Improving neighborhoods by preventing welfare recipients to take up residence: The Grand Chamber hearing in Garib v. the Netherlands

By Valeska David

On 25 January 2017, the Grand Chamber of the European Court of Human Rights (ECtHR) heard oral pleadings in *Garib v. the Netherlands*. The case concerns the refusal of a housing permit to a single mother living on social welfare on account of legislation imposing minimum income requirements on persons wishing to reside in a number of inner-city areas of Rotterdam. The Chamber judgment issued on 23 February 2016, which was discussed in a previous blogpost, held that there was no violation of Article 2 of Protocol No. 4 (right to choose one's residence). As the case was referred to the Grand Chamber, the Human Rights Centre of Ghent University and the Equality Law Clinic of the *Université Libre de Bruxelles* submitted a joint third party intervention. In this post, I shall briefly recount the issues addressed in our intervention to subsequently provide an overview of the questions discussed during the hearing before the Grand Chamber.

The third party intervention

Why would the Human Rights Centre of Ghent University and the Equality Law Clinic of the *Université Libre de Bruxelles* want to intervene in this case? The reason is probably the same that explains why the case reached the Grand Chamber. As our written comments underscore, the *Garib* case provides the Grand Chamber with a precious opportunity to develop the Court's standards with regard to two under-developed matters: one is the freedom to choose one's residence (Article 2 of Protocol No. 4), a right which does not come often under the Court's examination. The other reason is the application of the prohibition of discrimination (Article 14) when it comes to poverty-related grounds and their intersection with other prohibited grounds. Within these two areas of concern, our intervention –which can be consulted here –critically assesses the Chamber's approach with regard to the following three issues:

Unsuitability of the Animal Defenders line of case-law and the need for a proportionality analysis

According to the *Animal Defenders* judgment, "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" (§ 109). The intervention explains why this approach is inappropriate for the *Garib case* and unfolds the problematic implications of that line of reasoning. One of such implications is that the Chamber ends up downplaying the individual impact of the contested measure, rendering the experience of the applicant invisible and denying her agency. A second [illegible] ient review to [illegible] trictions of human rights. As a result, insufficient attention is paid to materials (e.g. evaluation reports from 2009 and 2015 cited in the Chamber judgment) casting doubts on the appropriateness of the Inner City Problems Act to achieve its stated aims (i.e. improving the quality of life and reversing the decline of impoverished inner-city areas). Moreover, the Chamber did not really address the availability of alternative measures, which were pointed out by the Equal Treatment Commission (*Garib* § 42).

Need to consider the applicant's vulnerability

The second issue discussed by the joint intervention is whether the applicant, as a single mother living on State support, should have been qualified as belonging to a vulnerable group in the sense of the Court's case-law. We argued for the affirmative. Besides the exclusion and obstacles to resilience brought about by material deprivation, vulnerability also stems from pejorative

preconceptions and stigma attached to the experience of socio-economic disadvantage or poverty. In this regard, it should be noted that antisocial behaviour, the influx of illegal immigrants and crime were some of the main problems to be tackled by the Act (see § 23 of the Chamber judgment). The vulnerability described above can furthermore be reinforced when socio-economic disadvantage intersects with other inequalities, such as those accorded to gender and migration background. The intervention encourages the Court to take the vulnerability of the applicant into consideration and recalls that the state enjoys a narrow margin of appreciation when a restriction on human rights applies to a particularly vulnerable group (*Alajos Kiss v. Hungary* § 42).

Use of the prohibition of discrimination to scrutinize disparate restrictions of the right to choose one's residence

Our intervention submits that in order to address the detrimental treatment experienced by people whose housing permit has been refused solely because they rely on social benefits or have a low income, Article 2 Protocol 4 alone is not enough. Article 14 ECHR should come into play. Though this provision was not at issue before the Chamber, we argue that the Grand Chamber may examine it by virtue of the *iura novit curia* principle and because the Court is the master of the legal characterization of the facts of the case.

Now, let me just flag the main considerations calling for an assessment of *prima facie* discrimination. First, the Inner City Problems Act adversely impacts a specific segment of the population which is usually socially disadvantaged and stigmatized: those who cannot meet the income criterion set by the Act. In doing so, the regulation is likely to aggravate both the social hardship and the stereotyping of those persons. Second, the prejudicial treatment of people who are systematically disadvantaged and the use or promotion of harmful stereotypes (such as those that associate poverty with criminality or anti-social behaviour), even when unintended, are both typical indications of discrimination. Third, in the present case, this could be direct or indirect discrimination. The gentrification measure raises an issue of direct discrimination on the basis of social disadvantage or poverty, which falls under Article 14's "social origin" or "other status." Additionally, as studies suggest that the regulation affects more significantly women and single mothers as well as people with a non-EU background, it may amount to indirect discrimination on the basis of sex and race. In this connection, the intervention also invites the Court to adopt an intersectional perspective. It is helpful to explore whether the measure rests on or reflects a combination of the inequalities constructed around gender, economic background and race.

The hearing before the Grand Chamber

In their oral pleadings, both parties framed their arguments in terms of Article 2 Protocol 4 and Article 14 ECHR. Also, both parties referred to our third party intervention several times.

Counsels for the applicant

They explicitly aligned themselves with the three points discussed above. They opposed the applicability of the general measure approach; claimed that the Act targeted a vulnerable group of people to which the applicant belonged, and argued that the measure led to direct or indirect discrimination. As such, the counsels asked the Court to consider its case law under Article 14 ECHR and subject the Inner City Problems Act to a very strict scrutiny. They pointed out that the issue of discrimination had already been discussed in the framework of this case and domestic bodies had expressed their views on the matter. Additionally, the counsels recalled that the applicant does not need to justify her choice of residence. It was the state who had to demonstrate the necessity and proportionality of the restriction. In this context, the counsels held that the contested measure has lasted for too long and its extension has been granted despite the lack of any measureable results for the area in terms of the aims of the Act. They actually doubted that these aims were accomplished, especially when the refusal of a housing permit was applied to persons already residing in the designated area, as it was the case of the applicant. Emphasis was also put on the authorities' reluctance to apply the hardship clause provided for by the Act (which allows for exceptions to its application) and on the lack of effective alternative accommodation, since finding one could take between eighth months and

seven years.

Counsel for the government

He characterized the measure as a last resort step whose aim was to allow deprived neighbourhoods to recover. In his view, state authorities could not be criticized for regulating the housing market to that end. In disagreement with the third party intervention, the government contended that the concept of poverty is relative and that the fact that the applicant was living on social welfare does not allow framing the case as one of poverty and vulnerability. Furthermore, the government argued that Article 14 ECHR could not form part of the proceedings before the Grand Chamber as the original application did not even in substance claim a violation of this provision. Moreover, the *juria novit curia* principle could only be applied when the characterisation of the facts of the case allows so. But, the counsel argued, there was nothing in the facts of the case that could point to any discriminatory behaviour. In any event, according to the government, no violation of Article 14 ECHR could be found. The Act does not refer to any status covered by Article 14 ECHR. For that reason alone, so stated the counsel, there could be no direct discrimination. As to the allegation of indirect discrimination, the government asserted, *inter alia*, that among the group affected by the Act, men and not women were overrepresented. Further, while people with low income were admittedly more affected, the government stressed that the criterion employed was not the level of income, but rather the source of income. Low- income students and the elderly were exempted from the measure. The government argued that 'source of income' does not qualify as a status prohibited under Article 14 ECHR, which contains statuses which are inherent to the person or that otherwise deserve protection. In the government's view, being dependent on social welfare is rather a situation to be terminated as soon as possible.

Questions to the parties

The Grand Chamber Judges posed a number of questions to the parties. Notably, they asked: 1) is the applicant seeking a re-characterization of the complaint to address a potential violation of Article 14 ECHR? 2) If so, would the applicant request the Grand Chamber to find that there had been indirect or direct discrimination? 3) Given that the applicant was already living in the area designated by the Act and wanted to move within the same area, how does her refusal of housing permit fit the aims of the law? 4) From the counsel's presentation it appears that the main goal of the measure was de-segregation or integration, whereas in several documents it appears it was rather combating anti-social behavior. Could the government clarify the aims of the Act? 5) Are there any statistics or evidence as to the way the Act has achieved its aims, thus proving to be effective? 6) How many more years will this measure be applied, considering that it has been in place for ten years already? 7) What did the government reply to the views adopted by the Human Rights Committee and the European Committee of Social Rights when in 2009 and 2011 they expressed concern about the Act being in contravention of the respective treaties, including the prohibition of discrimination? The conclusions reached by these bodies can be seen here (at para. 18, regarding Articles 2, 12, 17 and 26 ICCPR) and here (regarding Article 31.1 ESC).

There is no space to go into each answer to the questions. The summary gives us a fair picture of the competing claims and what is at stake in the case. So let me conclude by recalling some key issues that the Grand Chamber is called upon to address in *Garib*.

Final remarks

First, there is the issue of the proportionality analysis in the particular case. Does the fact that the regulation is part of a social policy authorize to do away with the proportionality test of a very significant and concrete restriction placed on the applicant's right to choose her residence? We do not think so. The goal, scope, duration and the aptitude of the measure to achieve its aims should be examined. Second, how strict should this scrutiny be, considering that the measure targeted low-income persons on social welfare? As discussed, there are reasons for heightened scrutiny. The diversity and/or quality of life of neighborhoods could potentially have been addressed by other means, including by regulating the concentration of high-income areas or residents. But it was not. The burden was put on a group of persons who are usually disadvantaged and stigmatized. This makes the issue of discrimination relevant. And here, the

real question is not whether a given condition or status is included in the wording of Article 14 ECHR, because the provision is open-ended. Nor is the relative character of the concept of poverty or the idea that only inherent features are protected (as if we could easily discern which traits are inner to us). The rationale behind provisions such as Article 14 ECHR is to protect people against being rendered subordinated or disadvantaged on grounds that may change over time and place.

Will the Grand Chamber's judgment engage with these considerations and with the analysis made by other human rights monitoring bodies?