Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in Garib v the Netherlands

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On November 6th the Grand Chamber of the European Court of Human Rights issued its judgment in Garib v. the Netherlands (Application n° 43494/09). It thereby confirmed the Chamber’s finding that refusing a housing permit to a single mother living on social welfare on account of legislation imposing minimum income requirements to reside in a number of hotspot areas of Rotterdam, did not violate her freedom to choose her residence (Article 2 of Protocol 4 ECHR). While the applicant and our third party intervention invited the Grand Chamber to examine the case also under Article 14 (prohibition of discrimination) read in conjunction with Article 2 of Protocol 4 ECHR, the Grand Chamber declined to do so. Five judges, rightly so, annexed three highly critical dissenting opinions. As we shall show in this post, this is a deeply disappointing judgment in terms of both reasoning and outcome.

Since previous posts have already discussed this case and our intervention in it (see here and here), this post shall focus on four major flaws of the Grand Chamber’s judgment. These are (1) the inconsistency of the arguments which excluded the issue of discrimination; (2) the abstract character of the judicial review; (3) the use of omissions and cherry picking; and (4) the mischaracterisation of the autonomy protected by the freedom to choose one’s residence. Before turning to these four critical points, let’s briefly recall the facts of the case.

Factual background

The Dutch Inner City Problems Act, which entered into force on 1st January 2006, allowed municipalities to adopt measures with a view to the “deghettoisation” of neighborhoods affected by economic decline, antisocial behavior and the influx of illegal immigrants. Rotterdam, wanting to reverse this trend by favoring residents with “gainful economic activity”, conditioned the settlement of new residents in designed areas on prior permission. In this context, Ms. Garib, a single mother of two children, who was living in the designated area of Tarwewijk in Rotterdam, wanted to move to another flat offered by her landlord in the vicinity of the one she was living in, which she was asked to vacate by the landlord. She was however refused a permit to move to the new flat because she did not meet the income requirement or the requirement of six years of residence in Rotterdam. She unsuccessfully claimed before the domestic courts and the Strasbourg Court a violation of her freedom to choose her residence and of the prohibition of discrimination.

An inconsistent reasoning to avoid the examination of discrimination (Article 14 ECHR)

The first question the Grand Chamber addresses is whether it could examine a possible violation of Article 14 in conjunction with Article 2 Protocol No. 4, considering that such a claim was not submitted before the Chamber. The Grand Chamber refused to do so arguing it was not “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” (§ 101). In its opinion, the discrimination complaint was “a new one,” raised neither in the original application nor later before the Chamber (§ 102). In what follows, we shall expose that the Grand Chamber’s reasoning appears inconsistent with the Court’s own case law while seemingly setting (without further motivation) a new criterion on the matter.
In our amicus, we argued that the Grand Chamber could examine the facts of the case under Article 14 of the ECHR. We substantiated this view on a number of reasons that were actually confirmed by the Grand Chamber, despite its final conclusion. First, in line with the principle of *juria novit curia*, “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” (§ 98). Second, the scope of a case referred to the Grand Chamber “is determined by the Chamber’s decision on the admissibility” of a complaint (§ 100). Third, as reiterated by the Grand Chamber, such a “complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on” (§ 101 – emphasis added). In this connection, it is important to note that the Grand Chamber also acknowledged that the allegation of discrimination was advanced by the applicant at the domestic level, although on the basis of the ICCPR instead of the ECHR (§ 99). Moreover, we cannot but observe that the material the Chamber had before it included domestic bodies’ opinions alerting about discrimination and domestic courts dealing with this issue. This also resurfaced in the dissenting opinion of Judges Keller and López Guerra, who called for the application of “the necessity test provided for under Article 14.”

For the Grand Chamber, however, the problem is that the applicant did not submit an Article 14 claim to the Chamber and it “was not open” to her to change this before the Grand Chamber. What does this mean? Would the Grand Chamber have examined a possible violation of the prohibition of discrimination had this legal claim been raised before the Chamber? If so, how to reconcile this approach with the rule according to which the scope of the case to be examined by the Grand Chamber “is not merely determined by the legal grounds”? Is the Grand Chamber then creating a new rule on the matter or otherwise an exception to its own principles? If that would be the case, the least we would expect is, for the sake of consistency, sufficient motivation. But this, unfortunately, is lacking.

What’s more, by refusing to rule on the question of discrimination, the Court avoids to deal with a pressing issue of contemporary European societies, namely the rights of people affected by poverty and the possible discriminatory character of a gentrification measure that specifically targets those on social welfare or below a certain level of income. The Grand Chamber thus misses the opportunity to develop important standards in terms of discrimination on the grounds of poverty or ‘social origin’ and its intersection with other grounds such as race and gender; a question particularly compelling in the present case, since the applicant was a single mother living on social welfare. Beyond the question of discrimination, it is striking that the Court fails to interrogate whether targeting socio-economically deprived persons is at all problematic under the right to choose one’s residence. It simply takes this for granted. As we shall see, the Court also fails to consider the vulnerable situation of the applicant.

**The in abstracto approach of the supposed in concreto review**

At § 136 of the judgment the Grand Chamber recalls:

“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”

In other words, the Grand Chamber is called to examine the application of the contested law in concreto. However, its analysis suggests exactly the opposite. The Grand Chamber, like the Chamber, adopts an extremely abstract and lenient review. This focuses on the State’s wide margin of appreciation on matters of socio-economic policy, in which legislative choices as to what it deems to be in the “public” or “general” interest, are to be respected by the Court “unless that judgment is manifestly without reasonable foundation.” (§ 137 – emphasis added). Judge Kuriš nicely summarises what this stance implies: “as the policy as such is justified (‘legitimised’), so is its application in the instant case.” (Judge Kuriš’ dissenting opinion § 4) As he rightly notes, this is the beginning and the end of the discussion. We shall not further elaborate here on why this line of reasoning, taken from the case of *Animal Defenders International v. the United Kingdom*, is unsuitable to the *Garib* case. Our amicus explained this in detail (see [here](https://strasbourgobservers.com/2017/11/16/strasbourg-fails-to-protect-th...)) and the dissenting Judges Kuriš, Pinto de Albuquerque and Vehabović also...
address the methodological flaw endorsed by the Grand Chamber (see §§ 4 and 13, respectively).

What we shall nonetheless discuss now is how the Grand Chamber’s approach, contrary to its declared intention, is remarkably detached from the concrete circumstances of the case. In what it seems to be a proportionality analysis, the Grand Chamber states that the contested Act does not “force any person to leave their dwelling” and “affects only relatively new settlers.” (§ 144) The assessment fails to give weight to the fact that (in real life) the applicant was not a newcomer. She was already living in the designated area and was planning to move nearby, as Judges Tsotsoria and De Gaetano point out (joint dissenting opinion § 2). By being prevented to do so, she was, in practice, forced to move from her neighbourhood. The Grand Chamber additionally underlines the temporary nature of the regulation (§ 152). But this overlooks the fact that the measure had been extended on many occasions and is actually intended to stay indefinitely (§§ 149 and 26). Although the Grand Chamber admits that the applicant had not incurred in any anti-social behaviour, it simply holds that this “cannot be decisive on its own when weighed in the balance against the public interest.” (§ 158) In this context, the Grand Chamber also rules out the relevance of the ‘less restrictive means test’ frequently applied to assess the necessity of rights restrictions (§ 157). All in all, the proportionality analysis is, as Judges Pinto de Albuquerque and Vehabović put it, “merely an illusion.” (Dissenting opinion § 12)

Between silence and cherry-picking

But the Grand Chamber’s judgment is additionally problematic for what it does not say and for what can be described as “cherry-picking.” That is, selecting for examination only those elements that support its findings, leaving aside essential elements that do not. In what follows, we shall point out the main ones.

To start with, it is interesting to note that while the Grand Chamber takes the time to include a section on “Practice elsewhere” (§§ 87-92) where it includes the example of Denmark –whose regulation is actually substantially different from that of the Netherlands; it does nothing with this information. Importantly, it fails to note that the Dutch gentrification policy is rather alone within the Council of Europe, as Judges Pinto de Albuquerque and Vehabović observe (dissenting opinion §20). This is to say that the contested policy is not reflective of any common practice or normative consensus across member states, which is a well-known reason to restrict the margin of appreciation granted to the respondent state. Nevertheless, the Grand Chamber remained silent about this.

But a further reason to narrow the State’s margin of appreciation was silenced, namely the alleged vulnerability of the applicant, a single mother living on welfare. The Grand Chamber, however, simply ignored this question, which was explicitly raised by both our intervention and the applicant’s counsel. The examination of the applicant’s vulnerability was essential, though: a State’s margin of appreciation is narrower when a vulnerable group is affected by a general measure. (Alajos Kiss v Hungary § 42). Consequently, the situation of the applicant ought to have been examined, as Judges Tsotsoria and Geatano recall, in the light of its standard case-law on “disproportionate burdens.”

An additional worrisome omission concerns the views that other human rights bodies have adopted on the matter discussed in Garib. The contested Act has been met with great concern by inter alia, the Human Rights Committee and the European Committee on Social Rights. And the Grand Chamber was aware of this, as revealed by the questions it posed to the government’s representative in its hearing of 25 January 2017. As pointed out in a previous blogpost, the government was asked about the reply given to the aforementioned bodies in 2009 and 2011 when they expressed concern about the Act being in contravention of the treaties in question, including the prohibition of discrimination. Inexplicably, though, this issue was totally left out from the Grand Chamber’s judgment.

Finally, reports have shown, in particular a 2015 report from Amsterdam University, that the measure disputed by the applicants has not had the desired effect. However, the Grand Chamber judged that this report was not relevant for the proportionality assessment of the case, since it assesses the effects of the contested measures ex post facto (from 2006 until 2013). Interestingly
though, the Court at the same time, decides to rely on the mere (ex post) fact that other municipalities have adopted similar measures between 2011 and 2016. For the Grand Chamber this was evidence that the “measures have been effective” (§ 149). This discloses a “cherry picking” attitude regarding the control of proportionality and the necessity of the measure.

**Distorting the question of the applicant’s autonomy to choose her residence**

Finally, the Grand Chamber holds:

“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 (...) 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.” (§166)

The Grand Chamber seems to conflate two different things: one is the autonomy principle that underpins the freedom to choose one’s residence. The other is the submission of arguments as to the harm experienced as a result of the restriction of the right. Article 2 Protocol 4 is an autonomy right as it is, for example, the freedom of assembly and association enshrined in Article 11 ECHR. It would be unthinkable to require an individual to justify why she or he wanted to join an assembly or association at any particular place and time (instead of staying at home or remaining unaffiliated). A different thing is what this person can tell about the harm, prejudice or disadvantage encountered as a result of being prevented from freely engaging in a peaceful assembly or association. The same goes for this case. The Court may legitimately expect the applicant to enlighten it on how the restriction of her right has impacted her or her children. But the Court cannot expect, without simultaneously incurring in agency denial (or paternalism), that the applicant explains why she chose to accept her landlord’s offer to move. The degree of protection afforded by the Convention cannot be made conditional upon the content of her choice. In any event, it is also good to recall that being patronised, like being stereotyped or discriminated against, in itself amounts to harm.

**Concluding note**

The previous blogpost on the Garib case closed with a question. It wondered whether the Grand Chamber’s judgment would consider the question of discrimination on poverty-related grounds, the proportionality analysis, the applicant’s vulnerability and the assessment made by other human rights monitoring bodies. The answer, unfortunately, is negative. The Grand Chamber, without convincing reasons, did not really engage with any of those issues. We may nonetheless find relief in the three dissenting opinions expressed by the five dissenters, whose arguments might promote a different, hopefully better, resolution of future similar cases.