Workshop 19 - Legal Aspects of Housing, Land and Planning

My home is my castle: Article 1, Protocol 1 and Article 8 ECHR

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Paper presented at the ENHR conference
"Housing in an expanding Europe: theory, policy, participation and implementation"
Ljubljana, Slovenia
2 - 5 July 2006
My home is my castle: Article 1, Protocol 1 and Article 8 ECHR

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Abstract

In the past years quite a few judgements of the European Court of Human Rights in Strasbourg involved Government decisions in the field of housing. Spatial changes will always have effects on property and therefore Article 1, the protection of the fundamental right to property, comes in play. But in the field of housing more fundamental rights as protected by the European Convention on Human Rights (ECHR) relevant: the right to a fair trial (Article 6) and the right to protection of ones private and family life, and ones home (Article 8). Article 6 relates entirely to guarantees of procedure. In essence it states that everyone is entitled to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Article 8 is a safeguard against ‘inter alia’ affection of the quality of life at home by serious pollution of the environment.

The paper gives a general survey of the interpretation and application of the articles mentioned, and will show that the application of fundamental rights connected with the concepts 'home' and 'property' goes further than the physical constructions and persons holding legal title.
**Convention for the Protection of Human Rights and Fundamental Freedoms**

**Article 6 - Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. to have adequate time and facilities for the preparation of his defence;
   c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

**Article 8 - Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

* Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms
  Paris, 20.III.1952

**Article 1 - Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
1. INTRODUCTION

A unified Europe will, among other things, lead to the rapid expansion of the labour market and to increased inter-state migration, but it also implicates a unity in the perception of fundamental and human rights.

On 4 November 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in Rome. The Convention is the product of the Council of Europe, a body founded to promote and protect the fundamental rights in post-war Europe. Now, more than a half century later, the ECHR has been ratified by all 46 member states of the Council of Europe. This includes all member states of the European Union (inclusive those that newly joined the EU on 1 May 2004) and all applicant countries. Article 6 of the Treaty on European Union affirms the Union’s foundation on the principles of human rights. It explicitly states that the Union shall respect fundamental rights, as guaranteed by the ECHR. This means that those rights do form part of Communal law.

According to the ECHR, the Contracting States are bound to secure to everyone within their jurisdiction the rights and freedoms laid down in the Convention. Everyone whose rights are violated will have an effective remedy before national authorities (Article 13 ECHR). The European Court of Human Rights, seated in Strasbourg, has the supervision over the observance by the Contracting States of their engagements arising from the Convention. In the vision of the Court the ECHR is “a constitutional instrument of European public order”, which creates, “over and above a network of mutual, bilateral undertakings, objective obligations” so setting standards for human rights within Europe (Loizidou v. Turkey (23 March 1995), §70 and 75).

In the field of housing the following fundamental rights as protected by the ECHR are relevant: the right to a fair trial (Article 6), the right to protection of ones private and family life, and ones home (Article 8), and the right to property (Article 1, Protocol 1).

Article 6 relates entirely to guarantees of procedure. In essence it states that everyone is entitled to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. It applies wherever there is a determination of a person’s “civil rights and obligations”. So in case property is involved, Article 6 imposes on the National Authorities a duty to provide adequate remedies. Therefore this article is also of significance to housing and planning. It enables parties concerned, whether it is an owner, user or developer, to argue that he has not had a fair hearing during the planning process. In Ortenberg v. Austria (25 November 1994) the European Court found that Article 6 also protects neighbours, in case the grant of planning permission for an adjacent plot might adversely affect the value of their property.

The importance of Article 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence”) in the field of housing is best illustrated by the case of Connors v. the United Kingdom (27 May 2004). In this case a Gipsy family was evicted from the site where they had lived for about fifteen years. The Court found that the eviction was not attended by sufficient procedural safeguards, namely a proper justification for the serious interference with applicant’s rights. Therefore the
interference was not proportionate to the legitimate aim being pursued, and a violation of Article 8 has been found. This case will be discussed in more detail later on.

For protection by Article 1, the interest invoked must have a certain economic value. The concept ‘property’ under Article 1 means more than just a legal title, which will be explained later on.

1.1. The test of Article 1 Protocol 1 and Article 8

The European court has adopted systematic testing schemes to assess whether there is a violation of Article 1, Protocol 1 or article 8.

Article 1, Protocol 1 creates a framework for interference by public authorities with private property rights. The most relevant principles are here the principles of legality and proportionality. In the test, five steps can be distinguished:

1. Did the applicant have property in the sense of Article 1?
2. Was there an interference with the peaceful enjoyment of the property?
3. Was the interference provided for by law?
4. Did the interference pursue the general interest?
5. Did the interference strike a fair balance?

The general testing scheme for article 8 also consists of five steps:

1. Is there a right under Article 8?
2. Was there an interference with this right?
3. Was the interference in accordance with the law?
4. Did the interference pursue a legitimate aim?
5. Was the interference necessary in a democratic society?

The five steps for Article 8 are quite similar to the steps for Article 1, Protocol 1. The Court first decides if there is a right under the mentioned article. The second and third steps are to determine whether there was an interference with this right and whether this interference was in accordance with national laws. In the case of Article 1, Protocol 1 the most important aspect is that the Court has to define ‘property’. With Article 8 the concepts ‘home’ and ‘private life’ are the key.

The last two steps have to make clear if there was a legitimate reason for the interference, and if the interference in this manner was necessary or whether it was disproportionate. A legitimate reason must be found in a general (public) legitimate aim.

At a first glance, an important difference between the two articles seems to be that Article 1 does not mention the ‘fair balance’ criterion for the test. It only says: “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” However, according to the case law of the Court all interferences must be proportionate; i.e. a reasonable relationship of proportionality between the means employed and the aim sought must be realised. The Court refers to the ‘fair balance’ that must be struck
between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (Sporrong and Lönroth v. Sweden (23 September 1982), §69). In each case the Court will therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden (see e.g. Immobiliare Saffi v. Italy (28 July 1998), §59). In this respect, it seems that the Court especially uses the fair balance test to judge the procedures. In that matter there is an overlap with article 6 which protects the right to a fair trial. See Jokela v. Finland (21 May 2002), §45: “Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures.”

Article 8 is much more explicit about the factors that should be considered. “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

In the following we will first discuss Article 1, Protocol 1 (the protection of home as property) and then Article 8 (the protection of home as a part of social/private life).

2. ARTICLE 1, PROTOCOL 1

2.1 Protection of home as property

Article 1 is based on a broad notion of property. The English text also speaks of ‘possessions’ and the French text of ‘biens’. The concept of property in the ECHR is therefore not limited to ownership of physical goods, like land or a house. It also encompasses the right of tenants, security rights in rem (like mortgage on land), but also contractual rights, like the right to payment of rent as the owners of real property, Mellacher v. Austria (19 December 1989).

For protection by Article 1, the interest invoked must have a certain economic value. Merely immaterial interests, like the existing view from ones house or the enjoyment of a quiet neighbourhood, fall as such outside the scope of Article 1. In those cases Article 8 can come in play. See e.g. Moreno Gomez v. Spain (16 November 2004) in case of disturbance by visitors of night clubs. We will discuss this case in more detail later on.

Article 1 doesn’t protect only existing possessions or assets, but also “claims, in respect of which the applicant can argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right”, Pine Valley Developments Ltd and

**Öneryildiz v. Turkey**

The wide interpretation of ‘possessions’ by the European Court can be illustrated with the case of **Öneryildiz v. Turkey** (30 November 2004). This case deals with the rights of a slum quarter inhabitant to his dwelling. The slum quarter concerned was sited next to a large rubbish dump. When the rubbish dump was brought into use, the closest built-up area was 3.5 km away, but since then more and more illegal dwellings were built in the surrounding areas. The applicant’s house was built on a piece of land adjacent to the rubbish dump.

In 1989 the Ümraniye district council wanted to redevelop the site of the rubbish dump, but the decision makers refused to adopt the urban-development plan. Nevertheless the council started dumping earth around the slum area, in order to redevelop the rubbish tip site. Two inhabitants of the slum area then brought proceedings against the council to establish title to land (in order to stop the redevelopment). They complained of damage to their plantations and they claimed that for years they had been treated like they had a legal title to the land. They paid taxes since 1977 and the filled in forms to regularize their title. They even had water and electricity installed in their houses at the request of the city council. The district council based its defence on the fact that the residence was contrary to the health regulations. In first instance the District Court ruled in favour of the applicants, but the Court of Cassation set aside the judgment, which was followed by the District Court. But the rubbish dump was still there and unwished-for by the district council.

Two years later the district council applied for experts to be appointed to give their opinion about the rubbish tip. According to the experts the rubbish dump did not conform to the technical requirements, such as safely collecting and burning waste gases. The tip therefore “exposed humans, animals and the environment to all kinds of risks”. The report was brought to the attention of the other concerning district councils, but they applied to have the report set aside. However the Environment Office (Ministry of Health) recommended the Ümraniye district council to handle the problems with the waste dump. The mayor of Ümraniye then applied to the District Court for the implementation of temporary measures to prevent the city council and the other district councils from using the rubbish tip site. He requested that no further waste was dumped and that the tip was closed. While this case was still pending on 28 April 1993 a methane explosion occurred at the site. The explosion caused a landslide and about ten slum dwellings were buried under a mountain of waste and thirty-nine people died.

One of the destroyed dwellings was the applicant’s dwelling. On 3 September 1993 he applied to the district council, the city council and the Ministries of the Interior and the Environment seeking compensation for his losses. He claimed compensation for pecuniary and non-pecuniary damage:

- for the loss of his dwelling and household goods (TRL 150.000.000)
for the loss of financial support incurred by himself and his three surviving sons (TRL 2.550.000.000, TRL 10.000.000, TRL 15.000.000, TRL 20.000.000)
for the non-pecuniary damage resulting from the deaths of their relatives for him and his three sons (TRL 900.000.000, TRL 300.000.000, TRL 300.000.000, TRL 300.000.000)
The district council and the Ministry of the Environment dismissed his claims, the others did not reply. The applicant therefore sued them, complaining that their negligence led to the death of his relatives and the destruction of his house and household goods.

In 1995 the Istanbul Administrative Court found a direct causal link between the accident and the negligence of the authorities, based on the reports of the experts that were made up in 1991. The Court ordered the authorities to pay the applicant and his children TRL 100.000.000 (approximately EUR 2077) and TRL 10.000.000 (approximately EUR 208) for non-pecuniary and pecuniary damage.

For the pecuniary damage the Court only took into account the destruction of the household goods. The applicant could not claim compensation for the loss of his dwelling because he had been allocated a subsidized flat. The claim for the loss of financial support was dismissed because the applicant was partly responsible for the damage and the victims had been his wife and young children who had not been in paid employment. The compensation had still not been paid when the case was reviewed by the European Court.

House on illegal occupied land: possession

It was undisputed that the dwelling had been erected in breach of town-planning regulations and that the land belonged to the State. The Court rejected the claim that Öneryıldız could acquire ownership of the occupied land as being speculative. The applicant’s hope of having the land in issue transferred to him one day constituted, according to the Court, not a claim that was sufficiently established to be enforceable in the national courts, and therefore there was no distinct “possession” within the meaning of Article 1 (§126).

But in respect of the dwelling itself, the Court concluded that the authorities let the applicant and his family live undisturbed in his house for five year, connected him to the water supply, and even levied council tax. Therefore the conclusion was made “that the authorities also acknowledged de facto that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods” (§127).
Therefore Article 1 was applicable. The case was examined in the light of the general rule in Article 1, the peaceful enjoyment of ones possessions. In the courts view the government should have protected the applicant’s proprietary interests. In this case not taking action meant an unlawful interference with the applicant’s rights under Article 1, Protocol 1.

Opens this the way for all builders of illegal dwellings to argue that they have a possession protected by the ECHR if the authorities have tolerated their illegal use of land? Judges Mularoni and Türmen express this fear in their dissenting opinions.
According to Mularoni the conclusion that Article 1 is applicable might have paradoxical effects. She sketches the image of “splendid villas and hotels built illegally on the coast or elsewhere which, under national legislation, cannot be acquired by adverse possession”, but where those who built them “in flagrant breach of the law” have a claim under Article 1 because the authorities have tolerated them.

3. ARTICLE 8

3.1 Home and homeless

One of the first things that comes in mind when discussing the right to respect for ones home, is the concept of home and homelessness. What is ‘home’ and what is ‘homelessness’? The terms homeless, houseless and roofless are used interchangeably, but they can also be used for different concepts. Every society has different perceptions of the concept ‘homeless’. The different definitions are influenced by different factors, such as traditions, culture, social infrastructure and welfare systems and financial issues (Springer, 2000, p. 476).

The United Nations defined homeless households as, “households without a shelter that would fall within the scope of living quarters. They carry few possessions with them, sleeping in the streets, in doorways or piers or in any old space, on a more or less random basis” (United Nations, 1998).

The European Federation of National Organisations Working with the Homeless (Feantsa) has created a definition of homelessness that is based on the legal, physical and social context (see figure 1). They make a distinction between rooflessness and houselessness as two categories of homelessness. The difference between roofless and houseless is based on the physical domain. A roofless person has no place to live; he literally has no roof. A houseless person has a place to live, but has no private space and no legal title to a space for exclusive possession.

<table>
<thead>
<tr>
<th>Conceptual Category</th>
<th>Physical Domain</th>
<th>Social Domain</th>
<th>Legal Domain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rooflessness</td>
<td>No dwelling (roof)</td>
<td>No private space for social relations</td>
<td>No legal title to a space for exclusive possession</td>
</tr>
<tr>
<td>Houseless</td>
<td>Has a place to live</td>
<td>No private space for social relations</td>
<td>No legal title to a space for exclusive possession</td>
</tr>
<tr>
<td>Insecure housing (adequate housing)</td>
<td>Has a place to live</td>
<td>Has space for social relations</td>
<td>No security of tenure</td>
</tr>
<tr>
<td>Inadequate housing (secure tenure)</td>
<td>Inadequate dwelling (dwelling unfit for habitation)</td>
<td>Has space for social relations</td>
<td>Has legal title and/or security of tenure</td>
</tr>
</tbody>
</table>

Figure 1: Conceptual definition on homelessness and housing exclusion (source: Kenna, 2005)
The FEANTSA definition goes further than the UN definition, which is based solely on the physical domain. FEANTSA connects private life aspects (social domain) to a definition of home(less). Having no private space for social relations can be a factor in homelessness. This definition fits the scope of Article 8 of the ENHR, which combines the right to respect for one’s private and family life with the right to respect one’s home. See *Moreno Gomez v. Spain* (16 November 2004), § 13:

“Home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person’s home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person’s right to respect for his home if it prevents him from enjoying the amenities of his home.”

### 3.2 The nomadic lifestyle of gypsies

Some people choose a lifestyle with no permanent residence, such as gypsies. Because they often have no legal title to a space for exclusive possession they could be called homeless. In several countries there is some kind of possibility for the authorities to designate land as gypsy sites, for instance in the United Kingdom. But that does not mean there are no housing problems.

*Connors v. the United Kingdom*

The case of *Connors v. the United Kingdom* (27 May 2004) deals with the rights of a gypsy family that was evicted from the land they had lived on for nearly 15 years. The land was owned by the local authority and was designated as a gypsy site. Until they moved to this site the applicants led a traditional lifestyle of travelling around, without a legal title to a plot of land. The increasing frequency of moving and harassments from other people made them decide to settle on the gypsy site. They lived there for 13 years, until February 1997 when they moved off the site due to deteriorating living conditions (anti-social behaviour of others living on or visiting the site). Because they could not adapt to living in a rented house they returned to the site. In 1998 the parents were granted (by the Leeds City Council) a licence to occupy a plot. A few months later their daughter was also granted a license to occupy a plot. But in 2000 they were suddenly summoned to vacate both plots. There were no detailed or written reasons, but the council mentioned that the family was a “magnet for troublemakers”. After a lost legal struggle of the gypsy family the council proceeded with the eviction. The gypsy family tried to frustrate eviction; they barricaded themselves in the plot. Finally the police forced them off.

The gypsy family contended to the European Court that the eviction from the site interfered unjustifiably with his right to respect for one’s private live and ones home. The interference was unnecessary and disproportionate. They also claimed that they did not have the opportunity to go to court and challenge the allegations made against them.
In this case it was not in dispute that Article 8 was applicable “and that the eviction of the applicant from the site on which he had lived with his family in his caravans disclosed an interference with his right to respect for his private life, family life and home” (§68). Therefore the debate concentrated on the question whether the interference was ‘necessary in a democratic society’.

The European Court in general considers interference ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and if it is proportionate to the legitimate aim pursued. Because the national authorities are in a better position to evaluate local social needs and conditions, the European Court finds that a margin of appreciation must be left to the national authorities. The range of the margin varies, depending on the nature of the right that is in issue.

In the case of *Connors v. the United Kingdom* the European Court finds the interference with the applicants rights under article 8 serious enough to require “weighty reasons of public interest by way of justification”. There is no doubt about the seriousness of the situation for the applicant. “The family was, in effect, rendered homeless, with the adverse consequences on security and well-being which that entails” (§85). The Court also noticed that the case “is not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of persons.” According to the court the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed.

The government’s arguments show that they treated the gypsies differently than others because of their nomadic lifestyle. This lifestyle – according to the government – “required flexibility in the management of local authority sites”. The Court notes that it is not apparent that the gypsy site has a high turnover of vacancies because of people travelling around. In fact most authority sites are residential in character. Therefore the claim was dismissed that eviction was used to maintain a turnover of vacant plots and to prevent the gypsies from becoming long-term occupants. The Court also ruled that anti-social behaviour in itself “cannot justify a summary power of eviction” since these problems also occur on other local authority sites and estates. In those cases other instruments are used to handle the situation and eviction can only be used after an independent court review. Security of tenure protection also applies to privately run gypsy sites and there is no reason to make a distinction.

An important aspect – that also explains the narrow margin of appreciation – is the fact that in the Courts view the existence of other procedural safeguards is crucial for the proportionality test of the interference. “The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community” (§94).
The court concludes that “the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a “pressing social need” or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention” (§95).

**Chapman v. the United Kingdom**

In contrast with the case of *Connors v. the United Kingdom* the Court accepted in the case of *Chapman v. the United Kingdom* (18 January 2001) a wide margin of appreciation.

This case is also about a gypsy family. The family has travelled constantly, but the applicant and her husband used to stop on temporary or unofficial sites for as long as possible while he found work. They were on a waiting list for a permanent site, but were never offered a place. They had to live with a lot of harassment, which was harmful for the family’s health, and education of the children was constantly interrupted because they had to move. Finally they decided to buy a plot of land to live on permanently. The family claims that a county council official told them that they would be allowed to live on it, but when they applied for a planning permission it was denied. A legal controversy arose between the family and the District Council. The council ordered the family to move from their land, but the family applied for a planning permission for a bungalow. The planning permission was denied and in fact the government refused every step the applicant took in respect of her occupation of the land. The applicant complained to the European Court this was a violation of Article 8 of the ECHR.

The Court found that Article 8 was in issue because the occupation of a caravan is an integral part of the applicant’s ethnic identity as a gypsy. This is still the case even though many gypsies choose to settle down. “Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition” (§73).

There was an interference with the applicant’s rights under Article 8 because the planning authorities refused the planning permission and forced the applicant to leave the plot.

As mentioned above, in order to decide whether there was a violation of Article 8 the Court has to decide whether the interference was in accordance with the law, whether it pursued a legitimate aim and whether the interference was necessary in a democratic society.

In this case the Court ruled there was no violation of Article 8. Just like in the case of Connors the seriousness of what was at stake for the applicant was clear. But this case was about general planning principles. The court finds that “the judgment by the national authorities in any particular case that there are legitimate planning objections to a particular use of a site is one which the Court is not well equipped to challenge” (§92).
Unlike in the Connors case the interference with the applicant’s rights in the Chapman case was purely based on strong environmental reasons. Furthermore the applicant’s personal circumstances had been taken into account in the decision making process and there were sufficient procedural safeguards for the applicant. The effect of the decisions cannot be regarded as disproportionate to the legitimate aim pursued.

3.3 Protection against environmental pollution

Article 8 is also a basis for the protection against (the risk of) environmental pollution of the home, and puts in this respect a positive obligation on the State. That means that Article 8 is not only a safeguard against interferences by the authorities, but also obligates the State to take active measures to protect citizens against interferences. See Guerra and Others v. Italy (19 February 1998), in case of toxic emissions (claim granted), Hatton and Others v. the United Kingdom (8 July 2003) in case of night flights to Heathrow Airport (claim dismissed) and Moreno Gomez v. Spain (16 November 2004) in case of disturbance by visitors of night clubs (claim granted). The last case we will discuss here.

Moreno Gomez v. Spain

This case is about a resident of a flat in a residential area of Valencia. From 1974 onwards the City Council allowed bars, pubs and discotheques to open in this area. After complaints about vandalism and noise, making it impossible for the residents to sleep, the City Council in 1983 decided not to permit any more night clubs to open in the area. Nevertheless, new licences were granted. In 1996 the City Council approved a new bylaw on noise and vibrations, putting limits to external noise levels in residential areas and defined “acoustically saturated zones”: areas in which local residents are exposed to high noise levels which cause them serious disturbance. The area in which the applicant lived was such a zone. However, the City Council granted a licence for a new discotheque in the same building the applicant lived in. From 1997 onwards she tried to get compensation for the damage she had sustained and the cost of installing double-glazing. Her claim was rejected, because she was not able to proof a direct link between the noise and the damage she had sustained.

As we mentioned before, the right to respect for his home as defined in article 8, means not just the right to the actual physical area, but also to the quiet enjoyment of that area. Also article 8 may put a positive duty on the State, and involve the authorities’ adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. In this case the Court notes that the applicant lives in an area that is indisputably subject to night time disturbances, and that the volume of the noise at night exceeded permitted levels.

To the fact that the domestic courts found that the applicant has failed to establish the noise levels inside her home, the Court considers that it would be unduly formalistic to require such evidence in the instant case, as the City authorities have already designated the area in which the applicant lives an acoustically saturated zone. The fact that the maximum permitted noise levels have been exceeded has been confirmed by council
staff. Therefore, there appears to be no need to require a person from an acoustically saturated zone such as the one in which the applicant lives to adduce evidence of a fact of which the municipal authority is already officially aware.

The Court finds that the applicant suffered a serious infringement of her right to respect for her home as a result of the authorities’ failure to take action to deal with the night time disturbances. The Valencia City Council tolerated the repeated flouting of the rules which it itself had established during the period concerned. “Regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Court must reiterate that the Convention is intended to protect effective rights, not illusory ones” (§61). Finally the applicant was awarded €3,884 damages for violation of her rights under Article 8.

4. ANALYSIS AND CONCLUSIONS

This paper is a first exploration of a highly interesting topic. The aim of this article is to give insight in the impact of Article 1, Protocol 1 and Article 8 in the field of housing and planning. We should throw more light on it, because of the importance of the concepts of property and home for the practice of housing and planning.

4.1 Home and property: autonomous concepts

Both ‘home’ (article 8) and property/possessions (article 1, protocol 1) are autonomous concepts. That means that the European Court is not bound by national definitions or classifications. The concept of home is not confined to dwellings or land, which are lawfully occupied or owned (Buckley v. United Kingdom, 25 September 1999, O’Rourke v. United Kingdom 26 June 2001). The case law on ‘home’ includes caravans and temporary dwellings. Furthermore the concept includes the human dimension of living and having relationships (home as a part of social or private life).

Also the concept of property in the ECHR is a wide one. The case law of the European Court indicates that it considers economic interests more than national, dogmatic legal concepts. In general any involvement with the use of land, so any planning instrument, will constitute interference in the sense of Article 1.

4.2 Article 1, Protocol 1 or Article 8?

There seems to be an overlap between Article 8 and Article 1, Protocol 1. Both protect interests in ones home. Article 1, Protocol 1 protects home as property. Deprivation of ones possessions can be the actual expropriation of the physical constructions. But Article 1 is also applicable if there is an economic loss or economic interests in ones possessions are at stake, see among others Pine Valley Developments Ltd and Others v. Ireland (29 November 1991). In short we can say that Article 1 is applicable if an interference with ones possessions has an economic impact on those possessions.
Article 8 comes in play if there is an interference with the right to respect for one's home. Article 8 protects home as a part of social or private life. There can be an interference with one's right to respect for one's home, without deprivation, see the case of *Moreno Gomez*. Here the right to respect for one's home means not just the right to the actual physical home, but also to the quiet enjoyment of that area. However, this interference can also have an economic impact, namely on the value of the estate. If the owner intended to sell the house he might have had a case under Article 1, Protocol 1. It is difficult to gain a clear insight into the choice between Article 8 and Article 1, Protocol 1. What factors determine whether to assess a case in light of one of the articles or maybe under both articles? Which is the most logical way to follow is a highly interesting question for further research.

### 4.3 Margin of appreciation

An important aspect in the cases of Connors and Chapman is the margin of appreciation the European Court affords to the national authorities (e.g. local policy makers and national courts). In the *Connors v. the United Kingdom* the government pointed out to the Court that they had examined issues in similar cases and found no violation of Article 8 or 14. The Court acknowledges “there is force in the Government’s argument that some weight should be attached to the views of national judges who are in principle better placed than an international one to assess the requirements of the society because of their direct and continuous links with that society” (§91). Nevertheless the Court is this case found that the margin of appreciation should be narrowed, because there were no general planning principles discussed. This case was all about the “policy of procedural protection for a particular category of persons”. Procedural safeguards are very important in the Court’s assessment of the proportionality of the interference. In the Chapman case the Court cites *Buckley v. the United Kingdom* (26 September 1996) in which the Court stated: “in so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation” (*Buckley*, §75). But the Court also says “it remains open to the Court to conclude that there has been a manifest error of appreciation by the national authorities. In these circumstances, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 ” (*Chapman*, §92). With regard to the margin of appreciation that is afforded to national authorities we conclude a strong influence of procedures. The European Court leaves a wider margin of appreciation in cases, which deal with general planning principles. When individual persons or a particular category of persons are in need of specific procedural protection a much narrower margin is applied.
4.4 The right to housing not in the ECHR

The fact that the ECHR protects the right to property and the right to one's home does not implicate that the ECHR provides a basis for a right to housing. “It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision” (Chapman, §99).

The right to a home in this context is too complex and precarious to describe in one paragraph, but nevertheless it is important to address the issue. It should be taken into account that Article 8 and also Article 1, Protocol 1 cannot be appealed merely to claim the right to a dwelling.

4.5 Procedural safeguards

Article 6 protects the right to a fair trial. Anyone is entitled to a fair and public hearing in court. But the protection of procedural safeguards is also implicitly present in Article 1, Protocol 1 and Article 8. Whether there is a violation of Article 1, Protocol 1 or Article 8 is tested in five steps. In both tests the aspect of procedural safeguards is significant. In the test of Article 1 the fact that the interference must be lawful, not only means that it must have a basis in national law (either statutory law or (national) case law, but also that rules of domestic law must be sufficiently accessible, precise and foreseeable. This also applies to the decisions of national courts. See Špaček, s.r.o. v. The Czech Republic (9 November 1999). As we will see procedural safeguards are also relevant factors in the ‘fair balance test’, the question whether the measure is proportionate (step 5 of the test scheme mentioned in 1.1). In this respect the Court will make an overall examination of the various interests in issue. The presence of procedural safeguards in broad sense is an important factor. This does not only require effective access to the courts (as protected by Article 6), but also that decisions (by civil authorities or national courts) are neither arbitrary nor unforeseeable. As the Court remarks in Broniowski v. Poland (22 June 2004), §151: “it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.”

In the test of Article 8 procedural safeguards are also important in deciding whether the interference was justified. In Connors v. the United Kingdom the court concludes that “the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a “pressing social need” or proportionate to the legitimate
aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention” (§95).
Accordingly there are often no separate issues under article 6. The right to respect for
ones home and the protection of property also cover proper procedural aspects.
This implies that the use of housing and planning instruments must be neither arbitrary
nor unforeseeable. Uncertainty (legislative, administrative or arising from practices
applied by the authorities) is a factor to be taken into account in the fair balance test.

4.6 Positive duties

The purpose of ECHR law is primarily that of protection against direct governmental
intrusion of the private sphere. These are the so-called negative obligations of the State,
not to interfere with the interests protected. But, founded on the effectiveness principle,
the European Court has developed implied positive obligations as well. A positive
obligation means that the ECHR might include a duty for the State to do something in
order to protect or promote people’s rights. Those positive obligations can even extend
to require public intervention in a genuinely inter-personal dispute (the so called third-
party effect of the Convention.
As we have seen in the case of Moreno Gómez the European Court of Human Rights
held Spain to violate the right under Article 8 by failing to take action to protect a
claimant from noise pollution. In a more recent case, Fadeyeva v. Russia (9 June 2005),
the Court explicitly ruled the that under Article 8 the government is responsible for
preventing serious damage to their citizens’ health caused by pollution from industrial
installations, even when they are privately owned and run.
Also Article 1, Protocol 1 can be a basis for positive obligations, as we have seen in
Öneryildiz v. Turkey. More practical Article 1 obliges the State to protect a citizen
against a violation of his right to property by other citizens, e.g. by not providing
(enough) protection. See e.g. P.M. v. Italy (11 January 2001), for a case in which the
applicant, owner of an apartment, was not able to enforce a court order permitting him
to evade the illegal occupiers.

LITERATURE

Kenna, P. (2005), Housing Rights and Human Rights, European Federation of National
Organisations Working with the Homeless, Brussels.

United Nations (1998), Principles and Recommendation for Population and Housing

Judgements of the European Court of Human Rights
Broniowski v. Poland, 22 June 2004
Buckley v. the United Kingdom, 25 September 1999
Chapman v. the United Kingdom, 18 January 2001
Connors v. the United Kingdom, 27 May 2004
Fadeyeva v. Russia, 9 June 2005)
Guerra and Others v. Italy, 19 February 1998
Hatton and Others v. the United Kingdom, 8 July 2003
Immobiliare Saffi v. Italy, 28 July 1998
Jokela v. Finland, 21 May 2002
Loizidou v. Turkey, 23 March 1995
Mellacher v. Austria, 19 December 1989
Moreno Gomez v. Spain, 16 November 2004
Öneryildiz v. Turkey, 30 November 2004
O’Rourke v. the United Kingdom, 26 June 2001
Ortenberg v. Austria, 25 November 1994
P.M. v. Italy, 11 January 2001
Pine Valley Developments Ltd and Others v. Ireland, 29 November 1991
Špaček, s.r.o. v. The Czech Republic, 9 November 1999
Sporrong and Lönnroth v. Sweden, 23 September 1982