

A close-up, high-contrast photograph of an elderly man's face. He has a thick, grey beard and mustache, and his eyes are a striking, intense green. The lighting is dramatic, highlighting the texture of his skin and the intensity of his gaze. The background is dark and out of focus.

# CHAP. 4

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**MONITORING  
OF EUROPEAN  
CASE LAW**  
IN RELATION TO  
HOUSING

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# MONITORING OF EUROPEAN CASE LAW

## LEGENDS



SUCCESSFUL



IMPROVING



COULD DO BETTER



UNSATISFACTORY

In the first edition of the report in 2015, EU housing legislation was reviewed and European case law was monitored for the first time in relation to housing rights. Judgements by the European Court of Human Rights, decisions by the European Committee of Social Rights (ECSR) and, to a lesser extent, judgements by the Court of Justice of the European Union, declared that housing rights be made explicit.

In a context marked by a worsening of living conditions for low-income and vulnerable households, European case law decisions are of critical importance as they set out the legal limits and obligations incumbent on public, national, and local bodies in relation to housing rights<sup>1</sup>. At the same time, the arguments contained in these decisions are indispensable for housing law practitioners in the national courts.

In this second edition, this chapter provides an update of the case law monitored in the first edition, in particular by means of a presentation of judgements relating to the rights of failed asylum seekers, occupants of land, and consumer rights in relation to mortgage loans.

<sup>1</sup> For a more in-depth analysis of the positive obligations arising from European case law in relation to housing rights, see FEANTSA/ Foundation Abbé Pierre (2016), *Housing-related Binding Obligations on States from European and International Law*, available at: <http://housingrightswatch.org/news/housing-related-binding-obligations-states-european-and-international-law>

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<http://hudoc.echr.coe.int/fre?i=001-169049>

**ECHR, V.M. and Others v. Belgium,  
7 July 2015 and 17 November 2016, Application No. 60125/11**
<http://hudoc.echr.coe.int/fre?i=001-169047>

A Serbian family of asylum seekers, subject to an order to leave Belgium, were deprived of basic subsistence and forced to return to their country of origin where their seriously disabled child died shortly after their return. The family complained that exclusion from Belgian accommodation services had left them exposed to **inhuman and degrading treatment**; and that reception conditions in Belgium had led to the death of their eldest daughter.

The Court carried out a review on whether a **violation of Article 3 of the Convention relating to the prohibition of inhuman or degrading treatment** had occurred. In determining whether the **threshold of severity** justifying the application of Article 3 had been attained, the Court had to consider **the status of asylum seeker** of a person belonging to a **particularly disadvantaged and vulnerable group in need of special protection**. The Court considered that this vulnerability was compounded by the presence of **young children**, including a baby and a disabled child.

The Court considered the family's living conditions between their **expulsion from the reception centre** and their departure for Serbia. The family, having spent nine days in a public square in Belgium, followed by two nights in a transit centre, slept for three weeks in a Brussels railway station.

Accordingly, the Court found that the Belgian authorities had not sufficiently taken into account the vulnerability of the applicants and that the Belgian State had failed to comply with its obligation not to expose them to **conditions of extreme deprivation**, by leaving them living **in the streets, destitute, without access to sanitation facilities, and with no means of meeting their basic needs**. The Court took the view that the family's living conditions combined with an absence of any prospect of securing an improvement in their situation attained **the threshold of severity required under Article 3, and therefore found a violation of the prohibition on inhuman or degrading treatment**.

The case was however referred to the Grand Chamber and, one year later, the Court, in a decision dated 17 November 2016<sup>2</sup>, observed that the applicants had not maintained contact with their lawyer and had failed to keep her informed of their place of residence or provide her with another means of contacting them. The Court considered that the circumstances permitted it to find that **the applicants had lost interest in the proceedings and no longer intended to pursue the application**. According to the Court, '[...] nor is there anything to suggest that the precarious conditions in which the applicants lived in Serbia were such as to prevent them from maintaining some form of contact with their lawyer, if necessary through a third party, for such a long period [...]'. It is nevertheless worth noting the dissenting opinion of Judge Ranzoni, also espoused by Judges López Guerra, Sicilianos, and Lemmens. In their opinion, **'the Grand Chamber should have continued the examination of the application under Article 37 § 1 to finality as in this case, there are special circumstances relating to respect for the human rights as defined the Convention and its Protocols which exceed the particular situation of the applicants'**.

A number of important questions arose from this decision:

- Defining or adjusting the **concept of vulnerability** to assess whether the threshold of severity justifying the application of Article 3 had been attained, with a greater degree of vulnerability justifying a lower threshold of tolerance.
- Recognising **asylum seekers as vulnerable**, even if they do not qualify as such unconditionally.
- The various **responsibilities regarding conditions of reception**.
- **The concepts of 'effectiveness' of a remedy and 'arguable complaint'** in the context of expulsion of foreign nationals, particularly in the event of transfers carried out under the Dublin Regulation.



### ECHR, 28 April 2016, Winterstein and Others v. France

<http://hudoc.echr.coe.int/eng?i=001-162215>

This case involved an application brought against the French Republic by 25 French citizens on 13 June 2007 under Article 34 of the Convention.

The applicants, who were in occupation of land in the locality of Bois du Trou-Poulet, in Herblay, France, were evicted from the land. Some of the applicants asked to be rehoused on family plots.

By Decision dated 17 October 2013, the Court found that there had been, in respect of all of the applicants, **a violation of Article 8 of the Convention** insofar as they did not benefit, as part of their **eviction from the land** they occupied in Bois du Trou-Poulet, in Herblay, from an **examination of the proportionality of the interference** in accordance with the requirements of that Article. In addition, the Court ruled that there had also been a violation of Article 8 in respect of the applicants who applied for relocation to family plots, on account of **the failure to give sufficient consideration to their needs**.

The applicants claimed, through an **application for just satisfaction**<sup>3</sup>, non-pecuniary and pecuniary damages, as well as a refund of the legal costs incurred.

The Court noted the **developments in domestic case law** following the Judgement in the main proceedings in 2013. It recognised that several lower court and Court of Cassation decisions had drawn conclusions from the Judgement. The domestic judges had taken into account **the proportionality of interference** that an eviction measure represents **in the rights of the applicants under Article 8 of the Convention**.

In its assessment of **pecuniary damages**, the Court pointed out that the families who had had to leave the land suddenly or following the eviction had been forced to abandon their caravans, chalets, or bungalows together with the belongings left inside. The Court awarded the families damages ranging from EUR 600 to EUR 3,000, depending on the circumstances.

**3**  
[http://www.echr.coe.int/Documents/PD\\_satisfaction\\_claims\\_ENG.pdf](http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf)

In its assessment of **non-pecuniary damages**, the Court approved the claims of the applicants and awarded the following amounts:

- EUR 7,500 for the applicants who remained on the land;
- EUR 15,000 for the individuals rehoused in social housing or who had found a relatively stable installation;
- EUR 20,000 for those still without long-term accommodation.

Finally, the Court granted the applicants EUR 5,000 in respect of legal costs.

Certain issues which arose from this Judgement should be highlighted:

- The loss of a home is a serious violation of the right to respect for the home. Any person who risks being a victim should in principle be able to have **the proportionality of the interference and the failure to give sufficient consideration to their needs** determined.
- The Court **welcomed** developments in French case law as regards **evictions from land occupied without title**. Several legal decisions in 2014 and 2015 have **balanced the claimant's property rights against the right to respect for one's private and family life**. Occupants without title are no longer necessarily regarded as being without rights and judges have refused to proceed with evictions in some circumstances or granted deferrals.
- The Court appeared, however, not to have been persuaded by the French State's expressed willingness to **take the individual measures necessary**, as it referred to the appropriate decisions that would 'help France' fulfil its obligations arising out of the Convention (§ 16 of the Judgement).



#### **ECHR, 11 October 2016, Bagdonavicius and Others v. Russia**

<http://hudoc.echr.coe.int/eng?i=001-167089>

This case involved an application brought against the Russian Federation by 33 French citizens on 12 May 2006 under Article 34 of the Convention.

The applicants were members of six Roma families who lived in the village of Dorojnoé, situated in the district of Gourievsk, in the Kaliningrad region of Russia. They were evicted and their houses were demolished.

In particular, the applicants alleged a **violation of Article 8** relating to respect for the home taken alone or in conjunction with Article 14 of the Convention relating to prohibition of discrimination due to **the demolition of their houses and their forced eviction** which, they complained, had occurred **on account of their membership of the Roma community**. On the basis of these facts, they also complained of a violation of Article 1 of Protocol No. 1 of the Convention relating to protection of property.

The Court pointed out that it had ruled, in the *Yordanova and Others*<sup>4</sup>, and *Winterstein and Others*<sup>5</sup> cases, that particular attention had to be paid to **the consequences of evicting members of the Roma community from their homes and the risk of homelessness**, having regard to how long the parties, their families, and the communities they had formed had been living there.

The Court also stressed the need, in the case of forced evictions of the Roma and Travellers, **for rehousing**, except in cases of force majeure. The Court moreover reiterated that **due to their membership of a socially disadvantaged group, the parties had specific needs which should have been taken into account in the examination of proportionality** that the national authorities were obliged to carry out. This principle applies not only to finding a solution to the illegal occupation of the site, but also, when such eviction is necessary, to determine the date and terms of its implementation, and, if possible, rehousing options. The Court also noted that Russia had been called upon to implement these principles within the framework of both the Council of Europe and the United Nations.

The possible consequences of the demolition of the houses and the forced eviction of the applicants were not taken into account by the domestic courts during or following the legal proceedings initiated by the prosecutor. With regard to the date and terms of the eviction, the Court observed that **the Government had not shown that the applicants had been duly informed of the intervention of the judicial officers** in charge of the demolition of the homes nor the terms of this operation.

With regard to the proposals for rehousing, the Government argued that the Kaliningrad regional government had adopted Order No. 288 dated 28 April 2006 which proposed the creation of a special housing fund to rehouse the applicants and that, in so doing, the national authorities had fulfilled the rehousing obligation. However, **the Government had not shown that Order No. 228 had been practically implemented**, in other words that its adoption had been followed by the actual creation of a housing fund, and that such housing had been made available and offered to the applicants.

Consequently, the Court took the view that **the national authorities had not conducted genuine consultations with the applicants about possible rehousing options, on the basis of their needs and prior to their forced eviction**.

The Court found that **there had been a violation of Article 8 of the Convention, as the applicants had not benefited, in the proceedings in relation to the demolition of their homes, to an examination of proportionality of the interference, in accordance with the requirements of that Article**, and that the authorities had failed to conduct genuine consultations with the applicants about possible rehousing options, on the basis of their needs and prior to their forced eviction.

One of the key elements of this Judgement was that **the Roma community had to be considered in the examination of proportionality as a socially disadvantaged group with special needs**.

**4**  
Yordanova and Others v. Bulgaria, Application No. 25446/06, 24 April 2012  
<http://hudoc.echr.coe.int/eng?i=001-110759>

**5**  
Winterstein and Others v. France, Application No. 27013/07, 17 October 2013  
<http://hudoc.echr.coe.int/eng?i=001-126910>

**ECHR, 28 July 2016, Hunde v. The Netherlands**<http://hudoc.echr.coe.int/eng?i=001-165569>

The case involves an application brought against the Netherlands by Gadaa Ibrahim Hunde, a person of Ethiopian origin. In particular, the applicant alleged a violation of Articles 2 and 3 of the Convention.

In December 2012, a group of approximately 200 irregular migrants in the Netherlands who – as rejected asylum-seekers – were no longer entitled to State-sponsored care and accommodation for asylum-seekers occupied St. Joseph Church in Amsterdam. These irregular migrants formed an action group called 'We Are Here/Wij Zijn Hier', seeking to attract attention to their situation. During their stay there, St. Joseph Church was colloquially referred to as the '**Refugee Church**' (Vluchtkerk). It appears that the group was evicted from the Refugee Church on 31 March 2013.

On 4 April 2013, the Municipality of Amsterdam offered temporary shelter to the original members of the 'We Are Here' group who had been staying in the Refugee Church since December 2012. Accordingly, **159 persons were housed temporarily in a former detention facility** on the Havenstraat Amsterdam - which came to be known as the '**Refuge Haven**' (Vluchthaven) - until 31 May 2014. The remaining persons from the Refugee Church who had been evicted and not offered shelter in the Refuge Haven, squatted in an indoor car park, which came to be known as the '**Refuge Garage**' (Vluchtgarage).

A number of **residents of the Refuge Garage** brought **administrative proceedings against the Municipality of Amsterdam** seeking the provision of basic services. The judge of the Central Appeals Tribunal ordered the Municipality of Amsterdam to provide basic services to the applicants, including overnight shelter, shower facilities, breakfast, and dinner.

In the decision of the Central Appeals Tribunal, the fact that the Netherlands Institute for Human Rights had witnessed **degrading living conditions in the Refuge Garage** had been taken into account. In addition, the Tribunal bore in mind two decisions of the European Committee of Social Rights of 1 July 2014, in which the Netherlands was found to have violated Articles 13 § 4 and 31 of the European Social Charter by failing to provide adult irregular migrants with adequate access to emergency assistance, food, clothing, and shelter.

The Association of Netherlands Municipalities set up the so-called 'Bed, Bath and Bread' scheme (bed-bad-broodregeling) for irregular migrants, starting from 17 December 2014. The scheme entailed central municipalities providing basic accommodation to irregular migrants, including overnight shelter with shower facilities, breakfast, and dinner. It was announced from the outset that this scheme would be temporary, awaiting the adoption of a resolution by the Committee of Ministers of the Council of Europe concerning the two decisions of the ECSR, in accordance with Article 9 of the Additional Protocol to the European Charter Providing for a System of Collective Complaints. Although these resolutions were adopted by the Committee of Ministers on 15 April 2015, the scheme has been prolonged and is currently still in place.

With regard to the fact that the applicant had been denied access to the Refuge Haven, the Mayor and city counsellors held that accommodation at that location had been offered to the original members of the 'We Are Here' group who had stayed in the Refuge Church for an uninterrupted period of time. The applicant did not fulfil those requirements.

The authorities further made reference to the **possibility of the applicant having recourse to the Repatriation and Departure Service**, which organises accommodation services, **subject to the person concerned cooperating with the arrangements to return to his country of origin.**

The Court considered the existence of a positive obligation under **Article 3** to provide the applicant – a failed asylum seeker at the time of the incident – with emergency social assistance. The Court pointed out that States have the right, as a matter of well-established international law, to control the entry, residence, and expulsion of foreign nationals. The corollary of a State's right to control immigration is the duty of foreign nationals to submit to immigration controls and procedures, and leave the territory of the Contracting State if they are lawfully denied entry or residence. Foreign nationals who are subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from services.

The Court reiterated that **there is no right to social assistance as such under the Convention**, and insofar as Article 3 requires States to take action in **situations of the most extreme poverty** – even when it concerns irregular migrants – the Netherlands authorities had already addressed this. In the first instance, the applicant had the possibility of applying for a 'residence permit' and/or to seek admission to a centre where his liberty would be restricted. It is furthermore possible for irregular migrants to seek a deferral of removal for medical reasons and to receive free medical treatment in case of emergency.

In addition, the Netherlands have most recently set up a special scheme providing basic needs for irregular migrants living in their territory in an irregular manner. That scheme was only operational as of 17 December 2014; one year after the applicant had taken shelter in the Refuge Garage. The Court explained that the design and practical implementation of such a scheme takes time, but that it understood the applicant's pursuit of domestic remedies. The Court considered that the Netherlands authorities **had failed to fulfil their obligations under Article 3.**

To conclude, the Court held that **the Netherlands guaranteed the fundamental rights of failed asylum seekers.**

The Judgement revealed a **restrictive stance on the part of the European Court** which had excluded the unconditional reception of this category of people. However, being a failed asylum seeker exposes such people far more to the risk of an infringement of privacy, and inhuman and degrading treatment, as they generally exist in marginalised sectors.

# CONSUMPTION

## *Mortgages/Unfair terms*



**ECJ (Grand Chamber), 21 December 2016, References for a preliminary ruling**

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=186483&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=573162>

By temporally limiting the effects of 'floor' clauses contained in mortgage loan contracts in Spain, Spanish case law is incompatible with EU law. According to the Court, this limit makes consumer protection defective and insufficient, and does not constitute adequate and effective means of preventing the use of unfair terms..

### Context:

In Spain, a number of owners brought legal proceedings against credit institutions to establish that **the 'floor' clauses contained in mortgage loan contracts concluded with consumers were unfair in nature and therefore were not binding on consumers**. The clauses in question provided that, even if interest rates fall beneath a certain threshold defined in the contract, the consumer must continue to pay minimal interest equivalent to this threshold without benefiting from a lower rate.

By Judgement dated 9 May 2013, the Spanish Supreme Court (Tribunal Supremo) **classified the 'floor' clauses as unfair**, given that the consumers had not been properly informed of the economic and legal burden which these clauses posed. Nevertheless, **the Supreme Court decided to limit the temporal effects of the declaration of nullity of these clauses**, so that they would only take effect in the future, from the date the Judgement was handed down.

Consumers affected by the application of these clauses began claiming back the money they had unduly paid to credit institutions from the date of conclusion of their mortgage loans. The Commercial Court No. 1, Granada (Juzgado de lo Mercantil no 1 Granada) and the Provincial Court of Alicante (Audiencia Provincial de Alicante) asked the Court of Justice of the European Union if the Supreme Court decision was compatible with the Directive on unfair terms, given that, according to this Directive, such clauses are not binding on consumers.

First of all, the Court pointed out that, according to the Directive, unfair terms must not be binding on consumers under the conditions fixed by Member State law which are responsible for laying down adequate and effective means to prevent the use of these clauses. **The Court reasoned that the domestic judge must purely and simply exclude the application of an unfair term** so that it is regarded as never having existed and does not have a binding effect on the consumer. A finding of unfairness must have the consequence of restoring the consumer to the situation that he or she would have been in had that term not existed.

Consequently, a finding of unfairness in relation to 'floor' clauses must permit the restitution of benefits wrongly obtained by the professional to the detriment of the consumer.

According to the CJEU, the Supreme Court could decide that its Judgement should not affect, in the interests of legal certainty, situations permanently resolved by previous judicial decisions. EU law cannot impose the exclusion of internal rules of procedure on national courts. However, **in the light of the fundamental requirement of a general and uniform application of EU law, it is for the Court alone to decide upon the temporal limitations to be placed on the interpretation it lays down in respect of such a rule of EU law.** In this regard, the Court specified that **requirements laid down by national law must not infringe on the consumer protection guaranteed by the Directive.**

However, **a limitation on the temporal effects of the nullity of the 'floor' clauses deprived Spanish consumers** – who had concluded a mortgage loan contract before the date the Spanish Supreme Court Judgement was handed down – **of the right to recover the money they had unduly paid to credit institutions.** This temporal limitation therefore resulted in **incomplete and insufficient consumer protection** which does not constitute either an adequate or effective means of preventing, as required under the Directive, the use of unfair terms.