”

THE LAW

I. SCOPE OF THE CASE BEFORE THE COURT

95. Before the Grand Chamber, the applicant submitted that since the measure in issue was obviously linked to the source of income of the persons affected, and thus implicitly connected to their “gender, social origin and/or race”, the case should be examined under Article 14 of the Convention which prohibits discrimination.

96. The intervening third parties, the Human Rights Centre of Ghent University and the Equality Law Clinic of the Université libre de Bruxelles, also urged the Court to consider the case under Article 14 of the Convention taken together with Article 2 of Protocol No. 4. They stated that the Inner City Problems (Special Measures) Act had a particular impact on “persons living in poverty or who [were] socioeconomically disadvantaged, such as people with a non-European background and single parents living on social security, like the applicant”; this, in their submission, contributed to the stigmatisation of those who could not meet the income requirement and accordingly constituted discrimination based on poverty or “social position”. Although recognising that the Chamber had examined the applicant’s complaint under Article 2 of Protocol No. 4 taken alone, they suggested that the Grand Chamber could in addition examine the case under Article 14 of the Convention in reliance on the case-law principle that the

Court was “master of the characterisation to be given in law to the facts of the case” and the principle *jura novit curia*.

97. The Government pointed out that no complaint under Article 14 had been submitted to the Chamber or communicated to them.

98. It is correct that the Court is master of the characterisation to be given in law to the facts of the case and therefore need not consider itself bound by the characterisation given by an applicant or a government (see, among many other authorities, *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 54, 17 September 2009 and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 59, 9 July 2015). It does not follow, however, that the Court is free to entertain a complaint regardless of the procedural context in which it is made.

99. The applicant, through her lawyer, advanced an argument based on Article 26 of the International Covenant on Civil and Political Rights (though not Article 14 of the Convention or Article 1 of Protocol No. 12) before the domestic courts, which argument was expressly addressed (and rejected) at both levels of jurisdiction. In contrast, and although assisted by the same lawyer before this Court (see paragraphs 2, 15 and 17 above), she did not complain of discrimination either in her original application to the Court or at any later stage in the proceedings before the Chamber. The Chamber accordingly considered the case within the limits defined by the applicant herself (compare *Mathew v. the Netherlands*, no. 24919/03, § 130, ECHR 2005 IX).

100. It is the Court’s standing case-law that the scope of a case referred to the Grand Chamber under Article 43 of the Convention is determined by the Chamber’s decision on admissibility (see, among many other authorities, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII; *Sommerfeld v. Germany* [GC], no. 31871/96, § 41, ECHR 2003-VIII (extracts); *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR 2007-IV; *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, and 2 others, § 194, 3 October 2008; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 47, 14 September 2010; *Murray v. the Netherlands* [GC], no. 10511/10, § 86, ECHR 2016; and *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 78, ECHR 2016).

101. Consequently, while it is true that a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on, this does not mean that it is open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber and by reference to which the Chamber declared the complaint admissible and, where applicable, reached its judgment on the merits.

102. From the Court’s perspective, the complaint under Article 14 is a new one, made for the first time before the Grand Chamber. It follows that

the Court cannot now consider it (see, *mutatis mutandis*, among others, *Kovačić and Others*, cited above, § 195, and *Sanoma Uitgevers B.V.*, cited above, § 48).

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

103. The applicant complained that the Inner City Problems (Special Measures) Act and the 2003 Housing By-law of the municipality of Rotterdam, and in particular section 2.6 of the latter (as in force at the time), violated her rights under Article 2 of Protocol No. 4, which provides as follows:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

The Government disputed this.

A. Applicability

1. *Whether there has been a restriction*

104. The Chamber held as follows (see paragraph 105 of its judgment):

“The Court notes at the outset that the applicant – who, as a Netherlands national, was lawfully within the territory of the State – was refused a housing permit that would have allowed her to take up residence with her family in a property of her choice. It is implicit that this property was actually available to her on conditions she was willing and able to meet. There has therefore undoubtedly been a ‘restriction’ on her ‘freedom to choose her residence’, within the meaning of Article 2 of Protocol No. 4. ...”

105. Neither the applicant nor the respondent Government has challenged this finding. The Court sees no reason to reconsider it of its own motion and accordingly endorses it.

2. *Whether the third or the fourth paragraph of Article 2 of Protocol No. 4 should be applied*

106. The Chamber held as follows (see paragraph 106 of its judgment):

“The restriction complained of affects only the applicant’s right to choose her residence, not her right to liberty of movement or her right to leave the country. It does not target any particular individual or individuals but is of general application in discrete areas (namely, circumscribed areas within the city of Rotterdam). The Court will therefore consider it under the fourth paragraph of Article 2 of Protocol No. 4, which relates directly to the first paragraph, rather than the third.”

107. The applicant argued that the third paragraph of Article 2 of Protocol No. 4 was applicable. In her submission, the drafting history of the Article and the Court’s case-law – in particular *Olivieira v. the Netherlands*, no. 33129/96, ECHR 2002-IV and *Landvreugd v. the Netherlands*, no. 37331/97, 4 June 2002 – suggested that the fourth paragraph could only apply in “exceptional situations”, an expression which she understood to mean “an acute (and temporary) emergency situation”.

108. The Government took the view that the fourth paragraph should be applied. They pointed out that the fourth paragraph referred only to the first paragraph of the Article, unlike the third paragraph which referred also to the second paragraph. They also submitted that the fourth paragraph was more appropriate to the facts of the case by dint of the ordinary meaning of the words used; moreover, it had been added with a view to enabling policies that tackled overcrowding and fostered adequate distribution of certain groups for socioeconomic reasons.

109. The Court finds nothing in the drafting history of the Article to suggest that the fourth paragraph was intended only to be used in case of an acute and temporary emergency. Rather, it is reflected in the drafting history that the fourth paragraph was added to provide for restrictions of the right to liberty of movement and freedom to choose one’s residence for reasons of “economic welfare”, whereas economic reasons could never justify restrictions on the right to leave one’s country (see the report of the Committee of Experts to the Committee of Ministers, Report H (65) 16, 18 October 1965, §§ 15 and 18, paragraph 85 above). Nor is the applicant’s position supported by the Court’s *Olivieira* and *Landvreugd* judgments, neither of which limits the applicability of the fourth paragraph to “emergency situations” or describes the problems caused by drug abuse in central and south-eastern Amsterdam as “acute and temporary”.

110. In light of the facts before it, the Court finds it more appropriate to consider the present case under the fourth paragraph of Article 2 of Protocol No. 4. The third and fourth paragraph of that Article being of equal rank in that both provide for free-standing restrictions on the exercise of the rights set out in the first paragraph and both being different in scope (paragraph 3 providing for restrictions for specified purposes but without limiting their geographical scope and paragraph 4 providing broadly for restrictions “justified by the public interest” but limited in their geographical scope), there is no need also to consider it under the third paragraph.

B. Merits

1. *Whether the restriction was “in accordance with law”*

111. The Chamber held as follows (paragraph 108 of its judgment):

“There is no doubt that the imposition of a housing permit requirement in the areas concerned was in accordance with domestic law, to wit, the Inner City Problems (Special Measures) Act and the 2003 Housing By-law of the municipality of Rotterdam (2006 version, as in force at the time).”

112. The applicant’s representative, speaking at the hearing of the Grand Chamber, argued that the restriction in issue had not been foreseeable for the applicant already at the time when she moved to Tarwewijk in 2005. He submitted that the legislative bill that was later to become the Inner City Problems (Special Measures) Act had not yet been presented in Parliament at the time when she moved to the Tarwewijk district of Rotterdam in May 2005; this had happened only later. Furthermore, the applicant could not have foreseen that Tarwewijk would be designated under that Act; that no transitional regime would be provided for persons already resident in a designated district at the time of its designation; or that the hardship clause would be applied as restrictively as it was.

113. The Government submitted that the restriction was based on an Act of Parliament, the Inner City Problems (Special Measures) Act, and the 2003 Rotterdam Housing By-law, the latter supplemented with provisions on processing housing permit applications. All had been made public. The Minister’s designation of Tarwewijk had been published as a parliamentary document and was likewise accessible to the public. The requirements of accessibility and foreseeability had therefore been complied with.

114. The Court notes that the applicant does not dispute that the Inner City Problems (Special Measures) Act and the delegated legislation based thereon were accessible to her while they were in force. It therefore accepts that the applicant was in a position to regulate her conduct and foresee with complete clarity, if need be with appropriate advice, the consequences which her actions might entail. The “foreseeability” requirement that the Court has recognised as an element of the more general requirement that an interference with a Convention right, if permitted at all, must be “in accordance with law” (an expression synonymous with “in accordance with the law” and “prescribed by law”, in French: *prévue(s) par la loi*; see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, §§ 49-50, Series A no. 30) cannot be interpreted as requiring the modalities of application of a law to be predictable even before its application in a given case becomes relevant.

2. *Whether the restriction served the “public interest”*

115. The Chamber held as follows (paragraph 110 of its judgment):

“The restriction here in issue was intended to reverse the decline of impoverished inner-city areas and to improve quality of life generally. There can be no doubt that this is an aim which it is legitimate for legislatures and city planners to pursue. Indeed, the applicant does not suggest otherwise.”

116. Neither the applicant nor the respondent Government has challenged this finding. The Court sees no reason to reconsider it of its own motion and accordingly agrees with the Chamber that the restriction in issue served the “public interest”.

3. Whether the restriction was “justified in a democratic society”

(a) The Chamber judgment

117. Basing its reasoning on the premise that there must be a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”, the Chamber proceeded to consider whether the restriction had been justified based on principles which it deduced from the Court’s case-law developed under Articles 8 of the Convention and 1 of Protocol No. 1 concerning housing and social and economic policy considerations.

118. The Chamber held that the respondent party was, in principle, entitled to adopt the legislation and policy in issue. It was observed that the Inner City Problems (Special Measures) Act aimed to address increasing social problems in particular inner-city areas of Rotterdam. The Act required the competent Minister to report to Parliament every five years on the effectiveness of the restriction in issue which was subject to temporal and geographical limitation. Moreover, the Act provided for safeguard clauses by, firstly, requiring the local council to satisfy the Minister that sufficient alternative housing remains available (section 6(2)); secondly, by providing that the designation of an area under the Act should be revoked if insufficient alternative housing was available for those affected (section 7(1)(b)); and thirdly, the individual hardship clause provided for in section 8(2). In the Chamber’s view, neither the criticism of the Act which had been expressed during the legislative process nor the availability of alternative solutions to reach the result sought could justify a finding that the domestic authorities’ policy decisions were manifestly without reasonable foundation.

119. Turning to the individual circumstances of the case in hand, i.e. the application of the general measure in the applicant’s case, the Chamber noted that the refusal of a housing permit to the applicant was consonant with the applicable law and policy. The applicant stated that the dwelling in B. Street was more spacious, had a garden and was apparently in a better state of repair; however, she had not submitted any reason for wishing to live in Tarwewijk, whereas she could take up residence in other areas of the Rotterdam metropolitan region outside the designated areas under the Act.

120. Further taking into account the fact that the applicant had qualified for a housing permit under the Act since May 2011 – by which time she had lived in the Rotterdam metropolitan region for six consecutive years – but nevertheless had elected to reside in a dwelling in Vlaardingen (rather than in one of the designated areas of the municipality of Rotterdam), the Chamber found no violation of Article 2 of Protocol No. 4.

(b) The parties' submissions

121. The applicant took issue with the view taken by the Chamber that the more convincing general justifications for a general measure are, the less importance attached to its impact in a particular case. In her view, the drafting history of Article 2 of Protocol No. 4 justified the finding that the rights enshrined in that Article were “near absolute”, not to be restricted on economic grounds.

122. It might well be that a measure was of a general nature, but that in itself did not justify or necessitate its application on the level of the individual. However wide the State's margin of appreciation, relevant and sufficient reasons were required to impose restrictions on individuals.

123. The applicant agreed that the policy decisions in general taken by the domestic authorities were not manifestly without reasonable foundation, but their effect was doubtful: the problems were too wide to be addressed solely by limiting the influx of new residents whose income consisted only of social-security benefits. The Amsterdam University report of November 2015 (see paragraph 74 above) had found that the quality of life had not been verifiably improved as a result of the restrictions on the freedom to choose one's residence. The low refusal rate of housing permits also suggested that the measure was ineffective, as did the decision of the authorities no longer to apply the Inner City Problems (Special Measures) Act as a free-standing instrument but as part of a twenty-year programme. Moreover, the individual hardship clause was too rarely applied.

124. With regard to her own situation, the applicant submitted that she and her children had already been resident in Tarwewijk when the housing requirement was introduced for that district. She herself was an exemplary citizen without a criminal record and constituted no threat to public order.

125. As a final point, the applicant stated that she was under no obligation to justify her choice of residence.

126. The Government explained that they saw themselves faced, in certain inner-city areas, with selective migration. More affluent households were moving out of those neighbourhoods, while those left behind and new arrivals often belonged to low-income groups and were dependent on social-security benefits. The resulting concentration of benefit claimants placed a correspondingly greater demand on social-security structures. At the same time, support for *bona fide* economic activity and services was significantly reduced, which caused the local economy to stagnate. The Government's

assessment was that living in such a neighbourhood represented an obstacle to integration and might lead to social isolation.

127. To reverse this trend, the Government had identified the need to impose temporary restrictions on the inflow of socioeconomically disadvantaged groups into certain areas. That would give these areas “room to breathe”, so that other measures that were already being implemented to make sustainable improvements could bear fruit.

128. Measures under sections 8 and 9 of the Inner City Problems (Special Measures) Act could be considered only once other measures – such as tackling illegal overcrowding and rogue landlords, joint initiatives involving youth workers and the police, educational measures and public investment in improving substandard housing – had been attempted and found insufficient. They were thus the final part of an integrated approach to tackling an inner-city area’s problems.

129. The local council was required to establish to the Minister’s satisfaction that designation under the Inner City Problems (Special Measures) Act was necessary. In the event, the Minister had been satisfied that the areas concerned were faced with a cumulation of social, economic and spatial problems, unemployment, dependence on social benefits, economic decline and impoverishment, and that the efforts being made by conventional means were not sufficient.

130. Measures under sections 8 and 9 of the Inner City Problems (Special Measures) Act were temporary: designations were valid for a maximum of four years. Although admittedly they could be extended, this implied a detailed reassessment of the situation every four years.

131. It had been established, in accordance with the Act, that enough suitable housing remained in the region for those seeking housing to whom a housing permit could not be delivered as a result of designation of a particular area.

132. As to the applicant herself, the Government commented that she had not, at the time of the events complained of, qualified for a housing permit since she had no income from employment and had not completed six years’ residence in the Rotterdam Metropolitan Region. It was reflected in the evaluation reports of 2009 and 2011 that the hardship clause had been applied in some 3% of all cases in which a housing permit had been granted with respect to privately-let housing (see paragraphs 61 and 69 above). Application of the individual hardship clause had to remain the exception for the measures under the Inner City Problems (Special Measures) Act to be effective: this was considered, for example, if moving into a dwelling in a designated area was the only way to relieve an acute emergency – medical or otherwise – or if the building and housing inspectorate had declared a dwelling uninhabitable and the person concerned would be left without housing as a result. No such compelling circumstances obtained in the applicant’s case.

133. It could not be decisive that the applicant had been living in Tarwewijk before the Inner City Problems (Special Measures) Act entered into force. Persons living in designated areas who wished to move but did not meet the requirements for a housing permit were free to move to a dwelling available to them outside the designated areas; in so doing they contributed to achieving the aims of the Act.

134. It could not be established that the dwelling which the applicant rented in A. Street was in such a state of disrepair that it posed a health risk. Contrary to the suggestion inherent in the Applicant's case, her landlord had not requested a building permit, as he would have needed to do before undertaking any serious renovation work. Alternatively, the applicant herself could have approached the building and housing inspectorate (*Dienst Bouw- en Woningtoezicht*) of the municipality of Rotterdam, which had the power to compel her landlord to bring the dwelling into line with standard requirements; however, she had not done so. Nor had the domestic courts found such a risk to exist. The Administrative Jurisdiction Division had observed that it was the policy of the Burgomaster and Aldermen to apply the hardship clause only in intolerable situations, such as cases of violence, and that the Burgomaster and Aldermen had been entitled not to do so in the applicant's case.

135. The applicant had never indicated what steps she had undertaken to find alternative housing in the Rotterdam Metropolitan Region. The chance of finding affordable rented housing varied with the search area and waiting times varied widely. Moreover, if the dwelling in A. Street genuinely posed a health risk, the applicant could have applied for priority treatment; as it was, she had failed to show that she had done so.

(c) The Court's assessment

(i) General principles

136. The Court reiterates at the outset that the Convention does not provide for the institution of an *actio popularis*. Under the Court's well-established case-law, in proceedings originating in an individual application under Article 34 of the Convention its task is not to review domestic law *in abstracto*, but to determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see, among other authorities, *Golder v. the United Kingdom*, 21 February 1975, § 39 *in fine*, Series A no. 18; *Minelli v. Switzerland*, 25 March 1983, § 35, Series A no. 62; *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X; *Krone Verlag GmbH & Co. KG v. Austria* (no. 4), no. 72331/01, § 26, 9 November 2006; *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008; *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 116, ECHR 2012; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014;

Perinçek v. Switzerland [GC], no. 27510/08, § 136, ECHR 2015 (extracts); and *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015).

137. The Court next draws attention to its fundamentally subsidiary role. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see, among other authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 70, ECHR 2004-III; *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI; and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012). The margin of appreciation available to the legislature in implementing social and economic policies should be a wide one: the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation (see, among other authorities and *mutatis mutandis*, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 166, ECHR 2006-VIII; *Andrejeva v. Latvia* [GC], no. 55707/00, § 83, ECHR 2009; *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010; *Khoroshenko v. Russia* [GC], no. 41418/04, § 120, ECHR 2015; and *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 179, ECHR 2016).

138. The legislature's margin in principle extends both to its decision to intervene in the subject area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests. However, this does not mean that the solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices (see, *inter alia* and *mutatis mutandis*, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts); *S.H. and Others v. Austria* [GC], no. 57813/00, § 97, ECHR 2011, and *Parrillo v. Italy* [GC], no. 46470/11, § 170, ECHR 2015).

139. The Court has held, in the context of Article 1 of Protocol No. 1, that spheres such as housing, which modern societies consider a prime

social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the State. In that sphere decisions as to whether, and if so when, it may fully be left to free-market forces or whether it should be subject to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues. More specifically, the Court has recognised that in an area as complex and difficult as that of the development of large cities, the State enjoys a wide margin of appreciation in order to implement their town-planning policy (see *Ayangil and Others v. Turkey*, no. 33294/03, § 50, 6 December 2011).

140. Turning to the questions posed by the present case, the Court first notes the apparent interplay between the freedom to choose one's residence and the right to respect for one's "home" and one's "private life" (Article 8 of the Convention). Indeed, the Court has on a previous occasion directly applied reasoning concerning the right to respect for one's home to a complaint under Article 2 of Protocol No. 4 (see *Noack and Others v. Germany* (dec.), no. 46346/99, ECHR 2000-VI).

141. However, it is not possible to apply the same test under Article 2 § 4 of Protocol No. 4 as under Article 8 § 2, the interrelation between the two provisions notwithstanding. The Court has held that Article 8 cannot be construed as conferring a right to live in a particular location (see *Ward v. the United Kingdom*, (dec.) no. 31888/03, 9 November 2004, and *Codona v. United Kingdom* (dec.), no. 485/05, 7 February 2006). In contrast, freedom to choose one's residence is at the heart of Article 2 § 1 of Protocol No. 4, which provision would be voided of all significance if it did not in principle require Contracting States to accommodate individual preferences in the matter. Accordingly, any exceptions to this principle must be dictated by the public interest in a democratic society.

(ii) *Application of the above principles*

(a) *Legislative and policy framework*

142. Turning to the legislative and policy background of the case, the Court first observes that the domestic authorities found themselves called upon to address increasing social problems in particular inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere (see paragraph 26 above). They sought to reverse these trends by favouring new residents whose income was related to gainful economic activity of their own (see paragraphs 28 and 29 above). Their intention was to foster diversity and counter the stigmatisation of particular inner-city areas as fit only for the most deprived social groups. It is for this purpose that the Inner City Problems (Special Measures) Act was called into existence.

143. The applicant does not deny that a need existed for public authority to act: the Court understands the applicant's admission that the legislation in issue is not "manifestly without reasonable foundation" in this sense. Rather, her criticism concerns the legislative choices made, which in her submission place an unfair burden on those whose only source of income is social-security benefits.

144. The Court observes that the system of the Inner City Problems (Special Measures) Act does not deprive any person of housing or force any person to leave their dwelling. Moreover, the measure under the Inner City Problems (Special Measures) Act affects only relatively new settlers: residents of the Rotterdam Metropolitan Region of at least six years' standing are eligible for a housing permit whatever their source of income. In the circumstances, this waiting time would not appear to be excessive. The Court considers these considerations material to its assessment of the proportionality of the measure here in issue.

145. The main thrust of the applicant's argument is that the measures introduced in Rotterdam by application of the Inner City Problems (Special Measures) Act have not had the desired effect. She points to the Amsterdam University report of November 2015 (see paragraph 74 above), according to which, in her interpretation, there has been no verifiable improvement in quality of life in the affected districts as a result of the impugned restrictions on the freedom to choose one's residence.

146. While the findings of the Amsterdam University report are relied on by both parties, the Court observes that it post-dates the decisions relevant to the complaint before the Court and covers the period from 2006 until 2013, thus assessing the effects of the Inner City Problems (Special Measures) Act *ex post facto*.

147. The Court considers that to the extent that it is called upon to assess socioeconomic policy choices, it should, in principle, do so in the light of the situation as it presents itself to the authorities at the material time and not after the event and with the benefit of hindsight (see, *mutatis mutandis*, *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 132, Series A no. 102). The Court sees no reason to adopt a different approach in the present case.

148. As a result, the report of the Amsterdam University is not relevant to the proportionality assessment to be carried out by the Court. In any event, the Court notes that it cannot in the present case interpret the facts as established in the Amsterdam University report as proof that the policy choices here in issue, at the time they were made, were plainly wrong or produced disproportionate negative effects at the level of the individual affected. The Court also notes, in particular, that the said report finds that the socioeconomic composition of the districts to which the Act is applied has begun to change – more new settlers being in work than before – and

that data concerning the effects of other measures on security and quality of life are not available.

149. The Court further notes that within the municipality of Rotterdam, the domestic authorities have extended the measures under the Inner City Problems (Special Measures) Act, actually linking them to a twenty-year programme which involves considerable public investment (see paragraphs 75 and 76 above). In addition, similar measures under that Act have in recent years been adopted in other municipalities, two of them in the Rotterdam Metropolitan Region (see paragraph 84 above). It therefore appears that, unlike the applicant, the domestic authorities consider the measures adopted to have been effective.

150. The legislative history of the Inner City Problems (Special Measures) Act shows that the legislative proposals were scrutinised by the Council of State, whose concerns were addressed by the Government (see paragraphs 23 and 24 above), and that Parliament itself was concerned to limit any detrimental effects. In fact, the three safeguard clauses included in the Inner City Problems (Special Measures) Act and identified by the Chamber (see paragraph 118 above) owe much to direct Parliamentary intervention (see paragraph 32 above). It is to these safeguard clauses, included in the Act itself (see paragraph 21 above), that the Court now turns.

151. To begin with, the entitlement of individuals unable to find suitable housing has been recognised by the Inner City Problems (Special Measures) Act itself: firstly, in section 6(2), which requires the local council to satisfy the Minister that sufficient housing remains available locally for those who do not qualify for a housing permit; and secondly, in section 7(1)(b), which provides that the designation of an area under that Act shall be revoked if insufficient alternative housing is available locally for those affected.

152. The restriction in issue remains subject to temporal as well as geographical limitation, the designation of particular areas being valid for no more than four years at a time (see section 5(2) of the Inner City Problems (Special Measures) Act).

153. The competent Minister is required by section 17 of that Act to report to Parliament every five years on the effectiveness of the Act and its effects in practice, as was in fact done on 18 July 2012 (see paragraph 72 above).

154. The individual hardship clause prescribed by section 8(2) of the Act (see paragraph 21 above) and adopted by the Municipality in the applicable by-law (see paragraph 38 above) allows the Burgomaster and Aldermen to derogate from the length-of-residence requirement in cases where strict application of it would be excessively harsh. It is reflected in the evaluation reports of 2009 and 2011 that at the time of the events complained of it was applied in some 3% of all cases in which a housing permit was granted in respect of housing let by private landlords (see paragraphs 61 and 69

above). Given that the hardship clause is intended to meet medical and social emergencies including situations of violence (see paragraphs 18, 61 and 69 above), the existence of which in her personal circumstances the applicant has not asserted, the Court cannot find that the Burgomaster and Aldermen fail to make appropriate use of it.

155. A final, procedural, safeguard is comprised by the availability of administrative objection proceedings and of judicial review before two levels of jurisdiction, both of them before tribunals invested with full competence to review the facts and the law which meet the requirements of Article 6 of the Convention.

156. In these circumstances, the Court cannot find that the policy decisions taken by the domestic authorities fail to make adequate provision for the rights and interests of persons in the applicant's position, that is, persons who have not been resident in the municipality for six years and whose only income is from social-security benefits.

157. The Court is prepared to accept that it would have been possible for Parliament to regulate the situation differently. However, the central question under Article 2 § 4 of Protocol No. 4 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article (see, *mutatis mutandis*, *James and Others v. the United Kingdom*, 21 February 1986, § 51, Series A no. 98; *Mellacher and Others v. Austria*, 19 December 1989, § 53, Series A no. 169; *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III; and *Evans v. the United Kingdom* [GC], no. 6339/05, § 91, ECHR 2007-I).

(β) The applicant's individual case

158. Turning now to the circumstances of the applicant herself, it is undisputed that the applicant was of good behaviour and constituted no threat to public order. Nonetheless, the applicant's personal conduct, however virtuous, cannot be decisive on its own when weighed in the balance against the public interest which is served by the consistent application of legitimate public policy.

159. Nor is it *per se* sufficient to point to the fact that the applicant was already resident in Tarwewijk when the housing permit requirement entered into force. As set out above, the purpose of the scheme was to encourage new settlement in distressed inner-city areas by households with an income from sources other than social benefits. The system of the Inner City Problems (Special Measures) Act is not as such called into question by the mere fact that it did not make an exception in respect of persons already residing in a designated area. While the specific modalities of the system are a matter falling within the margin of appreciation of the domestic authorities in this field, it can indeed be assumed that applying it to Tarwewijk residents could have the effect of prompting some of them, as in the present

case, to leave the area, thereby making more dwellings available to households meeting the requirements and assisting the furtherance of the policy aim of broadening the social mix.

160. It remains in dispute whether the A Street dwelling was in as dire a state as the applicant alleges. She has not submitted any specific information from which such a conclusion could be drawn. In addition, the Court – agreeing on this point with the Government (see paragraph 134 above) – does not find it established that the health of the applicant or her family actually suffered as a result of remaining in that dwelling for as long as 5 years and 4 months, nor has she even restated before the Grand Chamber her allegation before the Chamber that her health or that of her children was at risk. At all events, in the absence of any request for a building permit at all relevant times (see paragraph 83 above) or other evidence of any description, the Court cannot find that the A. Street dwelling was considered by its owner to need serious renovation work. Moreover, the applicant has stated no other reason (apart from her personal preference for the apartment in B. Street) why residence in the A. Street dwelling constituted actual hardship for her and her children.

161. It remains for the Court to balance the applicant's interests against those of society as a whole. *Mutatis mutandis*, for purposes of Article 2 § 4 of Protocol No. 4, the Court takes a similar view of the "general interest" in relation to the freedom to choose one's residence as it does in relation to environmental protection. In the latter context, the Court has held, from an Article 8 perspective, that the evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the interests of the local community. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment (see, *mutatis mutandis*, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 104, ECHR 2001-I).

162. In this connection, it has emerged that the applicant has been resident in a dwelling in Vlaardingen let to her by a Government-funded social housing body since 27 September 2010 (see paragraph 80 above). The applicant has not explained her reasons for choosing to move to Vlaardingen instead of remaining in the dwelling in A. Street for the final eight months needed to complete six years' residence in the Rotterdam Metropolitan Region, i.e. until 25 May 2011 (see paragraph 82 above), even though no later than early 2007 her landlord asked her to move out. Nor has she suggested that her present dwelling is inadequate to her needs or in any way less congenial or convenient to her than the one she had hoped to occupy in Tarwewijk.

163. In addition, it has not been stated, or even suggested, that the applicant has at any time since 2011 expressed the wish to move back to Tarwewijk.

164. It appears moreover that the applicant has found work (see paragraph 81 above), although she does not state when this happened. Should she have been in work prior to 25 May 2011, she would have been free already then to move to any dwelling of her choice in Rotterdam, including a different dwelling within Tarwewijk.

165. The information submitted therefore does not allow the Court to find that the consequences for the applicant of the refusal to her of a housing permit that would have allowed her to move to the B. Street dwelling amounted to such disproportionate hardship that her interest should outweigh the general interest served by the consistent application of the measure in issue.

166. The corollary of the applicant's position that she is not required to justify her preference for a particular residential area, if accepted, would be that both the Court itself and the domestic authorities – legislative, executive and judicial – would be deprived of the possibility of weighing the interest of the individual against the public interest generally and against the rights and freedoms of others. However, an unspecified personal preference for which no justification is offered cannot override public decision-making, in effect reducing the State's margin of appreciation to nought.

4. Conclusion

167. For all the above reasons, there has been no violation of Article 2 of Protocol No. 4.

FOR THESE REASONS, THE COURT

Holds, by twelve votes to five, that there has been no violation of Article 2 of Protocol No. 4 to the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 November 2017.

Johan Callewaert
Deputy to the Registrar

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint dissenting opinion of Judges Tsotsoria and De Gaetano;
- (b) dissenting opinion of Judge Pinto de Albuquerque, joined by Judge Vehabović;
- (c) dissenting opinion of Judge Kūris.

G.R.
J.C.

JOINT DISSENTING OPINION OF JUDGES TSOTSORIA AND DE GAETANO

1. We regret that we are unable to share the conclusion reached by the majority in this case.

2. We agree that this case was to be examined under the fourth paragraph of Article 2 of Protocol No. 4 (see paragraph 110 of the judgment). Nevertheless we are of the view that not enough emphasis was placed upon, and not enough attention was given to, the fact that in the instant case the restriction to which the applicant was subjected was not one preventing her from taking up residence in a “particular area” but one which prevented her from moving a few doors away in the very same area – Tarwewijk – in which she had been residing without any legal or other problems for close to two years. We also agree, in principle, with what is stated in paragraph 138.

3. However, in exercising its supervisory jurisdiction, the Court must confine its attention to the concrete case before it. While, on the one hand, it may be useful to assess the legislative choices underlying a particular general measure – bearing always in mind the English expression that “the road to hell is paved with good intentions” – no less than the quality of the parliamentary and judicial review conducted at domestic level, the manner in which such a general measure is applied to the concrete facts of a case is illustrative of its impact in practice and is material to the proportionality analysis (see *James and Others v. the United Kingdom*, 21 February 1986, § 36, Series A no. 98). Moreover a State’s margin of appreciation narrows down when a particularly vulnerable group is, or is likely to be, affected by a general measure which has been adopted (see, *mutatis mutandis*, *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010). The applicant’s contention that the legislative choices by the Dutch authorities had placed “an unfair burden on those whose only source of income is social-security benefits” (see paragraph 143) ought to have been examined by the Court in the light of its standard case-law on “disproportionate burdens”.

4. In our view, it can safely be said that, in so far as general policy decisions taken by the domestic authorities are concerned, these did make provision for the rights and interests of persons who, like the applicant, had not been resident in the municipality for six years and whose only income was from social-security benefits. What *was not taken specifically into account* was the situation of a person who was *already resident* in a particular area and simply wanted or needed to move *within* the same area, as was the case of the applicant. The individual hardship clause (paragraph 154) was intended to meet medical and social emergencies, including situations of violence, and therefore did not cover this contingency. While it could, therefore, be said that the domestic authorities did attempt to strike a balance between the general and the individual

interest in a general or abstract way, what the Court was required to consider and examine in the instant case was whether in the applicant's specific situation the proper balance was struck, or whether, conversely, she was made to suffer a disproportionate interference with her freedom to choose her residence.

5. As pointed out above, the applicant was already a resident of Tarwewijk at the time when the Inner City Problems (Special Measures) Act entered into force and the requirement of a housing permit was created by the Housing By-law of the Municipality of Rotterdam. The intended effect of her application for such a permit, made in response to the landlord's request to vacate the premises she was living in and his offer of alternative accommodation in the same Rotterdam district, was to enable her to remain in the same area, a few doors away from her first residence; and we take the view that the applicant was not required to justify or to give reasons for seeking to move from one address to another within the same hotspot, in any event.

6. More critically, the applicant's move from her dwelling in A. Street to a different dwelling in B. Street would not of itself have caused any change in the composition of the population of that district. Consequently, in our view, preventing her from so doing was not a measure capable of furthering the aims for which the Inner City Problems (Special Measures) Act was called into existence. The refusal of the permit amounted in effect to a forced "eviction" from the area in question, something which was never contemplated either in the general legislation or in the municipality by-laws.

7. The majority judgment accepts that the applicant was of good behaviour and constituted no threat to public order; indeed, the Government do not suggest otherwise. This makes it all the more difficult to understand how preventing the applicant from choosing a different residence *within* Tarwewijk was expected to further the improvement of social conditions in that district. She was, moreover, a single mother looking after two children, a fact which, together with the fact that all she was asking for was to move within the same area, does not appear to have been given any particular consideration either in the decision of 19 March 2007 or in the subsequent objection and appeal proceedings.

8. In the circumstances, therefore, while the applicant cannot strictly be described as a vulnerable person, and the refusal of the permit may be said not to give rise to "iniquity of an overriding nature" in the sense and within the meaning of section 8 § 2 of the Inner Cities Problems Act (see paragraph 21) – a very high threshold indeed –, we are of the view that the decision given by the Burgomaster and Aldermen on 19 March 2007, which prevented the applicant from moving within Tarwewijk for as long as she had not completed six years' residence in the Rotterdam Metropolitan Region, unless she secured an income from a source other than social

welfare benefits, constituted a disproportionate interference with her freedom to choose her residence.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGE VEHABOVIĆ

(Translation)

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I. Introduction (§§ 1-3)

1. In the case of *Garib v. the Netherlands* the European Court of Human Rights (“the Court”) was afforded the opportunity to rule on a question that is crucial and unfortunately more topical than ever, namely the insidious discrimination based on social precariousness affecting part of the population. But unfortunately that opportunity has not been seized by the Grand Chamber and I am thus unable to agree with the majority.

2. In my view, the Court’s reasoning in this judgment overlooks some of the most fundamental aspects of the case. Ms Garib has indeed sustained, in relation to her right to freely choose her residence under Article 2 of

Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) a considerable interference which indirectly stems from her social and economic situation. The justification put forward by the State should not therefore have been regarded as legitimate.

3. In the present opinion, I will set out the grounds for my dissenting vote, explaining first how Ms Garib’s right to freely choose her residence has been breached (II), before further developing the specific issues raised by this case in the field of discrimination (III).

II. The violation of the right to freely choose one’s residence (§§ 4-21)

4. In the present case, the applicant – a single mother with two children – was denied, pursuant to the Inner City Problems (Special Measures) Act (known as the “*Rotterdamwet*”), the necessary authorisation to move to a larger flat in the district where she was living¹. That legislation had been enacted by the Dutch authorities, according to the Government, in order to resolve the issues of social disorder witnessed in the most underprivileged neighbourhoods by encouraging a greater social mix and thus promoting “deghettoisation”. It enabled the authorities to subject relocation in certain areas, including the district of Tarwewijk where the applicant was living, to the issuance of a housing permit, for which a certain level of employment-

1. See paragraphs 20 and 21 of the Grand Chamber judgment. On the evolution, philosophy and effects of this Dutch urban policy, see the fundamental contributions of Van Gent *et al.* (2017), “Exclusion as urban policy: The Dutch ‘Act on Extraordinary Measures for Urban Problems’”, in *Urban Studies* 1–17; Uitermark *et al.* (2017), “The statistical politics of exceptional territories”, in *Political Geography* 57: 60–70; Ouweland and Doff (2013), “Who is afraid of a changing population? Reflections on housing policy in Rotterdam”, in *Geography Research Forum* 33(1): 111–146; Van der Horst and Ouweland (2012), “‘Multicultural Planning’ as a contested device in urban renewal and housing: Reflections from the Netherlands”, in *Urban Studies* 49 (4): 861–875; Schinkel and Van den Berg (2011), “City of exception. The Dutch revanchist city and the urban homo sacer”, in *Antipode* 43 (5): 1911–1938; Van Eijk (2010), “Exclusionary policies are not just about the ‘Neoliberal City’: A critique of theories of urban revanchism and the case of Rotterdam”, in *International Journal of Urban and Regional Research* 34 (4): 820–834; Stouten (2010), *Changing Contexts in Urban Regeneration: 30 years of modernisation in Rotterdam, Amsterdam*, Techne Press; Uitermark and Duyvendak (2008), “Civilizing the city: Populism and revanchist urbanism in Rotterdam”, in *Urban Studies* 45 (7): 1485–1503; Musterd and Ostendorf (2008), “Integrated urban renewal in The Netherlands: A critical appraisal”, in *Urban Research & Practice* 1(1): 78–92; Trip (2007), “Assessing quality of place: A comparative analysis of Amsterdam and Rotterdam”, in *Journal of Urban Affairs* 29 (5): 501–517; Priemus (2004), “Housing and new urban renewal: Current policies in the Netherlands”, in *International Journal of Housing Policy* 4 (2): 229–246; Uitermark (2003), “‘Social mixing’ and the management of disadvantaged neighborhoods: The Dutch policy of urban restructuring revisited”, in *Urban Studies* 40 (3): 531–549; and Kloosterman (1996), “Double Dutch: Polarization trends in Amsterdam and Rotterdam after 1980”, in *Regional Studies* 30 (5): 467–476.

related income was required. In technical terms, that legislation introduced a policy of urban gentrification².

5. The majority took the view, and rightly so, that the denial of the applicant's request for a permit could be regarded as interference with her freedom to choose her residence, as guaranteed by Article 2 of Protocol No. 4. However, in examining the legitimacy of this interference, the Grand Chamber confined its analysis to scrutiny of the general measure, without paying sufficient attention to the real basis of the interference sustained by the applicant, which lay in the individual measure imposed on her personally (A). And when the focus of the analysis is placed on the applicant's individual right, the interference can be clearly seen to be disproportionate (B).

A. The illegitimacy of the aim pursued by the interference with the applicant's right (§§ 6-14)

6. While the interference has been found to satisfy the conditions of legality and legitimacy, I take the view, with all due respect to my distinguished colleagues, that the aim pursued by the Dutch authorities cannot be regarded as legitimate in the present case. In my view, the

2. The term *gentrification* comes from *gentry*, meaning persons of high birth or social standing, just below the nobility in social rank. The aim of this urban policy is to encourage more wealthy people to appropriate an area in the city that has previously been occupied by less privileged inhabitants or users, thus transforming the economic, social, cultural and ethnic profile of the urban area for the benefit of a higher social stratum. For an introduction to the literature on this urban policy, see Zuk *et al.* (2015), "Gentrification, Displacement and the Role of Public Investment: A Literature Review", *Federal Reserve Bank of San Francisco Working Paper 2015-05*; Feldman (2014), "Gentrification, urban displacement and affordable housing: Overview and research roundup", Harvard Kennedy School's Shorenstein Center; Mathema (2013), "Gentrification, An updated Literature Review", Poverty & Race Research Action Council; Van der Graaf and Veldboer (2009), "The effects of state-led gentrification in the Netherlands", in Duyvendak *et al.* (eds), *City in sight: Dutch dealings with urban change, Amsterdam*, Amsterdam University Press, pp. 61-80; Atkinson and Wulff (2009), "Gentrification and displacement: a review of approaches and findings in the literature", AHURI Positioning Paper No. 115; Marcuse *et al.* (eds) (2009), *Searching for the Just City: Debates in Urban Theory and Practice*, New York: Routledge; Lees (2008), "Gentrification and social mixing: towards an inclusive urban renaissance?", in *Urban Studies* 45 (12): pp. 2449-2470; Biro (2007), "Gentrification: Deliberate Displacement, or Natural Social Movement?", in *The Park Place Economist*, vol. 15; Galster (2007), "Neighbourhood social mix as a goal of housing policy: A theoretical analysis", in *International Journal of Housing Policy* 7 (1): 19-43; Holmes (2006), "Mixed Communities: Success and Sustainability", Joseph Rowntree Foundation; Joseph (2006), "Is mixed-income development an antidote to urban poverty?", in *Housing Policy Debate* 17 (2): 209-234; and Tunstall and Fenton (2006), "In the mix: A review of mixed income, mixed tenure and mixed communities: what do we know?", London and York: Housing Corporation, Joseph Rowntree Foundation and English Partnerships.

majority failed to take into consideration the underlying grounds of the Dutch legislation going beyond the objective of regenerating deprived areas (1). In addition, they were wrong to focus their examination on the Inner City Problems (Special Measures) Act, without considering the real basis of the interference with the applicant's right, namely the individual measure imposed on her (2).

1. The reality of the aim of the interference with the applicant's right (§§ 7-9)

7. As has been rightly noted by the Chamber and Grand Chamber judgments in the present case, there is no doubt that the measure at issue was in accordance with law, because the Inner City Problems (Special Measures) Act and the 2003 Housing By-law of the municipality of Rotterdam expressly introduced this mechanism³. However, to answer the question whether this same measure pursued a legitimate aim proves more difficult. It is certainly clear that the law in question was officially aimed at the “deghettoisation” and regeneration of the most deprived areas. To attain these objectives it introduced measures intended to encourage a social mix in the neighbourhoods concerned. Accordingly, the stated aim pursued by the measure underlying the interference with the applicant's rights could certainly be considered legitimate. However, a more careful examination of the authorities' policy soon reveals an underlying aim that is less commendable, seeking as it does to remove the more underprivileged inhabitants from the areas concerned.

8. It is regrettable to note at the outset that the very wording of the Dutch legislation, like the vocabulary used by the domestic courts, is particularly illustrative of the aims pursued by the authorities beyond the stated objective of “deghettoisation”. It would thus appear that the relevant housing policy actually stems from the perpetuation of confusion between poverty and public order offences and is testament to a real phobia of the poor, giving rise to deep-rooted negative stereotypes. It can be noted in this connection that the cause of incivility and other social disorder in the areas concerned by the legislation has been attributed to individuals who have no work income. While there is no doubt that it is commendable to ensure a social mix, it is nevertheless a somewhat dangerous short-cut to assimilate poverty with insecurity – or even criminality.

The judgment of the Regional Court dismissing the applicant's appeal against the Burgomaster's refusal clearly indicates that the restrictions on freedom to choose one's residence seek “to reverse a process of overburdening and decreasing quality of life” in the districts concerned, but that they are also “necessary for the maintenance of *ordre public*”⁴. What is more, the judgment states that in those districts “there is a concentration of

3. Paragraphs 36-39 of the Grand Chamber judgment.

4. Paragraph 16 of the Grand Chamber judgment.

underprivileged individuals ... as well as considerable dissatisfaction among the population about inappropriate behaviour, nuisance and crime”⁵. Poverty, far from being perceived as a source of vulnerability, is described here as the fount of all social evil that will therefore have to be eradicated, or at least distanced or diluted as far as possible.

The Administrative Jurisdiction Division of the Council of State maintained that position in response to the applicant’s appeal, and took the view that the interference was “inspired by the interest that society ha[d] in [ensuring] the quality of life in districts of major cities”⁶. In addition, it unequivocally accepted that the relevant rules, since they necessarily affected underprivileged inhabitants, could lead to an “indirect distinction”, or more accurately an indirect discrimination, but nevertheless found it to be “necessary and proportionate”, because “the measure [was] limited in time”⁷.

To make matters worse, the amendment of the Inner City Problems (Special Measures) Act, which took effect on 1 January 2017, offers another particularly serious clue as to this ulterior motive⁸. It provides that the housing permit may also be denied to persons aged 16 or over who are already known to the police or the courts or who are quite simply suspected of being likely to contribute to an increase in disturbance or crime. This body of consistent indications confirms that the measure in question did not seek solely to promote the regeneration of deprived neighbourhoods but was also aimed at ridding them of the poorest inhabitants, who were seen as responsible for the bad living conditions there, and in particular as a cause of public insecurity and crime.

9. Moreover, it should be pointed out at this juncture that the notion of *ordre public* – brandished as a banner by the authorities in their crusade against the most vulnerable population groups – is not the “catch-all” notion at the disposal, or at the discretion, of the States parties that this case may suggest. On the contrary, the Court has previously had occasion to describe the Convention as a “constitutional instrument of European public order (*ordre public*)”⁹. This means that *ordre public* cannot be raised against the Convention system as a bulwark to ring-fence the national margin of appreciation. European standards form an integral part of this *ordre public* and cannot be negated for the sake of national preferences. The notion of *ordre public* cannot be instrumentalised as if were a tool of variable parameters whose application is subject to national circumstances,

5. Ibid.

6. Paragraph 18 of the Grand Chamber judgment.

7. Ibid.

8. Paragraph 79 of the Grand Chamber judgment. The wording used in the new versions of sections 5(3) and 10(1) and (2) of the Act are clear: “In order to reduce inconvenience and crime, ... it appears that there is a reasonable suspicion that their accommodation will lead to an increase of nuisance or crime in that complex, that street or that area.”

9. *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 75, Series A no. 310.

especially when the dramatisation of *ordre public* is fertile ground for the stepping-up of security measures that has been seen in certain European countries. This common talk of a social *malaise* gives widespread credence to a pattern of suspicion and discrimination, especially *vis-à-vis* all those who belong to minorities or who have “social problems”. The illegitimacy of the general measure as noted above is further confirmed by an examination of its manifestations at an individual level.

2. The basis of the interference with the applicant’s right (§§ 10-14)

10. Even assuming that the aim pursued by the legislation had been legitimate, it could not have obviated the prism through which this case must be apprehended. The fact of giving precedence, as the Chamber and Grand Chamber judgments have done, to the general aims of a national policy over any impact that it may have at an individual level, inevitably runs counter to the general scheme of the Convention as an international treaty for the protection of human rights.

11. As I have often had occasion to state¹⁰, the Convention must necessarily be read in a *pro persona* perspective, placing the individual at the heart of the reasoning. Monica Pinto defines this principle as “a hermeneutic criterion impregnating all human rights law, on the basis of which the most far-reaching norm, or its most extensive interpretation, must be taken into account when it comes to acknowledging protected rights”¹¹. Human rights treaties must be interpreted in the manner which best protects the rights and freedoms secured therein¹². Ultimately it is therefore a matter of selecting the interpretation of rights that is most favourable for the individual. The Court’s mission consists precisely in guaranteeing individual rights and not in whitewashing the decisions of national authorities, especially when those decisions entail a restriction of human

10. See, in particular, my dissenting and partly dissenting opinions in *Muršić v. Croatia* ([GC], no. 7334/13, ECHR 2016) and *A and B v. Norway* ([GC], nos. 24130/11 and 29758/11, ECHR 2016).

11. See Pinto, “El principio *pro homine*. Criterios de hermenéutica y pautas para la regulación de los derechos humanos”, in Abregu and Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, Buenos Aires, Centro de Estudios Legales y Sociales/Editores del Puerto, 1997, p. 163 (my translation). In the original version the author speaks of “un criterio hermenéutico qui informa todo el derecho de los derechos humanos, en virtud del cual se debe acudir a la norma más amplia, o a la interpretación más extensiva, cuando se trata de reconocer derechos protegidos”. See also, *inter alia*, Castilla, “El principio *pro persona* en la administración de la justicia”, in *Cuestiones constitucionales*, 2009, no. 20, and Amaya Villareal, “El principio *pro homine*: Interpretación extensiva vs. El consentimiento del Estado”, in *Revista Colombiana de derecho internacional*, 2005, pp. 337-380.

12 See *Wemhoff v. Germany*, 27 June 1968, § 8 [law part], Series A no. 7, and, following a long tradition of the Inter-American Court, *Ricardo Canese v. Paraguay*, 31 August 2004, Series C no. 111, § 181. This principle is based on Article 31 of the Vienna Convention on the Law of Treaties, which prescribes a teleological interpretation of international law.

rights. While the national authorities are in principle the best placed to assess the needs of society¹³, and while the Court must respect its subsidiary role, it is nevertheless precluded from adopting a *pro auctoritate* reading of the Convention and the Protocols thereto, but must, on the contrary, uphold the effectiveness and maximising of the rights secured to the individual.

12. An examination of the interference committed by the Dutch authorities with the applicant's freedom to choose her residence must therefore focus on the particular effects of the individual measure sustained by her. However, the Chamber judgment, like that of the Grand Chamber, had focused on the legitimacy of the general measure adopted by the Government and on the public interest that was supposed to be upheld by that measure. In the Chamber's view, *inter alia*, "the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case"¹⁴. The same reasoning can be found more subtly in the Grand Chamber's effort to assess *in abstracto* whether the Inner City Problems (Special Measures) Act was compliant with the Convention and in its wish to rule *urbi et orbi* upon the legitimacy under the Convention of the *Rotterdamwet* policy option¹⁵. As a result, the majority have implicitly endorsed the reasoning previously adopted in *Animal Defenders International v. the United Kingdom*, where the Court had accepted that the State could take general measures applying to pre-defined situations regardless of the specific circumstances of each individual case, even if those measures might lead to difficulties in certain cases¹⁶. Such an analysis at the general level considerably increases the State's margin of appreciation in the restriction of individual rights for the sake of collective goals.

In the light of the foregoing, the result of the assessment of the applicant's situation was a foregone conclusion, if not a fatality. The so-called weighing-up by the majority of the applicant's personal conduct, "however virtuous", against the "legitimate" public policy of the respondent State, was simply cosmetic¹⁷. The use of the proportionality test in respect of the individual measure applied to the applicant was merely an illusion. Indeed, being inspired by an unacceptable *pro auctoritate* ideology, the majority even contend that the applicant should have justified her preference for a given residential area and disclosed private information to the public authorities, thus making the assumption that the State should exercise a paternalistic, if not totalitarian, role in respect of certain deprived population

13. See *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

14. See paragraph 113 of the Chamber judgment.

15. See paragraph 156 of the Grand Chamber judgment.

16. See *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 106, ECHR 2013, with a reference to *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-15, ECHR 2006-IV.

17. See paragraphs 158 and 166 of the Grand Chamber judgment.

categories¹⁸. In so doing the majority have *de facto* reversed the burden of proof as regards the proportionality of the State's interference with the applicant's right. And in so doing the majority have ultimately contradicted the following principle of international law, which is now firmly established¹⁹:

“Persons living in poverty must be recognized and treated as free and autonomous agents. All policies relevant to poverty must be aimed at empowering persons living in poverty. They must be based on the recognition of those persons' right to make their own decisions and respect their capacity to fulfil their own potential, their sense of dignity and their right to participate in decisions affecting their life.”

13. By contrast, the Court has already had occasion to explain that the State's margin of appreciation will be restricted where “a particularly important facet of an individual's existence or identity is at stake”²⁰. While it usually holds this discourse when it comes to interference with the right to private and family life, there is no doubt that the right to freely choose one's residence, and more broadly questions related to the place of abode, may benefit from the same conclusion. Furthermore, the Court has already indicated that the margin of appreciation afforded to the State will be narrower “if a restriction on fundamental rights applies to a particularly vulnerable group in society”, and that the Government “must have very weighty reasons for the restrictions in question”²¹. Consequently, the transposition of the “general” reasoning from the *Animal Defenders* judgment (cited above) is not suited to the present case. Similarly, the reference to a broad margin of appreciation in the implementation of an urban policy, or more generally an economic and social policy, is quite out of place in the circumstances of the present case²². Having regard to the considerable repercussions that housing policies may have for the private and family life and vulnerability of the most underprivileged members of society, the position to be taken on these questions cannot be one of withdrawal or of excessive deference *vis-à-vis* the national authorities, without undermining the very substance of the Convention mechanism. The Court has, moreover, reiterated on many occasions that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”²³.

18. See paragraphs 162 and 166 of the Grand Chamber judgment.

19. United Nations General Assembly, “Guiding principles on extreme poverty and human rights”, 18 July 2012, A/HRC/21/39, § 36. The United Nations Human Rights Council adopted these principles by consensus in its Resolution 21/11 in September 2012. It should be pointed out that those principles also emphasise the need to “[r]evise legal and administrative frameworks to protect persons living in poverty from inappropriate intrusion into their privacy by the authorities. Surveillance policies, welfare conditionalities and other administrative requirements must be reviewed to ensure that they do not impose a disproportionate burden on those living in poverty or invade their privacy” (ibid., § 72).

20. See *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I.

21. See *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010.

22. See paragraphs 137 and 138 of the Grand Chamber judgment.

14. This fundamental premise reminds us that the Court’s mission consists in securing the effective enjoyment of Convention rights at an individual level. As the Court first stated expressly in *Handyside v. the United Kingdom*, European supervision “covers not only the basic legislation but also the decision applying it, even one given by an independent court”²⁴. Therefore the scrutiny of the interference sustained by Ms Garib must not be exercised exclusively or principally at the level of the general measure regulating housing permits for deprived neighbourhoods – which would, in any event, lead to the conclusion that it was illegitimate, as I have already shown – but also and above all must also concern the individual measure by which the applicant was denied such a permit. The Explanatory Report in respect of Protocol No. 4²⁵ confirms this view because its drafters chose not to provide, under Article 2 of the Protocol, that the right to freely choose one’s residence could be restricted for economic reasons, thus showing that the choice of a general policy, and of a general economic policy in particular, could not trump individual rights. This was one of the arguments put forward by the proponents of the position adopted at the time, to the effect that “[t]he adoption of the other view would allow States to restrict the freedom of movement not only of aliens but also of their own nationals on economic grounds and this would be a retrograde step rather than a step forward in the protection of individual rights”²⁶. Indeed, “[t]he majority of the Committee was against the inclusion of a provision permitting restrictions on the ground of economic welfare”²⁷. Thus, any mercantilist interpretation of the fourth paragraph, accepting a restriction of the right to freely choose one’s residence based exclusively or primarily on criteria of general economic welfare, such as the criterion of the inhabitants’ income, would run counter to the express intention of the drafters of Protocol No. 4. But this is precisely the possibility that the Grand Chamber has wrongly accepted in the present case²⁸.

23. See *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32.

24. See *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24.

25. Explanatory Report in respect of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16 September 1963, STE no. 46.

26. Paragraph 15 (f) of the Explanatory Report.

27. Paragraph 18 of the Explanatory Report.

28. On this point I share the view expressed in the joint dissenting opinion of Judges López Guerra and Keller appended to the Chamber judgment (paragraph 6). To put this more clearly: the interpretation put forward in paragraph 109 of the Grand Chamber judgment, according to which the fourth paragraph was added to provide for restrictions of the right to liberty of movement and freedom to choose one’s residence for reasons of “economic welfare” is literally at odds with the first sentence of paragraph 18 of the Explanatory Report, which refers expressly to that fourth paragraph. The drafting committee, in the fourth paragraph, had certainly accepted restrictions based on the public interest, but with the exception of those based on the requirements of “economic welfare”.

B. Lack of proportionality of the interference with the applicant's right (§§ 15-21)

15. Since the subject of the Court's supervision is actually the individual measure imposed on the applicant, this is the measure to which the test must be applied as to whether the interference was proportionate to the legitimate aim pursued. In the present case, however, whether under the third or the fourth paragraph of Article 2 of Protocol No. 4, the interference in question cannot be regarded as proportionate to the aim pursued. Moreover, the cause of this lack of proportionality is two fold: the measure was not only unnecessary (1), it did not give rise to an appropriate weighing-up of the relevant interests either (2).

1. Lack of necessity of the measure (§§ 16-17)

16. The denial of a housing permit to Ms Garib, who wished to move into a larger flat in the district where she was already living, did not correspond to any necessity in the light of the circumstances of the case. Accordingly, it cannot be considered, as the Grand Chamber has done, that the measure was justified by the appropriateness of the means used in relation to the aims pursued. The Equal Treatment Commission had found that the 2003 By-law and the Inner City Problems (Special Measures) Bill entailed indirect discrimination based on race in the case of persons of non-European immigrant descent and on gender in the case of working mothers, and that these distinctions were not justified given the availability of alternative measures²⁹. The reports on the implementation of the legislation in question, as now available, reveal that no noteworthy improvement has been achieved by the measures. They thus illustrate that the problems which the authorities had intended to combat cannot be attributed to the "poor". So in spite of filtering candidates for housing according to their income, and thus ensuring the gradual cleansing of these areas, no significant progression in the quality of life or feeling of safety has been recorded. To make matters worse, the effects of this legislation are quite alarming. The 2007 report reveals that only 40% of individuals who have been denied a housing permit on account of their social and economic situation have found new housing rapidly. That number reached two thirds in 2009. However, in that same year, the report reveals that, while the number of residents in receipt of benefit had declined in the sensitive neighbourhoods, the perceived lack of safety had not at all been reduced but had even increased there. The authors even admitted that "the effect of the housing permit in this respect was limited"³⁰. The data in the 2011 report are no more positive³¹. The most recent report from Amsterdam University, published in 2015,

29. See paragraph 45 of the Grand Chamber judgment.

30. See paragraph 62 of the Grand Chamber judgment.

31. See paragraph 70 of the Grand Chamber judgment.

contains the same findings almost ten years after the entry into force of the Inner City Problems (Special Measures) Act³². It certainly confirms the lack of safety and of quality of life in the areas concerned, but above all states that “the designated districts have shown a more negative development in their scores than the other districts of the city”, and that “it still appears that the districts covered by the Act display a significantly worse development than the other districts of Rotterdam”³³. The measure in question has thus quite simply proved ineffective for the pursuit of the legitimate aim announced by the authorities³⁴.

However, even though it was supposed to be temporary in nature³⁵, the legislation was extended and strengthened by an amendment, which entered into force on 14 April 2014, even though it had clearly not produced the intended effects³⁶. With the possibility of renewal for successive four-year periods from the entry into force of this amendment, the measure is thus prolonged indefinitely. In other words, the façade of the “limited duration” attached to the measure of “indirect distinction”, to use the Council of State’s wording, has fallen away³⁷. After more than ten years of application of a discriminatory policy *vis-à-vis* the poor, without seeing the slightest

32. I fail to see why the majority considered this report not to be relevant (see paragraph 148 of the Grand Chamber judgment). While the majority have relied on the precedent of *Lithgow and Others v. the United Kingdom* (8 July 1986, § 132, Series A no. 102), they have overlooked the much more recent finding in *S.H. and Others v. Austria* ([GC], no. 57813/00, § 84, ECHR 2011) that the Court may take account of developments occurring since the national authorities’ decisions. Moreover, the majority themselves have used the 2009 and 2011 evaluation reports in their argument (see paragraph 154 of the Grand Chamber judgment). It must be concluded from the majority’s reasoning that documents issued subsequent to the facts of the case have not all been given the same weight.

33. See paragraph 74 of the Grand Chamber judgment.

34. At this juncture it is noteworthy that the assessment by Amsterdam University has been confirmed by the most recent data. See Van Gent *et al.* (2017), “Exclusion as urban policy”, cited above: “This review examines the socio-spatial effects of the Act in Rotterdam between 2006 and 2013. While the Act produces socio-demographic changes, the state of the living environment in designated areas seems to be worsening rather than improving. Our findings show that the policy restricts the rights of excluded groups without demonstrably improving safety or liveability. ... the Act contributes to a worsening housing market position of the excluded residents ... the mobility and choices of unemployed residents have been restricted.”

35. It was approved in 2006 for an initial term of four years (see paragraph 40 of the Grand Chamber judgment).

36. See paragraphs 78 and 130 of the Grand Chamber judgment. In 2010 the designations of “sensitive areas” introduced in 2006 were extended for a second four-year term (see paragraph 41 of the Grand Chamber judgment).

37. As stated by Uitermark *et al.* in “The statistical politics of exceptional territories”, cited above, p. 66: “The exceptional becomes the new normal. This also happened with the Rotterdam Act. ... This is all the more remarkable considering that the Act was explicitly presented as a temporary measure that should be used as a last resort – ministerial documents literally refer to the measure as an *ultimum remedium*.”

success, neither an increase in living standard, nor a reduction in criminal behaviour and public disorder in the districts concerned, the legislature insisted and persisted in its mistake by adopting the above-mentioned amendments to the law, which entered into force in 2017³⁸.

17. Lastly, the necessity of the measure in question is further contradicted by an examination of the facts of the case. While Ms Garib derived her income from social-security benefit, she was already living in the Tarwewijk neighbourhood. Consequently, her eviction did not fall within the aims of the law, which sought to modify the composition of the population of the areas concerned by selecting new arrivals. There is no guarantee that the new occupants of Ms Garib's former housing, or that to which she wanted to move, would have been recipients of work income. The fact of living for more than six years in the area concerned allows a derogation from the mechanism, but Ms Garib failed to satisfy that condition. Therefore, the fact of denying a permit to a person who is already a resident of the neighbourhood but has lived there for less than six years does not make any sense in the light of the aims of the law and the disputed measure cannot, having regard to all of the foregoing considerations, be regarded as necessary for the pursuit of the stated legislative aim.

2. Lack of an appropriate balancing exercise (§§ 18-21)

18. In addition to it being necessary, an interference with Convention rights must be proportionate in itself, that is to say that it must ensure a fair balance between the interests at stake³⁹. Once the proportionality test is applied to the individual measure, the interference with the applicant's right in the present case does not satisfy that condition, for a number of reasons.

19. The most significant element of the non-proportionality of the measure lies in the total lack of any individual examination of the applicant's situation. While the Government admitted from the outset that there had been an interference with Ms Garib's right, the authorities had not found it necessary to assess its impact on her individual situation. The same omission can be seen in the reasoning of the Administrative Jurisdiction Division, which merely noted that "it does not appear that Garib cannot obtain suitable housing elsewhere in the Municipality or the Region".

The applicant is a single mother of two children and she relies on benefit to provide for her family all by herself. She was initially living in a small run-down flat with her children when her landlord offered her the rental of a three-bedroom flat better suited to their needs and located only about forty metres away. She had already started fitting out her new flat when she received the decision refusing her a housing permit. Since the applicant was already living in the area concerned, the refusal to authorise her move to a

38. See paragraph 79 of the Grand Chamber judgment.

39. See *Klass and Others v. Germany*, 6 September 1978, § 59, Series A no. 28.

flat that was available and in the same area – having regard to the living conditions of the family and the effects of the measure on their already precarious situation – cannot be regarded as striking a fair balance between the considerable individual interest at stake here and the collective interest that the measure was supposed to serve.

20. Lastly, there is no doubt that less restrictive measures could have been used to fulfil the “stated” aim of the legislation in question. Work to regenerate and promote these districts could also have been envisaged in order to attract higher income households. A strengthening of police presence and the implementation of social policy actions could also have contributed to improving the feeling of safety and quality of life. It is also particularly significant that the Netherlands is the only European State to have adopted, to my knowledge, this type of strategy⁴⁰. While many other countries seek to influence the composition of the population of urban areas in a perspective of desegregation, as is the case for example of France, Germany, Switzerland or Belgium, those countries have, by contrast, opted for the settlement of underprivileged groups in various areas by imposing minimum quotas of social housing⁴¹. Ultimately, it is difficult to understand how the eviction of the residents of the district in question could have been more effective with a view to its “deghettoisation”, in the light of the considerable interference caused by this type of measure with the fundamental rights of those concerned⁴². In reality, the crux of the matter

40. In paragraphs 87-92 of the Grand Chamber judgment, the majority present at some length the Danish example of practices adopted in other Council of Europe States, but that is a quite different situation. In Denmark, the restrictions applicable to “residents out of work” concern only candidates for social housing. That has nothing to do with the applicant’s situation in the present case. The specialised literature confirms the uniqueness of the Dutch legislation (see Van Gent *et al.* (2017), “Exclusion as urban policy”, cited above, p. 5).

41. For an introduction to the various alternative urban regeneration policies applied in Europe, see Widmer and Kübler (eds), *Regenerating Urban Neighbourhoods in Europe, Eight case Studies in six European Countries*, Aarau Centre for Democracy Studies, Working Paper Nr. 3, May 2014, with an article by Van Ostaaijen, “Regenerating Urban Neighbourhoods (RUN): an overview for Rotterdam”, pp. 179-212; Uitermark (2014), “Integration and control: The governing of urban marginality in Western Europe”, in *International Journal of Urban and Regional Research* 38(4): 1418-1436; van Ham *et al.* (eds) (2012), *Neighborhood Effects Research: New Perspectives*, Dordrecht: Springer; Van Gent (2010), “Housing context and social transformation strategies in neighbourhood regeneration in Western European cities”, in *International Journal of Housing Policy* 10(1): 63–87; Van Gent *et al.* (2009), “Disentangling neighborhood problems; Area-based interventions in Western European cities”, in *Urban Research & Practice* 2(1): 53–67; Ireland (2008), “Comparing responses to ethnic segregation in urban Europe”, in *Urban Studies* 45 (7): 1333-1358; and Galster (2007), “Should policy makers strive for neighborhood social mix? An analysis of the Western European evidence base”, in *Housing Studies* 22 (4): 523-545.

42. A housing policy favourable to the poor should “[e]nsure adequate public expenditure on affordable housing and promote policies and programmes that enable access to

seems in my view to lie elsewhere, namely in the almost open intention of the Government to rid the areas concerned of the most underprivileged residents by means of this housing policy, while at the same time massively reducing investment in positive integration programmes for marginalised groups, in the restructuring of public services and in the renovation of buildings in those areas⁴³.

III. Discrimination on grounds of social precariousness (§§ 22-39)

22. The interference with Ms Garib’s right to freely choose her residence conceals the real issue in this case. Behind Dutch housing policy hides a more serious problem of discrimination against individuals on account of their socially precarious situations. The present case is, at that level, fundamental and provided the Court with an opportunity to take a position on a social phenomenon which is continually growing. While the world has seen unprecedented economic growth, wealth gaps have become intolerable and the living conditions of precarious groups represent, more than ever, a breach of human dignity. In those circumstances, the most underprivileged suffer from a latent discrimination, which is both the cause and consequence of their poverty⁴⁴.

23. The case of *Garib v. the Netherlands* unfortunately illustrates this trend, since the Dutch legislation undeniably creates discrimination based on the social and economic situation of the residents (**A**). This case also required the Court, in parallel, to address the problem of insidious, indirect or intersectional forms of discrimination (**B**).

affordable housing for persons living in poverty. Such policies and programmes should accord priority to the most disadvantaged groups and may include housing finance programmes, slum upgrading, titling and regularization of informal settlements, and/or State subsidies for rent or credit for housing ownership” (“Guiding principles on extreme poverty and human rights”, cited above, § 80). See also Committee on economic, social and cultural rights, General Comment no. 4/1991: The right to adequate housing (Art. 11 (1) of the Covenant), 1 January 1992, § 11: “States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.”; and Human Rights Committee, General Comment no. 27 on Freedom of Movement (Article 12), 2 November 1999 (§§ 16 and 17): the Committee criticised provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination.

43. See on this point the findings of fact by Van Gent *et al.* (2017), “Exclusion as urban policy”, cited above, pp. 5 and 14.

44. “Guiding principles on extreme poverty and human rights”, cited above, § 8, p. 5.

A. The discriminatory basis of the Dutch legislation (§§ 24-30)

24. The applicant unfortunately failed to rely in her observations on a violation of Article 14 of the Convention. Nevertheless, in accordance with the *jura novit curia* principle, the Court had the capacity to examine the case from the perspective of the prohibition of discrimination. In addition, the parties analysed certain aspects of the case in terms of discrimination, and the domestic courts had been called upon to address this issue⁴⁵. Such a perspective would have enabled the Grand Chamber to set in motion an essential development in European case-law by expressly including poverty among the discrimination criteria prohibited under Article 14 (1), and to acknowledge the discriminatory treatment sustained by the applicant (2).

1. Poverty as a criterion of discrimination (§§ 25-26)

25. The combat against extreme poverty has become a fundamental development issue, especially since the 1990s. Economic development and the increase of wealth have paradoxically drawn attention to the most underprivileged, who have been left out of this phenomenon. The considerable discrepancy in living standards, sometimes within a single society, has given rise to a real awareness at the international level. The definition of precariousness (lack of basic security) as promoted by the United Nations is particularly significant. It reads as follows⁴⁶:

“The lack of basic security connotes the absence of one or more factors enabling individuals and families to assume basic responsibilities and to enjoy fundamental rights. The situation may become widespread and result in more serious and permanent consequences. The lack of basic security leads to chronic poverty when it simultaneously affects several aspects of people’s lives, when it is prolonged and when it severely compromises people’s chances of regaining their rights and of reassuming their responsibilities in the foreseeable future.”

This definition is particularly useful since it has the merit of immediately highlighting the multifaceted nature of poverty and its consequences. Poverty thus contains within it a highly destructive potential as it jeopardises the fulfilment of many fundamental freedoms. This is the reason why the United Nations has entreated the member States to adopt poverty reduction strategies based on human rights⁴⁷. The eradication of poverty is, in particular, among the millennium goals set out in 2000⁴⁸. Thus envisaged,

45. See paragraph 95 of the Grand Chamber judgment. See also the joint dissenting opinion of Judges López Guerra and Keller appended to the Chamber judgment, referring to the “applicable principles concerning discrimination” (§ 14).

46. Final report on human rights and extreme poverty, submitted by the Special Rapporteur, Mr. Leandro Despouy, and adopted by a Sub-Commission of the Commission on Human Rights, Geneva, 1996 (E/CN.4/Sub.2/1996/13), p. 63.

47. “Guiding principles on extreme poverty and human rights”, cited above, § 50.

48. United Nations General Assembly, “Millennium Declaration”, 8 September 2000 (A/RES/55/2).

social precariousness is a global issue for international human rights law, illustrating once again, if need be, the interdependency and indivisibility of human rights.

26. Going beyond its personal dimension and the dramatic effects it entails for the daily life and future of those concerned, poverty further modifies, in the most negative possible way, their relationship with others and with society. The risk of stigmatisation and discrimination is both aggravated and aggravating for individuals in a precarious situation. Access to certain basic services, like their full and complete integration into the social fabric, may be jeopardised by their social and economic situation, as a result of negative stereotypes and prejudices being perpetuated. Accordingly, many international instruments prohibit discrimination on grounds of “economic condition/status” or “social origin”, for example: Article 26 of the International Covenant on Civil and Political Rights; Article 2 § 2 of the International Covenant on Economic, Social and Cultural Rights; Article 1 of the American Convention on Human Rights; Article 1 § 1 of the ILO Convention concerning Discrimination in Respect of Employment and Occupation; the UNESCO Convention against Discrimination in Education; or Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12. Article 30 of the European Social Charter provides in particular for the right to protection against poverty and social exclusion, requiring States to⁴⁹:

“... take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance.”

This is also the case of much domestic legislation, particularly under French law, which adds “the particular vulnerability stemming from [the] apparent or known economic situation” to the criteria of discrimination penalised by law since 2016⁵⁰. Article 3 of the Italian Constitution proclaims the equality of all citizens before the law without any distinction

49. See also Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2004/113/EC of the Council of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, which prohibits discrimination in access to housing. On EU law in this area see “The meaning of racial or ethnic origin in EU law: between stereotypes and identities, European network of legal experts in gender equality and non-discrimination”, drafted by Lilla Farkas, 2017, with an interesting analysis of the present case; “La discrimination dans le logement, Réseau européen des experts juridiques en matière de non-discrimination”, drafted by Julie Ringelheim and Nicolas Bernard, 2013; and “Report on measures to combat discrimination directives 2000/43/EC and 2000/78/EC”, Country Report 2011, The Netherlands, by Rikki Holtmaat.

50. Law no. 2016-832 of 24 June 2016 on the prevention of discrimination on grounds of social precariousness, JORF no. 0147, 25 June 2016.

“in personal or social conditions”. Belgian law prohibits discrimination based *inter alia* on “wealth” or “social origin”. This phenomenon is not limited to Europe because illustrations can be found in the Constitutions of South Africa⁵¹, Bolivia⁵² or Ecuador⁵³, for example. The Inter-American Court of Human Rights has already implemented such rules. In the case of *Gonzales Lluy v. Ecuador*, it included poverty among the grounds for the discrimination sustained by the applicant in finding a violation of Article 1(1) of the American Convention on Human Rights. That court explained clearly that “Talia Gonzales Lluy suffered discrimination derived from her situation as a person living with HIV, a child, a female, and living in conditions of poverty”⁵⁴. It is clear, therefore, that poverty is seen by the Inter-American judges as a potential factor of discrimination, prohibited by the American Convention. In view of this uniform conception of poverty as a prohibited ground of discrimination, it is appropriate once again to point out the need to interpret the European Convention not in a vacuum⁵⁵, but in the light of the relevant international law, or of any consensus that may emerge among the States parties. It has always been clear in Europe that “the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein”⁵⁶. It is thus essential to bear in mind that social precariousness figures among the grounds of discrimination prohibited under Article 14 of the Convention⁵⁷.

2. Discrimination against the applicant on the basis of her social and economic situation (§§ 27-30)

27. It is undeniable that there is a connection between housing policy and risks of discrimination which can arise from such policy, based on precarious individual situations. In its comments on Article 30 of the Social Charter, the European Committee of Social Rights (ECSR) had previously indicated that “[t]he measures taken for such a purpose must promote and remove obstacles to access to fundamental social rights, in particular employment, housing, training, education, culture and social and medical assistance.”⁵⁸. The “Guiding principles on extreme poverty and human

51. Article 9 § 3.

52. Article 14.

53. Article 11.

54. Inter-American Court of Human Rights (IACtHR), *Gonzales Lluy et al. v. Ecuador*, judgment of 1 September 2015 (Preliminary Objections, Merits, Reparations, and Costs), Series C no. 298, § 291.

55. *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports of Judgments and Decisions* 1996-VI.

56. *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008.

57. On the vulnerability of the poor in the light of the Convention, see Lavrysen (2015), “Strengthening the protection of Human Rights of Persons Living in Poverty under the ECHR”, in *Netherlands Quarterly of Human Rights*, 33 (3), pp. 293-325.

rights” of the United Nations, which set out norms of “soft law”⁵⁹, deal specifically with this question. They call for the implementation of an adequate right to housing and security of tenure, observing as follows⁶⁰:

“Discrimination in access to housing, lack of affordable housing and speculation in housing and land, in addition to violations perpetrated by private actors, including landlords, real estate agents and financial companies, contribute to the increased vulnerability of persons living in poverty and push them further into destitution or homelessness.”

The States parties are thus asked to “[a]ccord priority to individuals and communities living in poverty in housing and land allocation, especially where access to work and services is available”⁶¹.

28. A number of international authorities and bodies have shown particular concern about the Dutch housing policy at issue in the present case. The majority have quite simply ignored the reiterated and consistent positions of the United Nations Human Rights Committee, the ECSR, the European Commission against Racism and Intolerance (ECRI) and the Council of Europe’s Commissioner for Human Rights, as to the specific question discussed here. This is yet another methodological choice on the part of the majority that I have difficulty understanding. It is particularly hard to comprehend why the highly commendable work of the ECSR, which is the competent body on questions of the right to housing and discrimination in access to housing, has been ignored⁶².

Already in 2007, in its third report on the situation in the Netherlands, ECRI adopted the following position⁶³:

“... ECRI strongly recommends that the Dutch authorities monitor the impact of measures taken in these fields and ensure that these comply with the prohibition to discriminate directly or indirectly on the basis of grounds covered by ECRI’s mandate. It recommends that policies that are found to be in breach of such prohibition should be discontinued. ... ECRI recommends that in their efforts to combat *de facto* segregation the Dutch authorities give priority to measures aimed at improving the socio-economic conditions prevailing in disadvantaged areas.”

58. Statement of interpretation on Article 30, see also Conclusions 2003, France, p. 227.

59. For a discussion on the legal value of this kind of normative text, see my separate opinion in *Muršić* (cited above).

60. “Guiding principles on extreme poverty and human rights” (cited above), § 79.

61. *Ibid.*, § 80.

62. The Court has never before been asked to examine a case with such major consequences for the right to housing of underprivileged groups, as for the political geography of European cities. On the protection of the right to housing in international and European law, see Office of the United Nations High Commissioner for Human Rights, “The Rights to Adequate Housing”, Factsheet no. 21 (Rev. 1), and Kenna and Uhry, *Lent déploiement d’une chrysalide : Le droit européen au logement*, 2016.

63. CRI(2008)3, Third report on the Netherlands, adopted on 29 June 2007, §§ 72-75. See also CRI(2013)39, Fourth report on the Netherlands, adopted on 23 June 2013, §§ 87-91, expressing specific concerns about discrimination in the access to housing of temporary workers coming from Poland and other Eastern European countries.

In the 2009 report on his visit to the Netherlands, the Council of Europe’s Commissioner for Human Rights emphasised the discriminatory potential of this legislation *vis-à-vis* the poor and the unemployed, and called for it to be reviewed⁶⁴.

In its 2011 findings on the report submitted by the Netherlands, the ECSR expressed concern about the relevant Dutch legislation’s potential discrimination as a result of the income criterion for housing permits⁶⁵. The ECSR pointed out that the general interest in improving the quality of housing in certain areas had to be weighed against the specific interest of the vulnerable category⁶⁶. It thus instructed the Netherlands Government as follows:

“The Committee requests the next report to clarify how the balance between the general interest of improving the quality of housing in certain areas and the interest of specific vulnerable groups is taken into account. Should the next report not provide evidence that the setting of such income requirements did not produce discriminatory effects on low-income persons and families, there will be nothing to show that the situation is in conformity with Article 31 § 1 as regards the effective access to and enjoyment of adequate housing.”

This request has remained unanswered⁶⁷.

At UN level, the Human Rights Committee also expressed concern about this situation in its conclusions on the periodical report submitted by the Netherlands in 2009. As it clearly stated⁶⁸:

64. Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to the Netherlands, 21-25 September 2008, CommDH(2009)2, § 158.

65. ECSR, Conclusions 2011, the Netherlands, Article 31-1, 2011/def/NLD/31/1/EN.

66. The extremely clear and significant words of the ECSR report read as follows: “The Committee reiterates that States Parties shall guarantee equal treatment with respect to housing on the grounds of Article E of the Charter. Article E prohibits discrimination and therefore establishes an obligation to ensure that, in the absence of objective and reasonable justifications, any individual or groups with particular characteristics enjoys in practice the rights secured in the Charter. Moreover, Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Discrimination may also arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all (*International Association Autism-Europe (Autisme) v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 52 and *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, decision on the merits of 25 June 2010, § 35). As regards the right to housing the Committee has held that equal treatment must be assured to the different groups of vulnerable persons, particularly low-income persons, unemployed, single parent households, minors, persons with disabilities including mental health problems, persons internally displaced due to wars or natural disasters, etc. (Conclusions 2003, France).”

67. The ECSR Conclusions of 2015 on Article 31-1, 31-2 and 31-3 concerning the report submitted by the Netherlands remain silent on this subject. It is clear that the Government had avoided the subject in their report.

68. Concluding observations of the Human Rights Committee, 25 August 2009, CCPR/C/NLD/CO/4, §18.

“... making the allocation of housing in certain areas subject to additional income qualifications under the 2006 Urban Areas (Special Measures) Act, together with the deliberate housing of low-income persons and families in peripheral and central municipalities, may result in violations of articles 12, paragraph 1; and 26 of the Covenant. (arts. 2, 12, para. 1, 17 and 26).”

Like the ECSR, its conclusion was that “[t]he State party should ensure that its regulation of access to housing does not discriminate against low-income families and respects the right to choose one’s residence”⁶⁹.

29. The Inner City Problems (Special Measures) Act has, since 2006, indeed applied a difference in treatment based on a person’s source of income. It provides in section 5 that the Minister can designate areas in which persons seeking housing may be made subject to certain requirements. Section 8 of the Act (see paragraph 21 of the judgment) thus requires one of the following sources of income:

- “(a) income from work under a contract of employment;
- (b) income from an independent profession or business;
- (c) income from an early retirement pension;
- (d) an old-age pension within the meaning of the General Old-Age Pensions Act;
- (e) an old-age pension or survivor’s pension within the meaning of the Wages (Tax Deduction) Act 1964; or
- (f) a student grant within the meaning of the Student Grants Act 2000.”

This difference in treatment depending on the income source is not, in reality, based on any objective justification but on a latent stigmatisation of the most disadvantaged groups who are often living off welfare. This can be seen from the language used by the authorities in this connection, as already mentioned. The Explanatory Memorandum in respect of the Bill explained as follows (see paragraph 26 of the judgment):

“The emergence of concentrations of ‘socioeconomically underprivileged’ in distressed inner-city areas had been observed, with serious effects on the quality of life owing to unemployment, poverty and social exclusion. Many who could afford to move elsewhere did so, which led to the further impoverishment of the areas so affected. This, together with antisocial behaviour, the influx of illegal immigrants and crime, was said to constitute the core of Rotterdam’s problems.”

The Regional Court, in its decision of 4 April 2008 to dismiss the applicant’s appeal, already indicated that “in those districts there [was] a concentration of underprivileged individuals in deprived districts as well as considerable dissatisfaction among the population about inappropriate behaviour, nuisance and crime” (see paragraph 16 of the judgment). In the eyes of both the legislature and the domestic court, poverty and social disorder are thus closely linked. This approach becomes even clearer in the light of the above-mentioned amendment (see paragraph 8 above), which

69. Ibid.

entered into force in 2017, extending the category of person excluded from the designated areas to any individual who is known to the police or the courts, or who is suspected of being likely to contribute to an increase in disturbance or crime in the relevant area. Such a proposition is totally at odds with the principle of the presumption of innocence and again reveals the dangerous stigmatisation in which the authorities have engaged⁷⁰. It is thus sufficient to be merely suspected of being likely to cause potential nuisance (and it is not known how this is taken into consideration) or of belonging to a defined category of vulnerable person (those who do not have work income) in order to sustain a considerable interference with the right to freely choose one's residence. It is not the pragmatic finding of the need for sufficient income to pay one's rent which forms the basis of the difference in treatment, but indeed the underlying treatment of benefit recipients as troublemakers who should be removed from the areas intended for regeneration.

30. In reality the applicant has been used as a scape-goat of society, in spite of her particularly vulnerable situation. The law in question affects *de facto* a specific underprivileged category on which it imposes unfavourable treatment compared to the treatment of the majority group. The precarious population groups who find themselves in this situation are thus subject to a double punishment, because they face poverty-related difficulties in combination with constant social stigmatisation. The link systematically made by the law between disorder and other forms of incivility, on the one hand, and poverty, on the other, is nonsensical and is not corroborated by any statistical evidence. Such a misconception contributes to the perpetuation of stereotypes with dramatic effects for these population groups, whereas, on the contrary, they need particular assistance to rise above their condition. Legislation which institutionalises such

70. As pointed out by Van Gent *et al.* (2017), "Exclusion as urban policy", cited above, p. 14: "The Act was also expanded in 2016 to not only improve living conditions but also target public safety more directly. It now holds provisions to allow the exclusion of residents based on police records of crime, 'anti-social behaviour', and suspicions of extremism and radicalism. These policy changes represent a further step towards a reliance on profiling and exclusion." See in general, about territorial stigmatisation and the stigmatising effect of urban policies, especially the policy of urban gentrification, Wacquant *et al.*, "Territorial stigmatization in action", in *Environment and Planning A* 2014, 46: 1270-1280; Sakizlioglu and Uitermark (2014), "The symbolic politics of gentrification: the restructuring of stigmatized neighborhoods in Amsterdam and Istanbul", in *Environment and Planning A* 2014, 46: 1369-1385; Van Duin *et al.* (2011), "Marginality and stigmatization: identifying with the neighbourhood in Rotterdam", Annual RC21 Conference 2011; Musterd (2008), "Residents' views on social mix: Social mix, social networks and stigmatisation in post-war housing estates in Europe", in *Urban Studies* 45 (4): 897-915; Van der Laan Bouma-Doff (2007), "Confined Contact. Residential segregation and ethnic bridges in the Netherlands", in *Urban Studies* 44 (5/6): 997-1017; and Dean and Hastings (2000), *Challenging Images: Housing Estates, Stigma and Regeneration*, Bristol: Policy Press.

stereotypes and has considerable negative consequences for individuals cannot therefore be perceived as objectively justified for the purposes of the Convention. In my view, it would have been better to deal with the present case under Article 14 in order to identify and condemn the discrimination suffered by Ms Garib on account of the precarious nature of her personal situation.

B. The multiplicity of the forms of discrimination (§§ 31-39)

31. The *Garib v. the Netherlands* case further required the Grand Chamber to take note of the multiplicity of the possible forms of discrimination, going beyond the mere direct discrimination expressly prohibited by Article 14 of the Convention. These more insidious forms of discrimination are all the more dangerous as they are not so easy to pinpoint, while being particularly harmful for those affected. The applicant in the present case indeed sustained indirect discrimination (1), further aggravated by its intersectional nature (2).

1. The indirect discrimination suffered by the applicant (§§ 32-33)

32. The Dutch housing legislation does not only give rise to direct discrimination by expressly excluding precarious population groups from certain residential areas. Its application by the authorities also results *de facto* in making some of the individuals concerned assume particularly heavy consequences, unlike other population categories, and thus in subjecting them to a less favourable treatment than that enjoyed by other Dutch citizens. This is the epitome of indirect discrimination. The European Court is already familiar with this concept as defined in *D.H. v. Czech Republic*: “a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group”⁷¹. The heart of such indirect discrimination thus lies in a *de facto* situation caused by a legal provision which is not expressly directed against a particular group. Indirect discrimination is all the more pernicious as it is not blatant. It is sometimes not even intended by the legislature. Nevertheless, the Court found in the case of *Hugh Jordan v. the United Kingdom*⁷² that intent to discriminate was not necessary for indirect discrimination to be established. Once there has been an allegation, it is then for the State to prove that the legislation in question does not produce any disproportionate detrimental effects for a given group⁷³. The ECSR has also issued a warning against this type of policy, pointing out as follows⁷⁴:

71. *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV. See also *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 150, ECHR 2010.

72. *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001.

“Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.”

33. In the present case, the dissenting judges at the time of the Chamber judgment had already made the following remark about the income-based restriction⁷⁵:

“It not only leads to stigmatisation of the poor, but it indirectly creates discrimination based on race and gender, since the people most gravely affected by unemployment are immigrants and single mothers.”

Studies have indeed shown that women – and especially single mothers – are more exposed to the risk of poverty than men⁷⁶. Similarly, the statistics available – and the Court has previously found statistical evidence to be admissible in discrimination cases⁷⁷ – show that migrants are over-represented in the categories of persons facing the risks of poverty and social exclusion in the Netherlands⁷⁸. Accordingly, the measure at issue has

73. *Timichev v. Russia*, nos. 55762/00 and 55974/00, § 57, ECHR 2005-XII.

74. Digest of the Case Law of the European Committee of Social Rights, 1 September 2008.

75. Joint Dissenting Opinion of Judges López Guerra and Keller appended to the Chamber judgment (§ 18).

76. Lancker, “Effects of poverty on the living and working conditions of women and their children, in Main causes of female poverty, compilation of in-depth analyses”, Brussels, European Parliament, 2015, pp. 8-13.

77. *D.H. and Others v. the Czech Republic*, cited above, § 180.

78. See paragraph 74 of the Grand Chamber judgment on the passage of the excellent report by Amsterdam University already cited: “More often than the reference group, the potentially refused are young, male and live alone. More often than the reference group, the potentially refused are of non-European foreign origin, and much more often, they are from the European migrant population. Trends between 2004 and 2013 show a strong increase in the proportion of persons among the European migrant population, principally from Eastern European countries like Poland, Bulgaria and the Czech Republic.” See also the article by Van Gent *et al.*, “Exclusion as urban policy”, cited above: “While the criteria for excluding residents seem clear-cut, our analyses show that a wide net is cast. A dynamic and diverse group of low-income residents is targeted, with the implicit assumption that these individuals are a burden. At the expense of the rights and entitlements of this group, the government expands its discretion by increasing its possibilities to exercise power in the form of enclosure and exclusion. The Act originates in right wing politics that promote strong-arm tactics with the promise of ‘getting things done’ and reasserting control over the city ...” As to the motivation of and the increased risk caused by such urban policies of discrimination against ethnic minorities, under the slogan “The color is not the problem, but the problem has got a color”, see Ouwehand and Doff, “Who is afraid of a changing population?”, cited above, pp. 112, 129, 138 and 139: “Although the final regulations do not discriminate on ethnicity, but use economic proxies instead, it cannot be denied that the policy was developed to lower the predicted increase in ethnic minorities in certain neighborhoods in the city and that ethnic minority households would be affected the most. Secondly, city leaders equated an increase in ethnic minority households with an increase

a greater impact on women and non-European migrants, as a sub-set of the group targeted as a whole by the national legislation and already suffering from the direct discrimination that, in my view, it causes. It is quite simply inconceivable that a vulnerable category should be the object of direct discrimination and that certain sub-categories within it are additionally the object of *de facto* or indirect discrimination on grounds of sex or ethnic origin. This state of affairs has considerably increased the vulnerability of Ms Garib, who, in addition to the initial consequences of the measure imposed on her, has also suffered from its effects by ricochet. All this serves to highlight the inadequacy of the justification given by the State in its attempt to make the relevant difference in treatment seem acceptable.

2. Acknowledgment of intersectional forms of discrimination (§§ 34-39)

34. However, the essential contribution of the *Garib* case in the field of discrimination, and one that the Court – both the Chamber and the Grand Chamber – has unfortunately refused to consider, lies in the highlighting, through the facts of the case, of a particular form of discrimination that European human rights law must incorporate into its bulwark of legal protection. I refer to the concept of “intersectional discrimination”, which represents a reality that has been virtually disregarded to date by the European system, whereas it has been increasingly acknowledged in international law. It is now indispensable to take this phenomenon into consideration in order to reach a global and comprehensive understanding of the various discrimination situations and thus guarantee the effectiveness of the Convention rights.

35. The concept of intersectional discrimination appeared for the first time in the context of American feminist thought, in the writings of Kimberle Crenshaw, who addressed the specific situation of women of colour being subjected to discrimination based on both gender and ethnic origin. In her work she sought to devise a notion to identify the “intersection” or cross-over between forms of discrimination suffered by this sub-group as a result of the combination of their gender and colour. She thus explains that “[b]ecause of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both [gender and race]”⁷⁹.

in physical and social problems. Although the majority of these households do not have criminal records and do not show anti-social behaviour, they are all equated with problems. Politicians and practitioners exhibited a tendency to stereotype ethnic minorities as problematic; the same type of stereotyping occurs along with the increase of immigrant workers from other European countries, such as Poland, Bulgaria and Romania. These observations support the conclusion that the policy was not based on thorough and precise argumentation but rather on a pure political populist stance.”

79. See Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, *Stanford Law Review* Vol. 43, No. 6 (Jul. 1991), p. 1244 (French translation in “Cartographie des marges : intersectionnalité, politique de l’identité et

The concept of intersectionality thus helps us to perceive the relevant situations as a whole, rather than, as before, from a purely one-dimensional perspective. Going beyond the aggregation of factors of discrimination, this method allows us to consider the effects of the intersection of the relevant forms of discrimination. To sum up, it is a question of acknowledging the *composite* nature of the sources of discrimination and the *synergy* of their effects. It is therefore the interaction and simultaneous impact which distinguish between intersectional discrimination and multiple forms of discrimination⁸⁰. In the course of the preparatory work for the World Conference against racism, racial discrimination, xenophobia and related intolerance, Radhika Coomaraswamy, who was then the Special Rapporteur on violence against women, submitted a Report to the United Nations General Assembly in which she set out a relevant working definition of the concept. She expressed the following view⁸¹:

“The idea of ‘intersectionality’ seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups.”

36. This analytical tool, which is particularly effective as it allows multidimensional discrimination to be addressed in a holistic manner and the actual consequences for victims to be assessed, has gradually found its way into the sphere of international human rights law. The Committee on the Elimination of All Forms of Discrimination against Women, for example, indicated as follows in its recommendation no. 28⁸²:

violences contre les femmes de couleur”, in *Cahier du genre*, 2005/2, no. 39, p. 54), and the pioneer text, Crenshaw (1989), “Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics”, in *University of Chicago Legal Forum*, 139; and for a recent review of the literature, see Goldblatt, *Intersectionality in international anti-discrimination law: addressing poverty in its complexity*, (2015) 21(1) *Australian Journal of Human Rights* 47.

80. The NGO ATD Quart Monde summarises this comparison as follows (translation): “multiple discrimination and intersectional discrimination are manifested in two different ways. First, various factors may come together: a migrant woman may suffer discrimination at work on account of her origins and because she is a woman. Secondly, the factors may interact with each other; thus, a young woman may suffer from discrimination in employment because she is likely to become pregnant. Intersectional discrimination obtains where two or more criteria interact to the point where they are inextricable” (*Discrimination et pauvreté - Livre blanc : analyse, testings et recommandations*, October 2013, p.13).

81. United Nations General Assembly “Review of reports, studies and other documentation for the preparatory committee and the world conference”, A/CONF.189/PC.3/5, 21 July 2001, § 23.

82. Committee on the Elimination of All Forms of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 24th

“Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”

The Committee on Economic, Social and Cultural Rights emphasised in its General Comment no. 20 as follows⁸³:

“Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.”

37. This concept has not only been acknowledged at a theoretical level, it has also been implemented in practice on various occasions. For example, in the case of *Alyne da Silva Pimentel Teixeira v. Brazil*, the Committee on the Elimination of All Forms of Discrimination against Women found as follows⁸⁴:

“Ms. da Silva Pimentel Teixeira suffered from multiple discrimination, being a woman of African descent and on the basis of her socio-economic background. In this regard, the Committee recalls its concluding observations on Brazil, adopted on 15 August 2007, where it noted the existence of de facto discrimination against women, especially women from the most vulnerable sectors of society such as women of African descent. It also noted that such discrimination was exacerbated by regional, economic and social disparities.”

Nor is the concept of intersectional discrimination unknown to the European Court itself. It was addressed in the *B.S. v. Spain* judgment, where the Court noted as follows⁸⁵:

“... the decisions made by the domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.”

session, 2010, CEDAW/C/GC/28, § 18.

83. Committee on Economic, Social and Cultural Rights, General Comment no. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, § 17. Whilst the Committee seems to place multiple and intersectional discrimination under the same head, it does refer later on in this Comment (§ 27) to “the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability”, and this also corresponds to the scope of intersectional discrimination *per se*.

84. Committee for the Elimination of All Forms of Discrimination against Women, *Alyne da Silva Pimentel Teixeira v. Brazil*, Comm. no. 17/2008, 27 September 2011, § 7.7.

85. *B.S. v. Spain*, no. 47159/08, § 62, 24 July 2012.

38. The Inter-American Court of Human Rights seems to be more advanced in this area. It addressed the relevant notion in the case of *Artavia Murillo et al. v. Costa Rica*, where it took the view that “the interference had a differentiated impact on the victims owing to their situation of disability, gender stereotypes and, for some of the victims, to their financial situation”⁸⁶. It then expressly enshrined the notion a few years later in the case of *Gonzales Lluy et al. v. Ecuador*. It found as follows as regards the situation of the applicant and her family (she was a young girl from a deprived background with HIV, who had been denied access to education):

“... in Talia’s case, numerous factors of vulnerability and risk of discrimination *intersected* that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talia was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the *intersection* of those factors; in other words, if one of those factors had not existed, the discrimination would have been different.”

The Inter-American Court went on to develop its reasoning more clearly as follows⁸⁷:

“... the poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV. The situation of poverty also had an impact on the difficulties to gain access to the education system and to lead a decent life. Subsequently, because she was a child with HIV, the obstacles that Talia suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she required greater support from the State to implement her life project. As a woman, Talia has described the dilemmas she feels as regards future maternity and her interaction in an intimate relationship, and has indicated that she has not had appropriate counseling. In sum, Talia’s case illustrates that HIV-related stigmatization does not affect everyone in the same way and that the impact is more severe on members of vulnerable groups.”

The intersection of the various factors of discrimination is flagrant here and the effects of their synergy can thus be clearly understood.

39. It is precisely this consideration of the additional harmful effects produced by the combination of factors of discrimination which has proved indispensable in addressing complex situations of discrimination. It is not always sufficient to add together the multiple factors of discrimination, especially where the intersection between them exacerbates their consequences. Such synergy does not necessarily result in an accumulation of forms of unitary discrimination, but in a new form of multidimensional discrimination. In view of the significance of the phenomenon, its consequences in terms of the effectiveness of the guaranteed rights, and the

86. IACtHR, *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, judgment of 28 November 2012 (Preliminary Objection, Merits, Reparations and Costs), Series C no. 257, § 314.

87. IACtHR, *Gonzales Lluy et al. v. Ecuador*, cited above, § 290.

international consensus obtaining at the present time, the Court must today include this aspect in its scrutiny under Article 14 of the Convention.

Ms Garib’s situation was, unfortunately, an ideal case for this type of analysis. Indeed, as I have already mentioned, the applicant was affected by the measure in question in a quite specific manner on account of her poverty and her status as a woman. While she thus had more chance, statistically, of facing difficulty in finding housing, it is also not hard to imagine the hurdles she had to overcome as the single mother of two children. There is therefore no doubt that the applicant’s intersectional situation, being both a woman and impoverished, considerably exacerbated her vulnerability *vis-à-vis* the Dutch housing policy in question. In order to assess the effects of the interference with her right to freely choose her residence, the authorities and – all the more so – the Court, should have taken into consideration this particular vulnerability resulting from the combination of a number of factors of discrimination. To treat Ms Garib as any other citizen or to see her through the prism of her poverty, or that of her status as a woman, would not enable a holistic analysis of the negative effects for her personal life of the decision to deny her a housing permit. It was indispensable, in the circumstances at issue, to assess the aggregate effect of the whole body of factors and thus to reach the indisputable finding that the measure in question could not have been proportionate.

IV. Conclusion (§ 40)

40. “It is the missed opportunity that counts”⁸⁸. Let us hope that this will ultimately be true for the *Garib v. the Netherlands* case. The Court has rarely persisted to this extent in disregarding the fundamental issues raised by a case before it. It is regrettable that the Grand Chamber did not seize the opportunity offered by the “*Rotterdamwet* case” to take a position on these questions, rich as they are in consequences, in addition to appropriately verifying the proportionality of the measure in question. Whether it was about asserting poverty as a prohibited ground of discrimination or taking intersectional forms of discrimination into consideration, this case could have enabled the Court to take a decisive step forwards in the protection of the right to choose one’s residence and in the fight against discrimination. We can only hope that this missed opportunity will indeed count and will inspire a different solution for the future.

DISSENTING OPINION OF JUDGE KÜRIS

1. Paragraph 158 of the judgment contains a methodological fallacy. The majority, having admitted that “the applicant was of good behaviour and

88. Antoine de Saint-Exupéry, *Citadelles*, 1948.

constituted no threat to public order”, go on to state that “the applicant’s personal conduct, however virtuous, cannot be decisive on its own when weighed in the *balance* against the public interest which is served by the consistent application of legitimate public policy” (emphasis added).

A balance is an equilibrium, even if not an ideal one, between the *two* matters in question. It is thus a *relationship*. What is meant by these “related two” aspects is explained in paragraph 157: “the central question under Article 2 § 4 of Protocol No. 4 is ... whether, in striking the balance at the point at which it did, *Parliament* exceeded the margin of appreciation afforded to it under that Article” (emphasis added). Thus, the interests of the *individual* applicant are juxtaposed and weighed against the restrictions stemming from statute law, that is to say, from *general measures* as such, and *not against their application to that individual*. These general measures, after their most amicable examination (see paragraphs 142–57), are assessed, by the majority, as expressing the “interests ... of society as a whole” (paragraph 161). From this angle, the applicant’s interests pertaining to the improvement of her and her family’s well-being – and let it be emphasised, *not at anyone else’s expense!* – are apparently a reality that is parallel to the societal interests and not as important as the latter. The judgment deals with individuals’ interests as if they – or at least *some* of them, or rather those of *some* individuals, – are not part of a societal interest. Social scientists from Adam Smith and Jeremiah Bentham to Vilfredo Pareto and Roscoe Pound, let alone contemporary protagonists of enlightened and/or rational self-interest, would perhaps shrug their shoulders. But this is not the point I want to make.

2. As a matter of principle, general measures (i.e. public policy) may be alright (“legitimate”) as such, but this does not mean that *each and every* application of these measures can be justified by virtue of the overall justification for the policy in general. The application, to a particular individual, of even a seemingly “very good” law does not mean that *that* person’s right under the Convention will not actually be violated.

The Court was set up not to approve or disapprove of general measures (i.e. policies) as such, or their consolidation in national legislation, but to examine their application to individual persons from the standpoint of its compatibility with the Convention. Still, I do not go so far as to argue that the majority could not express themselves as to – and thus approve of (even if indirectly) – the aim of the Dutch State’s general policy to reverse the trends of “increasing social problems in particular inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere ... by favouring new residents whose income was related to gainful economic activity of their own” (paragraph 142). Perhaps they could, especially as they did not openly endorse this policy and even cast some doubt on it (by being “prepared to accept that it would have been possible for

Parliament to regulate the situation differently” (ibid.)). But who would reasonably assert that the application of that policy to the instant applicant contributed to these legitimate aims? In particular, would anyone agree that that application “foster[ed] diversity and counter[ed] the stigmatisation of particular inner-city areas as fit only for the most deprived social groups” (ibid.)? In my opinion, even if the general policy sought to counter “the stigmatisation of particular inner-city areas”, its application to the instant applicant indeed *stigmatised* her. It’s as plain as that. Or, to quote the late Leonard Cohen (“Everybody Knows”, from “I’m Your Man”, 1988, Columbia Records):

*Everybody knows the fight was fixed
The poor stay poor, the rich get rich
That’s how it goes
Everybody knows*

Here, “poor” is not only “the poor as a class”. It is also an *individual* “poor”. Including the applicant in the instant case.

3. In *this* case, it is not the *general* legislative policy, as consolidated in the impugned Act of Parliament that is under challenge. What is under challenge from the point of view of the Convention is the concrete manifestation of the implementation of that policy, its application to the instant applicant (and, by extension, to her family), i.e. to a specific individual. Justification (“legitimation”) for general measures – legislative policy, as consolidated in a statute – must not be extended so that their application to an individual is also automatically justified (“legitimised”).

4. Of course, the majority are mindful that it is the Court’s role to look into the individual situation. In paragraph 136 it is reiterated (and the Court’s abundant case-law is referred to) that the Court’s “task is not to review domestic law *in abstracto*, but to determine *whether the manner in which it was applied to, or affected, the applicant* gave rise to a violation of the Convention” (emphasis added). But, having said that, the majority’s reasoning, alas, goes in the opposite direction: as the policy as such is justified (“legitimised”), so is its application in the instant case. This is the starting point of the reasoning – but also the crowning argument, which allows the majority to find that there has been no violation of Article 2 of Protocol No. 4.

Here’s the rub. *The modalities do not match*. This methodology is fallacious. Equally fallacious is the finding based on it, especially in *this* case, which, in my firm belief, is *the least suitable* for application of this methodology owing to one factual circumstance to which due regard has not been given (on this, see paragraphs 7–11 below).

5. I do not want to say that there are no additional arguments presented which aim at supporting the starting point. There are some in paragraphs 159–62. But none of them even merits detailed or profound legal analysis, as they all – quite artificially – attempt to convince the reader that

the applicant did not really need to change her place of residence, or at least that she did not prove that she needed that change, or that the apartment in which she lived needed “serious renovation work”, etc.

6. All this case is not only about law; this is about something much bigger than law. The above-mentioned considerations manifest a fundamental oversight, if not a certain approach (and if it is an approach, then it is a value approach, I regret to have to name it). Such considerations downgrade an individual’s *liberty* and *will* to seize the opportunity, once it is there, to improve his or her (and his or her family’s) well-being – again, *at no one’s expense!* – to the level of something truly insignificant, which does not merit understanding or appreciation. (In principle, the same goes for the owner’s will to have his property vacated because he “wished to renovate it for his own use”, even if he offered the applicant a different property (see paragraph 10), which – without this being rebutted by the respondent Government – was even more suited to the needs of the applicant’s family.) Some would say that such an attitude does not behove a court, because, at least under the rule of law, the calling of courts is not only to protect and defend *human dignity*, whenever it is encroached upon in individual cases, but to boost it by promoting general respect for it. And if this does not behove any court, *a fortiori* it does not behove *this* Court.

7. Why has it become possible at all for such reasoning to be laid down on paper?

This possibility stems from the fact that a very important *factual circumstance* is not given due attention; moreover, it is even not mentioned in the judgment, and this amounts to its concealment from the readers.

In paragraph 10 it is stated that the landlord asked the applicant and her two young children to vacate his property and move to a different one “at the address B. Street 72A, also in the Tarwewijk area”.

What is most important – and not given due regard – is that the proposed property was not only “in the Tarwewijk area”. It was just around the corner; *next door* – virtually and even literally.

8. I only wonder this: as, under the domestic law, the authorities’ permits to move to any other residence in Tarwewijk are needed in all cases, would such permit have been necessary to obtain had the applicant and her landlord agreed that it was desirable (for them, not for “society as a whole”!) for her to move to a hypothetical property located on the same corridor, on the same floor, in the same house? Would the application of the impugned general policy, which (as no exceptions are allowed in principle, unless the tenant convinces the authorities that he or she really needs to change his or her place of residence) would have been nothing else but the rejection of the said permit, have been justified also in such a case?

9. In paragraph 159 the majority attempt to address such hypothetical cases:

“Nor is it *per se* sufficient to point to the fact that the applicant was already resident in Tarwewijk when the housing permit requirement entered into force. ... [T]he purpose of the scheme was to encourage new settlement in distressed inner-city areas by households with an income from sources other than social benefits. The system of the ... Act is not as such called into question by the mere fact that it did not make an exception in respect of persons already residing in a designated area. While the specific modalities of the system are a matter falling within the margin of appreciation of the domestic authorities in this field, it can indeed be assumed that applying it to Tarwewijk residents could have the effect of prompting some of them, as in the present case, to leave the area, thereby making more dwellings available to households meeting the requirements and assisting the furtherance of the policy aim of broadening the social mix.”

The area in question is one which does not have a good name (or at least did not have a good name at the material time). Speaking of “making more dwellings available” seems to ignore this “detail”, just like almost all wishful thinking, typically, tends to ignore something which is not indeed insignificant in reality. I agree that “the specific modalities of the system are a matter falling within the margin of appreciation of the domestic authorities in this field”, however, this does not at all mean that no question arises as to the “fact that [the Act] did not make an exception in respect of persons already residing in a designated area”.

10. But *why*, in the opinion of the majority, cannot the omission of exceptions (see paragraph 9 above) be called into question, especially if – as the majority explicitly admit themselves – the aim of the impugned policy was “to encourage *new settlement in distressed inner-city areas*” (emphasis added)?

The word-rich paragraph 159 in fact does not shed any light on this question. The majority’s response is simply this: the Court says that there is no question, so no question arises. *Roma locuta est, causa finita*.

But questions do arise, all sorts of them, legal and moral. And they call for answers.

One of these answers is that the application of the impugned policy to the applicant in the instant case was *disproportionate*, given her individual factual circumstances.

And not only that, such application was *not necessary*. It was not justified even from the standpoint of that policy itself, because the prohibition on the applicant moving *next door* did not make the respective “inner-city area” less “distressed”, and no proof was presented by the respondent Government that any “new” settler was effectively “encouraged”, by the prohibition imposed on the applicant, to settle on the different property proposed to the applicant by the owner, or that any new settler would have settled on the property to be vacated by the applicant – property which the owner needed “for his own use”.

11. By the way, where could the applicant move to, had she decided not to stay on the same property? To a more well-off area? Come on. As “everybody knows”, this would not be “how it goes”.

The obvious answer to the above question makes the applicant's case one of *discrimination* based on her social and economic status, which is something repugnant in the eyes of the Convention.

Indiscriminate policy, whatever understandable or even noble aims it may have at the stage of its formation and consolidation in statutes (which allow for its being declared “legitimate” by courts), having been applied to the applicant (and her family) *in an indiscriminate manner*, is nothing other than *discriminatory*. Such application of any policy should have never been endorsed by the Court.

12. These are but a few of the reasons why I am not able to vote for this judgment. To save space and time, I have not dealt, in this opinion, with a number of others. I am not sure that it would be necessary, given that the essential problem with this judgment is that the methodology on which its reasoning is based is at odds with logic, and its underlying approach is at odds with respect for individual liberty and, consequently, with justice. Whichever of these two deficiencies is the cause (making the other one the result) does not matter much, as they complement and reinforce each other.