



Number: U-I-64/14-20
Date: 12 October 2017

DECISION

At a session held on 12 October 2017 in proceedings to review constitutionality initiated upon the request of the Administrative Court, the Constitutional Court

decided as follows

- 1. Articles 152 and 156a of the Construction Act (Official Gazette RS, Nos. 102/04 – official consolidated text, 14/05 – corr., 126/07, 108/09, 57/12, 110/13, and 19/15) are inconsistent with the Constitution.**
- 2. The National Assembly of the Republic of Slovenia must remedy the unconstitutionality established in the preceding Point within one year of the publication of this Decision in the Official Gazette of the Republic of Slovenia.**
- 3. Until the established inconsistency is remedied, individuals are ensured judicial protection against a final order rejecting a suspension of enforcement in accordance with Article 156a of the Construction Act in proceedings for the judicial review of administrative acts; the filing of a motion to suspend enforcement in accordance with Article 156a of the Construction Act, the filing of an appeal against an order rejecting a suspension of enforcement in accordance with Article 156a of the Construction Act, and the filing of a lawsuit before the Administrative Court result in the suspension of the inspection measure of the removal of a building. Enforcement may be suspended multiple times.**
- 4. Article 2 of the Act Amending the Construction Act (Official Gazette RS, No. 110/13) is abrogated.**

REASONING

A

1. The applicant requests a review of the constitutionality of Article 152 of the Construction Act (hereinafter referred to as the CA-1), which regulates inspection measures in connection with illegal construction. The mentioned Article of the CA-1 is allegedly inconsistent with Article 2 of the Constitution as it does not take into consideration the specific circumstances characteristic of illegal buildings in existing Roma settlements and does not determine additional conditions for the adoption of inspection measures in instances of illegal buildings in existing Roma settlements. Proceedings for the judicial review of administrative acts were initiated by a person who was subject to an inspection and who is a member of the Roma community. He challenges the inspection decision requiring him, as the investor in an illegal building, to remove the building and restore the previous situation. He allegedly built the house in which he lives with his wife and their five children with the tacit permission of the local authorities already in the year 2000. The house has been their home ever since.

2. The applicant states that on the basis of Article 65 of the Constitution, which determines the status and special rights of the Roma community, the legislature adopted the Roma Community in the Republic of Slovenia Act (Official Gazette RS, No. 33/07 – hereinafter referred to as the RCRSA-1) and thereby regulated, *inter alia*, the special right of the Roma community with regard to the spatial integration of Roma settlements. In spite of such, it failed to regulate one of the aspects of the implementation of that right in the CA-1 – i.e. the application of inspection measures in instances of illegal buildings in Roma settlements. In the applicant's opinion, the legislature should have determined additional conditions subject to which inspection measures in accordance with Article 152 of the CA-1 could be applied in instances of illegal buildings in existing Roma settlements. The existing legal regulation allegedly enables the state and municipalities to avoid the issue of the spatial integration of Roma settlements whose existence they have tolerated for decades.

3. The applicant further asserts that individual inspection decisions requiring the demolition of illegally constructed buildings in Roma settlements could lead to the demolition of buildings that entail the homes of Roma families. This would allegedly result in a situation comparable to the one considered by the European Court of Human Rights (hereinafter referred to as the ECtHR) in its Judgment in *Yordanova and others v. Bulgaria*, dated 24 April 2012, by which the ECtHR established a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR). In the applicant's view, the Act Amending the Construction Act (hereinafter referred to as the CA-1E) enables suspension of the enforcement of inspection measures with regard to illegal buildings; however, it allows for such only

once and for a period not exceeding one year. The applicant questions whether the competent authorities would be able to resolve the issue of the spatial integration of a specific Roma settlement within one year. It similarly questions whether the building at issue can potentially be legalised. It proposes that the Constitutional Court establish that Article 152 of the CA-1 is inconsistent with Article 2 of the Constitution and require the legislature to remedy the established inconsistency within a specified period of time. In addition, it proposes that the Constitutional Court determine the manner of implementation of its decision by declaring that, until the adoption of an adequate amendment of the statutory regulation, inspection procedures that have already been initiated shall be stayed and no new procedures may be initiated.

4. The National Assembly replied that the spatial integration of Roma settlements is being implemented through the planning of adequate spatial regulations that can be of local or of national significance. The National Assembly adopted a set of special recommendations after considering the report of the Human Rights Ombudsperson regarding the living conditions of the Roma in the south-eastern part of Slovenia.¹ Two recommendations are highlighted in the reply, namely (1) that the municipalities that have not yet included Roma settlements in their spatial acts should undertake the preparation of the necessary acts as well as the preparation of other measures for the legalisation of Roma settlements and their integration into the municipal infrastructure, and (2) that in the preparation of concrete measures – in the framework of the National Programme of Measures for the Roma for the Period 2010–2015 of the Government of the Republic of Slovenia – special attention should also be devoted to the legalisation of Roma settlements and their integration into the municipal infrastructure. In the opinion of the National Assembly, the request to review the constitutionality of Article 152 of the CA-1 specifies neither the special circumstances characteristic of illegal buildings in Roma settlements nor the additional conditions subject to which inspection measures could be applied in instances of illegal buildings in Roma settlements. The National Assembly assesses that there exist no objectively substantiated reasons to include the specific legal regulation of Roma settlements in the provision regulating inspection measures with regard to illegal buildings. A regulation that determined special conditions for different categories of settlements or for different buildings within Roma settlements as regards the implementation of inspection measures could entail an interference with the general principle of equality before the law.

5. In the view of the Government, the regulation determined in Article 152 of the CA-1 is not unconstitutional. The alleged unconstitutional legal gap in the CA-1 with regard to respect for the right to appropriate housing or respect for home was allegedly remedied by the CA-1E, which introduced Article 156a of the CA-1. In accordance with this provision of the CA-1, enforcement of an inspection measure may be

¹ Special Report regarding the Living Conditions of the Roma in the South-Eastern Part of Slovenia, Ljubljana, 2012, accessible at <<http://www.varuh-rs.si/>>.

suspended if the person who is subject to the inspection demonstrates that it concerns a residential building in which he or she or other persons who do not have at their disposal other appropriate housing in accordance with the criteria determined by Article 10 of the Housing Act (Official Gazette RS, No. 69/03, 57/08, and 87/11 – hereinafter referred to as the HA-1) have in fact and without interruption lived in that building at least since the initiation of the inspection procedure. By adopting this regulation, the legislature allegedly ensured the proportionality of inspection measures in instances of illegal buildings in Roma settlements. The Government also refers to the HA-1, which enables individuals in the most dire financial situations to obtain non-profit rental housing as a long-term solution to their housing and financial difficulties or to be assigned a residential unit as a temporary solution for such difficulties. The mentioned measures determined by construction and housing legislation allegedly also fulfil the requirements stemming from the positions of the ECtHR. The Government does not agree with the Administrative Court that the suspension of enforcement for one year is not a sufficiently long period of time to enable an investor in an illegal building to either obtain a building permit in accordance with the prescribed conditions or to solve his or her housing difficulties on the basis of the HA-1. The Government emphasises that the legislation in the fields of spatial planning and construction is primarily intended for the protection of the public interest that is expressed in the requirements ensuring the safe use of buildings, a safe living environment, feasible use of land, and the protection of other constitutional values. The establishment of the right to build in a procedure to issue a building permit allegedly also indirectly protects the right to private property. According to the statements of the Government, the ECtHR also has not denied the protection of these rights in its judgments. In the mentioned judgment, the ECtHR emphasised that, when regulating enforcement and eviction, the legislature has to take into consideration the principle of proportionality by deliberating the necessity of the removal of an illegally constructed building and, if removal is necessary, by providing a sufficiently long period of time for the removal and by ensuring an appropriate manner of eviction as well as adequate substitute housing. In the opinion of the Government, the CA-1 and HA-1 enable such.

B – I

6. The applicant asserts that Article 152 of the CA-1, which regulates the issuance of an administrative decision by which a building inspector requires a person who is subject to an inspection and who is a member of the Roma community in an illegal Roma settlement to remove an illegally constructed building, is inconsistent with the right to respect for home enshrined in Article 8 of the ECHR. As all natural persons enjoy the right to respect for home, the Constitutional Court did not limit its review only to the position of members of the Roma community who live in illegal Roma settlements, but reviewed the challenged statutory regulation from the perspective of all natural persons who are subject to inspections with regard to illegal buildings.

7. When deciding on the constitutionality and legality of a regulation, the Constitutional Court is not bound by the proposal stated in the request, but may also review the constitutionality and legality of other provisions of the same or of another regulation regarding which a review of constitutionality or legality has not been requested if such provisions are mutually related or if such is necessary to resolve the case (Article 30 of the Constitutional Court Act, Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA). Article 156 of the CA-1 regulates suspension of the enforcement of inspection measures regarding illegal buildings, buildings constructed or used contrary to the building permit, and buildings used without the required occupancy permit (hereinafter referred to as suspension of enforcement in accordance with Article 156a of the CA-1). As the enforcement of a decision issued on the basis of Article 152 of the CA-1 may be suspended on the basis of Article 156a of the CA-1, Articles 152 and 156a of the CA-1 are mutually related in such a manner that, in the light of the applicant's assertions, a separate review of the two provisions is not possible. Article 2 of the CA-1E determines when Article 156a of the CA-1 may be applied. Consequently, the resolution of the case at issue requires that the Constitutional Court also take into consideration this provision. Therefore, on the basis of Article 30 of the CCA, the Constitutional Court initiated proceedings to review the constitutionality of Article 156a of the CA-1 and Article 2 of the CA-1E. As Articles 156a of the CA-1 and Article 2 of the CA-1E do not raise any new questions with regard to the review of constitutionality and their content does not exceed the framework of the statements and claims contained in the request, the Constitutional Court deemed that the National Assembly already had a possibility to clarify its positions in its reply to the request.

B – II

8. The term home has multiple meanings. A home is a physical space that provides an individual² protection from his or her surroundings. At the same time, a home is a private space in which an individual can live as he or she wishes, thus realising his or her individual identity. By settling in a specific place, an individual develops a feeling of belonging to such place and a relationship with the community surrounding him or her. An individual needs a home, an address, or a space to which he or she is officially and legally bound by the intention to conduct most of his or her personal business from there and in order to be able to vote and to exercise different rights.³ A home is an essential element of an individual's social identity.

² In this Decision, the Constitutional Court applies the term individual in the sense of a natural person as a bearer of rights and obligations.

³ Cf. L. Fox, The Meaning of Home: A Chimerical Concept or a Legal Challenge, *Journal of Law and Society*, No. 4 (2002), pp. 580–610.

9. According to the position of the ECtHR, the aim of Article 8 of the ECHR is to protect the rights that are of central importance to an individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others, and a settled and secure place in the community.⁴ Within the framework of Article 8 of the ECHR, individuals are also ensured the right to respect for home. It follows from the case law of the ECtHR that the term home included in Article 8 of the ECHR is an autonomous concept that does not depend on the regulation under domestic law. One's home is not only protected in a functional sense, but on a symbolic level as well. The right to respect for home protects the spatial and social aspects of privacy that are related to the essence of the right to respect for family and private life.⁵ As can be derived from its case law, the ECtHR protects three values within the framework of the right to respect for home, namely security, privacy, and an individual's social and emotional attachment to a specific place.⁶ Whether an individual's residence in a specific place already entails his or her home depends on the factual circumstances, the most important of which is a sufficient and continuous connection with a specific place.⁷ The right to respect for home accords an individual the right to a private space in which he or she can live without external interferences and in accordance with his or her own ideas and convictions. The right to respect for home is primarily intended to protect the individual from state interferences with his or her protected living space.⁸ A home can also be a place or building that has been illegally occupied by an individual or that has been illegally erected or constructed.⁹

10. The ECtHR emphasised that an interference with the right to respect for home is only admissible if it (a) is in accordance with the law, (b) pursues a legitimate aim under the second paragraph of Article 8 of the ECHR, and (c) is necessary in a democratic society.¹⁰ In the framework of the last criterion, the ECtHR considers a number of circumstances. Individuals must be ensured an adequate procedure in

⁴ See the ECtHR Judgments in *Connors v. the United Kingdom*, dated 27 May 2004, Paras. 81–84, and *Orlić v. Croatia*, dated 21 June 2011, Para. 63.

⁵ See the ECtHR Judgments in *Connors v. the United Kingdom*, Para. 82, *Chapman v. the United Kingdom*, dated 18 January 2001, Para. 73, and *Yordanova and Others v. Bulgaria*, dated 24 April 2012, Para. 105.

⁶ Cf. A Buyse, *Strings Attached: The Concept of "Home" in the Case Law of the European Court of Human Rights*, *European Human Rights Law Review*, No. 3 (2006).

⁷ See the ECtHR Judgments in *Buckley v. the United Kingdom*, dated 25 September 1996, Paras. 52–54, *Gillow v. the United Kingdom*, dated 24 November 1986, Para. 46, and *Wiggins v. the United Kingdom*, dated 8 February 1978, Para. 40.

⁸ C. Grabenwarter, *European Convention on Human Rights, Commentary*, Verlag C. H. Beck, München 2014, p. 197.

⁹ See the ECtHR Judgments in *McCann v. the United Kingdom*, dated 13 May 2008, Para. 46, and *Yordanova and Others v. Bulgaria*, Para. 103.

¹⁰ See the ECtHR Judgment in *Chapman v. the United Kingdom*, Paras. 71–82.

which they can effectively protect their right to respect for home.¹¹ They must be ensured a possibility to also invoke their personal circumstances in a review of the proportionality of an interference with their right to respect for home.¹² Such entails that individuals must be ensured that the admissibility of an interference with their right to respect for home is reviewed in adversarial proceedings before an independent body, even if the affected individual does not have a right to occupy the relevant space under domestic law.¹³ An interference with the right to respect for home cannot be justified simply due to the fact that it is based on a general legal norm that does not allow for any exceptions. The mere possibility of the judicial review of an administrative decision that entails the loss of a home does not suffice. Individuals must have the right to challenge such decision due to an excessive interference with their right to respect for home in the light of their personal circumstances.¹⁴ The competent bodies must be authorised to prevent an excessive interference with the right to respect for home. They must also verify whether there exist other, less invasive, measures.¹⁵

11. Hitherto, the Constitutional Court has not decided whether an individual's social and emotional bonds with a place that this individual considers his or her home also enjoy constitutional protection. Such concerns the right to respect for home as the right to reside peacefully in a specific place. In its decisions the Constitutional Court clarified that the Constitution does not expressly guarantee the right to a home in the sense of the right to reside in a specific place.¹⁶ It stated that such does not entail that this right is not grounded in treaties that are binding on the Republic of Slovenia.¹⁷ However, the fact that the Constitution does not explicitly regulate the right to respect for home does not entail that in the Republic of Slovenia this right is not guaranteed directly on the basis of constitutional provisions. An individual's social identity that results from the feeling that he or she belongs to a certain place is linked to the spatial aspect of privacy. The right to respect for home is thus protected by the first

¹¹ See the ECtHR Judgments in *Connors v. the United Kingdom*, Para. 81, *McCann v. the United Kingdom*, Para. 49, *Kay and Others v. the United Kingdom*, dated 21 September 2010, Para. 67, and *Yordanova and Others v. Bulgaria*, Para. 118.

¹² See the ECtHR Judgments in *McCann v. the United Kingdom*, Paras. 51–55, and *Ćosić v. Croatia*, dated 15 January 2009, Paras. 21–23.

¹³ See the ECtHR Judgments in *McCann v. the United Kingdom*, Para. 50, *Ćosić v. Croatia*, Para. 22, and *Kay and Others v. the United Kingdom*, Para. 68.

¹⁴ See the ECtHR Judgments in *McCann v. the United Kingdom*, Paras. 51–55, and *Ćosić v. Croatia*, Paras. 21–23.

¹⁵ See the ECtHR Judgment in *Ivanova and Cherkezov v. Bulgaria*, dated 21 April 2016, Para. 53.

¹⁶ See Constitutional Court Orders No. Up-179/95, dated 27 November 1996 (OdlUS V, 207), Para. 12 of the reasoning, and No. U-I-172/02, dated 25 September 2003, Para. 22 of the reasoning.

¹⁷ See Constitutional Court Order No. U-I-172/02, Para. 22 of the reasoning.

paragraph of Article 36 of the Constitution. Individuals are protected against measures that entail an interference with their right to respect for home on the basis of the first paragraph of Article 36 of the Constitution.

12. The Constitutional Court has already adopted positions regarding the content of the general right to privacy as well as the spatial aspect of the privacy of natural persons.¹⁸ It held that the act of residing or living – whereby the material environment in which such takes place is, as a general rule, a residence, home, or dwelling – is a typical and essential aspect of an individual's privacy. The factual and exclusive authority over the space of a dwelling and over everything material in it is an essential part and a precondition for residing in a specific place as part of an individual's privacy.¹⁹ The Constitutional Court adopted the position that the right to the inviolability of dwellings (the first paragraph of Article 36 of the Constitution) does not protect premises as such, but an individual's privacy on such premises. It held that the first paragraph of Article 36 of the Constitution protects a dwelling in the sense of protecting privacy on residential premises where an individual reasonably expects privacy and deems such premises to be his or her residential premises. The essence of such privacy lies in an individual's intention to reside in a space where he or she can lead his or her private life, and such privacy is protected against any interference against the will of the resident of that space.²⁰

13. The right to respect for home protects an individual's social and emotional bonds with a place (or a building) that this individual considers his or her home. In inspection procedures regarding an illegal building, the right to respect for home ensures individuals that the building they live in will not be removed as long as there exist circumstances that render such an interference with their right to respect for home disproportionate. A procedure for the removal of an illegal building entails not only an interference with privacy, but also the loss of a physical space that is an individual's home. Such requires that the Constitutional Court amend its position with regard to the content of the right stemming from the first paragraph of Article 36 of the Constitution to a certain degree. In instances of the removal of a building in which a natural person lives, the right to respect for home stemming from the first paragraph of Article 36 of the Constitution thus also protects the existence of the building as a physical space.²¹

¹⁸ The leading decisions in this regard are Constitutional Court Decisions No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), and No. U-I-115/14, Up-218/14, dated 21 January 2016 (Official Gazette RS, No. 8/16).

¹⁹ See Constitutional Court Decision No. Up-32/94, dated 13 April 1995 (OdlUS IV, 38), Para. 12 of the reasoning.

²⁰ See Constitutional Court Decision No. Up-3381/07, dated 4 March 2010 (Official Gazette RS, No. 25/10), Para. 5 of the reasoning.

²¹ Cf. W. A. Schabas, *The European Convention on Human Rights, A Commentary*, Oxford University Press, Oxford 2017, p. 399.

14. The right to respect for home does not entail that in instances when the removal of a specific building would disproportionately interfere with the right to respect for home the state has to legalise such building merely due to this reason. With regard to measures connected with illegal buildings, it must be taken into account that the state does not have to tolerate an illegal building indefinitely.²² The right to respect for home further does not entail that the state has to provide substitute housing to the affected individuals in all such instances.²³ The exercise of the right to respect for home as such also cannot affect property rights or contractual rights.

15. The conditions for limitations of the right to respect for home, which is enshrined in the first paragraph of Article 36 of the Constitution, are included in the following paragraphs of the Article. The constitution framers deemed that, in addition to the general conditions for the admissibility of an interference with a human right determined by the third paragraph of Article 15 and Article 2 of the Constitution, special procedural safeguards that ensure the proportionality of an interference with the right to respect for home have to be observed as well. The first part of the second paragraph of Article 36 of the Constitution serves as the legal basis for a review of the admissibility of an interference with the right to respect for home in connection with the removal of a building that is an individual's home. In accordance with this provision, a resident's personal space may only be entered against his or her will on the basis of a prior court order. The inspection measure of the removal of a building entails not only that a private space is entered, but also the loss of the space in which an individual lives. The loss of a home is the most severe interference with the right to respect for home.²⁴ Such entails that – before a measure entailing the loss of a home is enforced against a natural person – in accordance with the first part of the second paragraph of Article 36 of the Constitution, this person must be guaranteed prior judicial control of the proportionality of the measure entailing an interference with his or her right to respect for home.

²² See the ECtHR Judgment in *Yordanova and Others v. Bulgaria*, Para. 131.

²³ See the ECtHR Judgments in *McCann v. the United Kingdom*, Para. 99, and *Yordanova and Others v. Bulgaria*, Para. 130. Article 78 of the Constitution imposes an obligation upon the state and guides it in its activities in the field of housing policy. By that provision, the Constitution explicitly emphasises one of the social aspects deriving from the principle of a social state (Article 2 of the Constitution). The state shall adopt appropriate measures to create opportunities for citizens to obtain adequate housing. Thus, from the mentioned provision there follows the obligation to create an active housing policy (see B. Kresal in: L. Šturm, *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 762, and Constitutional Court Decision No. U-I-109/15, dated 19 May 2016 (Official Gazette RS, No. 38/16), Para. 22 of the reasoning).

²⁴ Cf. the ECtHR Judgment in *Yordanova and Others v. Bulgaria*, Para. 118.

16. The Constitution determines special conditions for the admissibility of interferences with spatial privacy in the remainder of the second paragraph and in the third and fourth paragraphs of Article 36 of the Constitution. Pursuant to the fifth paragraph of Article 36 of the Constitution, a law may determine in further detail the conditions subject to which an official may enter the dwelling or other premises of another person without a court order and conduct a search in the absence of witnesses. The provisions that regulate the exercise of inspection procedures in connection with illegal buildings are not intended to allow interferences with privacy in order to conduct a search or to regulate in further detail the conditions for the urgent apprehension of perpetrators of criminal offences and the protection of persons and property in dwellings and on other premises of third parties. Therefore, the second part of the second paragraph and the third, fourth, and fifth paragraphs of Article 36 of the Constitution are not relevant for the review of the constitutionality of the legislation in the field of inspection measures in connection with illegal buildings.

17. It has to be noted that not every inspection measure of the removal of a building entails an interference with the right to respect for home. A person who is subject to an inspection carries the burden of allegation and the burden of proof, i.e. of alleging and establishing all circumstances that are important for the protection of his or her right to respect for home.²⁵ If the question of the protection of the right to respect for home arises in an inspection procedure with regard to an illegal building, the affected natural person must have the possibility to challenge the decision due an excessive interference with the right to respect for home in the light of his or her personal circumstances. This entails that in an inspection procedure regarding an illegal building the person who is subject to the inspection must be guaranteed the possibility to invoke all circumstances affecting his or her right to respect for home in adversarial proceedings before the removal of the building in question. The competent court must be authorised to prevent an excessive interference with the right to respect for home. In the proceedings the court must have the jurisdiction and the duty to consider all relevant circumstances and must be authorised to impose measures for the protection of the right to respect for home if the circumstances of a specific case indicate that the removal of a building would entail an excessive interference with this right.²⁶

18. A weighing of all of the circumstances that are important for the review of whether the removal of a specific building entails an excessive interference with the right to respect for home may only be carried out in an individual case.²⁷ When assessing whether the removal of a building in an individual case entails an excessive

²⁵ Cf. the ECtHR Judgment in *Brežec v. Croatia*, dated 18 July 2013, Para. 46.

²⁶ See the ECtHR Judgments in *McCann v. the United Kingdom*, Para. 50, *Ćosić v. Croatia*, Para. 22, and *Kay and Others v. the United Kingdom*, Para. 68, as well as the ECtHR Decision in *J. L. v. the United Kingdom*, dated 30 September 2014, Para. 45.

²⁷ Cf. the ECtHR Judgment in *Ivanova and Cherkezov v. Bulgaria*, Para. 54.

interference with the right to respect for home, the court must take into account whether the building in question is an individual's home, whether the individual resides in the building illegally and whether he or she has been aware of this illegality, the nature and extent of the illegality, and the legal nature of the public interest that will be protected by the demolition of the building.²⁸ It must also take into account the duration of the residence and the degree to which the individual is connected with the place in question.²⁹ The competent authorities and the court must assess the risk that the affected individuals become homeless following the removal of the building and their possibility to obtain housing with the assistance of the state.³⁰

19. An important factor of the court's deliberation is also the question of whether the person who is subject to the inspection is a member of an underprivileged or vulnerable social group.³¹ Members of the Roma community are members of a particularly vulnerable social group.³² Article 65 of the Constitution determines that the status and special rights of the Roma community living in the Republic of Slovenia shall be regulated by law. This constitutional provision entails the legislature's authorisation to grant, by law, the Roma community that lives in the Republic of Slovenia as a specific ethnic community special rights in addition to the general rights enjoyed by everyone. The constitutional authorisation determined by Article 65 of the Constitution allows the legislature to ensure the Roma community and its members special (i.e. additional) protection, which is referred to by scholars as so-called positive discrimination or positive protection. The positive protection that the majority nationality recognises to national, ethnic, linguistic, and other communities (i.e. minorities) expresses the readiness of the state to promote and implement the rights of the mentioned communities as part of the democratic development of the society (state) as a whole.³³ The legislature enjoys a wide margin of appreciation with regard to the selection of the type and content of the measures by which the legislature grants to the Roma community special rights in addition to the general rights enjoyed by everyone.³⁴ The fundamental law that regulates the special rights of the Roma

²⁸ See the ECtHR Judgment in *Chapman v. the United Kingdom*, Paras. 102–104.

²⁹ See the ECtHR Judgment in *Yordanova and Others v. Bulgaria*, Para. 121.

³⁰ See the ECtHR Judgments in *Chapman v. the United Kingdom*, Paras. 103 and 104 of the reasoning, and *Yordanova and Others v. Bulgaria*, Para. 130 of the reasoning, as well as A. Remiche, *Yordanova and Others v. Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home*, *Human Rights Law Review*, No. 4 (2012), p. 799.

³¹ See the ECtHR Judgment in *Yordanova and Others v. Bulgaria*, Para. 129.

³² See the ECtHR Judgments in *Oršus and Others v. Croatia*, dated 16 March 2010, Para. 147, and *I. G. and Others v. Slovakia*, dated 13 November 2012, Para. 123.

³³ Held by the Constitutional Court in Decision No. U-I-416/98, dated 22 March 2001 (Official Gazette RS, No. 28/01, and OdlUS X, 55), Para. 7 of the reasoning.

³⁴ See Constitutional Court Decision No. U-I-15/10, dated 16 June 2010 (Official Gazette RS, No. 54/10), Para. 10 of the reasoning.

community in the Republic of Slovenia, the competences of state authorities and the authorities of local communities with regard to the exercise of these rights, and the participation of the representatives of the Roma community in the implementation of their rights and obligations determined by law is the RCRSA-1. The legislature granted the Roma community special rights with regard to the establishment of the conditions for resolving the issue of the spatial integration of Roma settlements or areas where members of the Roma community live. Article 5 of the RCRSA-1 determines the obligation that, during the preparation of spatial acts, municipalities, and in exceptional cases the Government, consider and assess – in light of expert findings regarding the properties and capacities of an area and on the basis of an analysis of the state of the area – the possibilities as to directing spatial development and determining development restrictions in areas where members of the Roma community already live, as well as possibilities as to the rehabilitation of such areas, insofar as they entail degraded areas. When reviewing the proportionality of an interference with the right to respect for home in instances concerning the illegal buildings of members of the Roma community, courts must therefore also take into account whether the special right of the Roma community in the field of spatial planning determined by Article 5 of the RCRSA-1 has been ensured to the members of this community. The principle of proportionality further requires that courts treat instances of the removal of illegal buildings in Roma communities that have lived in a certain place for a long period of time differently than individual instances of the removal of individuals from land on which they have built illegally.³⁵ This is even more true if an illegally constructed Roma settlement has existed continuously for several years or even decades with the tacit or express consent of a local community.

20. The ECtHR also established the requirement of a prior court decision as one of the conditions for ensuring the proportionality of an interference with the right to respect for home when the interference is very invasive.³⁶ In instances when the competent state authorities intensely interfere with the right to respect for home by exercising their statutorily determined authorisations, from the viewpoint of the requirement of a prior court order authorising the measure, an equal level of protection of the constitutional right to respect for home is guaranteed by both the Constitution and the ECHR. Therefore, in the case at issue, the constitutional review has to be conducted from the perspective of the Constitution.

21. The requirements stemming from the first paragraph and the first part of the second paragraph of Article 36 of the Constitution are also binding on the legislature. In the proceedings for the review of the statutory regulation that is the legal basis for the inspection measure of the removal of a building, the Constitutional Court must take into account all of the stages of the procedure, from the initiation of the

³⁵ See the ECtHR Judgment in *Yordanova and Others v. Bulgaria*, Para. 121, and W. A. Schabas, *op. cit.*, p. 400.

³⁶ *Cf.* the ECtHR Decision in *J. L. v. the United Kingdom*, Para. 47.

inspection procedure until the enforcement of the decision.³⁷ In accordance with the position of the ECtHR, protection of the right to respect for home may namely be ensured in enforcement proceedings.³⁸ Therefore, hereinafter the Constitutional Court, taking into account the premises outlined in the preceding paragraphs of this reasoning, assessed whether the regulation determined in Articles 152 and 156a of the CA-1 observes the constitutional requirements stemming from the first paragraph and the first part of the second paragraph of Article 36 of the Constitution.

B – III

Review of Articles 152 and 156a of the CA-1

22. Article 152 of the CA-1 determines: “In instances of illegal buildings, a competent building inspector declares that the construction shall cease immediately and that the building or part of the building that has already been constructed shall be removed within a specified period of time at the cost of the person who is subject to the inspection and the previous situation shall be restored or, if the previous situation cannot be restored, that the building, part of the building, or land shall be remedied by other means.”

23. The cited provision constitutes the legal basis for inspection procedures in instances of illegal buildings.³⁹ On the basis of the challenged provision, the building inspector, once it has been determined that the building is illegal, declares that the person who is subject to the inspection must remove the building.⁴⁰ The inspector must determine a deadline by which the person who is subject to the inspection shall fulfil his or her obligation him- or herself. When determining the deadline for remedying the irregularity, the inspector must take into account the principle of proportionality, the severity of the violation, its consequences for the public interest, and the circumstances that determine the time frame in which the natural person who is subject to the inspection can remedy the irregularity with due care (the third

³⁷ Cf. the ECtHR Judgment in *Zehentner v. Austria*, dated 16 July 2009, Para. 54, its Decision in *J. L. v. the United Kingdom*, Para. 31, and the Judgment of the Supreme Court of the United Kingdom in *Manchester City Council v. Pinnock*, dated 3 November 2010, Para. 45.

³⁸ Cf. the ECtHR Decision in *J. L. v. the United Kingdom*, Para. 45, and the ECtHR Judgment in *Ivanova and Cherkezov v. Bulgaria*, Para. 58.

³⁹ An illegal building entails that construction or work that requires a building permit is or was performed without a valid building permit (point 12. 1. of the first paragraph of Article 2 of the CA-1).

⁴⁰ Removal of a building entails work by which the building is removed, demolished, or pulled down and the previous situation is restored (point 7. 4. of the first paragraph of Article 2 of the CA-1).

paragraph of Article 7 of the Inspection Procedure Act, Official Gazette RS, Nos. 43/07 – official consolidated text, and 40/14 – hereinafter referred to as the IPA). An individual can lodge an appeal against the inspector's decision, which does not suspend its enforcement (Article 30 of the IPA). Judicial protection is ensured in proceedings for the judicial review of administrative acts.

24. As an appeal against a decision requiring the removal of a building does not suspend its enforcement (Article 30 of the IPA), the competent authority can commence the enforcement proceedings right after the implementation deadline expires. In accordance with the first paragraph of Article 291 of the General Administrative Procedure Act (Official Gazette RS, Nos. 24/06 – official consolidated text, 126/07, 65/08, 8/10, and 82/13 – hereinafter referred to as the GAPA), the administrative enforcement procedure is conducted on the basis of an enforceable decision and an order authorising the enforcement. However, in the procedure for issuing an enforcement order the competent body does not review the legality of the decision to be enforced.⁴¹ An appeal against the enforcement order can be lodged only for reasons related to the enforcement (the first paragraph of Article 292 of the GAPA).

25. In its reply the Government stated that by Article 156a of the CA-1⁴² the legislature regulated a special form of the suspension of enforcement in instances of

⁴¹ E. Kerševan, V. Androjna, *Upravno procesno pravo, Upravni postopek in upravni spor* [Administrative Procedural Law, Administrative Procedure, and the Judicial Review of Administrative Acts], second, amended and supplemented, edition, GV Založba, Zbirka pravna obzorja, Ljubljana 2017, p. 482.

⁴² Article 156a of the CA-1 determines as follows:

“(1) In addition to the grounds for a suspension of enforcement determined by the act regulating the general administrative procedure, with regard to illegal buildings, buildings constructed or used contrary to the building permit, and buildings used without the required occupancy permit, a building inspector shall suspend the enforcement of an inspection decision upon a motion of the person who is subject to the inspection if such person demonstrates that:

- the case concerns a residential building in which he or she or other persons who do not have at their disposal other appropriate housing in accordance with the criteria determined by Article 10 of the Housing Act (Official Gazette RS, Nos. 69/03, 18/04, 47/06, 45/08, 57/08, 62/10, 56/11, 87/11, and 40/12) have in fact and without interruption lived at least since the initiation of the inspection procedure, or
- an economic activity has been carried out without interruption in the object at least since the initiation of the inspection proceedings and the enforcement of the inspection measure would result in the risk that the person who is subject to the inspection will suffer severe economic damage or the enforcement of the inspection procedure would be the direct reason for the dismissal of workers, whereby severe economic damage is deemed to entail permanent illiquidity or the loss of the only source of income and means of subsistence, or

illegal buildings in order to ensure protection of the right to respect for home with regard to the removal of objects in accordance with the requirements that follow from the case law of the ECtHR. It also follows from the legislative materials in connection with the CA-1E⁴³ and the Act Amending the Construction Act (Official Gazette RS, No. 19/15 – CA-1F)⁴⁴ that the legislature regulated this special form of the suspension of enforcement for this reason. In light of such, the Constitutional Court also considered the regulation of the suspension of enforcement in accordance with Article 156a of the CA-1 throughout the proceedings for the review of the statutory regulation that is the legal basis for the inspection measure of the removal of a building.

26. On the basis of Article 156a of the CA-1, a person who is subject to an inspection may request the competent authority to suspend enforcement immediately after the order authorising the enforcement is issued.⁴⁵ The first paragraph of Article 156a of the CA-1 determines the grounds that enable the suspension of an administrative enforcement procedure. An individual may, *inter alia*, request a suspension of enforcement in accordance with Article 156a of the CA-1 if the object of the enforcement is a residential building in which the person who is subject to the inspection or other persons who do not have at their disposal other appropriate housing have in fact and without interruption lived at least since the initiation of the

– the person who is subject to the inspection lodged an application to amend the relevant spatial act and the municipality already included such in a procedure for the amendment of the spatial act and stated in writing that it will take such into account in the next amendment, or

– the person who is subject to the inspection lodged a complete request for the issuance of a building or occupancy permit.

(2) The enforcement referred to in the preceding paragraph may only be suspended once, namely:

– in the instances referred to in the first and second indents: for a period of up to five years,

– in the instances referred to in the third indent: until the spatial act enters into force, but only for a period of up to five years,

– in the instances referred to in the fourth indent: until the decision on the request for the issuance of a building or occupancy permit attains legal finality.”

⁴³ See the Draft of the Act Amending the Construction Act, Gazette of the National Assembly of 22 November 2013, EPA 1600 – VI – urgent procedure.

⁴⁴ See the Draft of the Act Amending the Construction Act, Gazette of the National Assembly of 6 February 2015, EPA 333 – VII – urgent procedure.

⁴⁵ The suspension of enforcement entails the provisional staying of enforcement or the provisional staying of enforcement proceedings that have already been initiated due to the fact that the enforcement is impeded by a specific circumstance that hinders the initiation or continuation of enforcement proceedings. The enforcement that was suspended continues when the impediment or grounds for suspension cease to exist; however, it may also be stayed with finality if a circumstance that hinders the continuation of enforcement proceedings arises after the suspension (see E. Kerševan, V. Androjna, *op. cit.*, pp. 487–488).

inspection procedure (the first indent of the first paragraph of Article 156a of the CA-1). In these instances, the enforcement may be suspended only once and only for a period of up to five years (the first indent of the second paragraph of Article 156a of the CA-1). The lodging of a motion to suspend enforcement does not have a suspensive effect on the enforcement.⁴⁶ The building inspector decides on the suspension of enforcement by means of an order. The affected individual may lodge an appeal against this order, which is decided on by the competent ministry; however, the appeal does not suspend the enforcement procedure (the third paragraph of Article 292 of the GAPA). It follows from the case law of the Supreme Court that a decision by which a motion to suspend enforcement is rejected is not an administrative act in the sense of Article 2 of the Judicial Review of Administrative Acts Act (Official Gazette RS, Nos. 105/06, 62/10, and 109/12 – hereinafter referred to as the JRAAA-1).⁴⁷ Such entails that, in accordance with the established case law, an individual may not initiate the judicial review of a final order rejecting a motion to suspend enforcement.

27. The Constitutional Court had to decide whether the outlined statutory regulation of inspection measures with regard to illegal buildings, including their enforcement or the suspension thereof, constitutes an interference with the right to respect for home stemming from the first paragraph of Article 36 of the Constitution. A competent building inspector's decision that a building is illegal and that the person who is subject to the inspection has to remove it does not of itself entail the loss of the home of this person or his or her family. The loss of their home occurs if the inspection decision is enforced and the building is in fact removed.⁴⁸ The coercive enforcement of the decision adopted on the basis of Article 152 of the CA-1 in an enforcement procedure in which the competent authorities remove the building that constitutes the home of the person who is subject to the inspection against the will of such person thus entails the interference with the right to respect for home.

28. The statutory regulation of the coercive enforcement of a decision issued in an inspection procedure regarding an illegal building thus entails an interference with the right to respect for home that is protected within the framework of the first paragraph of Article 36 of the Constitution. The admissibility of an interference must first be reviewed within the framework of the specific criteria determined by the first part of the second paragraph of Article 36 of the Constitution. In accordance with the first part of the second paragraph of Article 36 of the Constitution, the removal of a

⁴⁶ See Supreme Court Order No. X Ips 226/2013, dated 11 February 2015.

⁴⁷ See Supreme Court Order No. I Up 111/2013, dated 24 July 2013.

⁴⁸ Cf. the ECtHR Judgment in *Yordanova and Others v. Bulgaria*, Para. 104. In Point 1 of the operative provisions of this Judgment and in Point 2 of the operative provisions of the Judgment in *Ivanova and Cherkezov v. Bulgaria*, the ECtHR stated that there would be a violation of Article 8 of the ECHR in the event of the enforcement of the removal order.

building that is the home of a natural person against the will of the person who is subject to an inspection is only admissible if it is based on a prior judicial decision.

29. On the basis of Article 152 of the CA-1, following the finding that a building is illegal, a building inspector must impose the measure of the removal of the building regardless of the concrete circumstances of the person who is subject to the inspection. This provision does not enable the inspector to impose a milder measure instead of the prescribed one or to not impose any measure at all.⁴⁹ In the inspection procedure, the inspector must only establish facts and present evidence that are important for the decision on whether the building is illegal. When setting the deadline, the inspector's review is limited to the circumstances that influence the possibility to effectively enforce the administrative decision, and not a review of the circumstances that influence the exercise of the right to respect for home. Consequently, when reviewing the legality of an administrative decision, neither the appellate authority nor the Administrative Court can take into account circumstances that are not essential for the inspector's decision-making in the light of the statutory regulation. This entails that a person who is subject to an inspection cannot achieve a substantive review of the proportionality of the interference with his or her right to respect for home by means of an appeal against a decision issued on the basis of Article 152 of the CA-1. In addition, the lodging of an appeal or a lawsuit does not suspend enforcement. The enforcement of a decision adopted on the basis of Article 152 of the CA-1 is admissible already before the appellate authority or a court decided on the legal remedies.

30. It follows from the first indent of the first paragraph of Article 156a of the CA-1 that the competent authority may suspend enforcement due to circumstances that are important from the perspective of the right to respect for home. This entails that in the procedure for the suspension of enforcement in accordance with Article 156a of the CA-1 the person who is subject to an inspection is ensured a concrete review of the proportionality of an interference with his or her right to respect for home. However, the building inspector decides on the suspension of enforcement by means of an order. The individual may lodge an appeal against this order, which is decided on by the competent ministry. The lodging of a motion to suspend enforcement does not have a suspensive effect on the enforcement.⁵⁰ It follows from the case law of the Supreme Court that a decision by which a motion to suspend enforcement is rejected is not an administrative act in the sense of Article 2 of the JRAAA-1, entailing that in

⁴⁹ This standpoint also constitutes a part of the established case law of the Administrative Court (e.g. Judgments No. III U 151/2015, dated 11 September 2015, and No. III U 197/2014, dated 16 January 2015). Cf. also M. Pečarič in: P. Kovač, *Inšpekcijski nadzor, razprave, sodna praksa in komentar zakona* [Inspection Procedures, Discussions, Case Law, and Commentary on the Act], Založba Uradni list Republike Slovenije, Ljubljana 2016, pp. 106–107.

⁵⁰ See Supreme Court Order No. X Ips 226/2013, dated 11 February 2015.

the procedure for a suspension of enforcement judicial protection of the right to respect for home is not ensured.⁵¹ The removal of a building that entails an interference with the right to respect for home is thus based on the decision of a building inspector, not a judicial decision.

31. The finding of the Constitutional Court that persons who are subject to an inspection are not ensured judicial control of the proportionality of an interference with the right to respect for home in inspection procedures is decisive for the review of the admissibility of an interference with the right to respect for home. The regulation contained in Articles 152 and 156a of the CA-1 namely allows for an interference with the right to respect for home on the basis of an administrative decision, not on the basis of a prior judicial decision.⁵² This refers to inspection procedures that have a substantive character (i.e. establishing that a building is illegal) as well as to enforcement procedures.

32. As the regulation of inspection procedures regarding illegal buildings contained in Articles 152 and 156a of the CA-1 does not ensure that an interference with the right to respect for home resulting from the removal of a building is based on a judicial decision by which a court scrutinised the proportionality of the interference, Articles 152 and 156a of the CA-1 inadmissibly restrict, contrary to the first part of the second paragraph of Article 36 of the Constitution, the constitutional right to respect for home guaranteed by the first paragraph of Article 36 of the Constitution.

33. It is not possible to abrogate Articles 152 and 156a of the CA-1. The abrogation of Article 152 of the CA-1 would prevent inspection measures with regard to illegal construction also in instances where the right to respect for home was not at risk. Furthermore, the abrogation of Article 156a of the CA-1 would deprive persons who are subject to inspection of any possibility to prevent the enforcement of the inspection measure of the removal of a building. This would be problematic from a public interest perspective as well as from the perspective of the protection of the right to respect for home. Therefore, on the basis of the first paragraph of Article 48 of the CCA, the Constitutional Court adopted a declaratory decision (Point 1 of the operative provisions). In accordance with the second paragraph of Article 48 of the CCA, it required the legislature to remedy the unconstitutionality established in Point 1 of the operative provisions within one year from the publication of this Decision in the Official Gazette of the Republic of Slovenia (Point 2 of the operative provisions). In order to satisfy the requirements stemming from the first paragraph and the first part of the second paragraph of Article 36 of the Constitution, the legislature will have to comprehensively regulate the protection of the right to respect for home in inspection procedures regarding illegal buildings. It will have to ensure prior judicial

⁵¹ See Supreme Court Order No. I Up 111/2013, dated 24 July 2013.

⁵² Cf. Constitutional Court Decision No. U-I-40/12, dated 11 April 2013 (Official Gazette RS, No. 39/13, and OdlUS XX, 5), Para. 39 of the reasoning.

control of the proportionality of interferences with the right to respect for home in inspection procedures regarding illegal buildings and ensure that in individual procedures the courts will have the authorisation required for the effective protection of the right to respect for home. The legislature can ensure prior judicial protection from interferences with the right to respect for home either in the procedure for issuing an inspection decision with regard to an illegal building or in enforcement proceedings. At the same time, the legislature will have to ensure adequate protection of the public interest by means of effective inspection measures and prevent abuses of rights in inspection procedures.

34. As the decision of the Constitutional Court [establishing an unconstitutionality] would not have eliminated the possibility of further inadmissible interferences with the right to respect for home, the Constitutional Court determined the manner of the implementation of its Decision on the basis of the second paragraph of Article 40 of the CCA (Point 3 of the operative provisions). In doing so, it took into account that a complex statutory regulation will have to be enacted in order to remedy the established inconsistency with the Constitution and determined the manner of implementation within the framework of existing institutions. In light of the above, it determined that until the established inconsistency is remedied, persons who are subject to inspections are ensured judicial protection against a final order rejecting a suspension of enforcement in accordance with Article 156a of the CA-1 in proceedings for the judicial review of administrative acts; the filing of a motion to suspend enforcement in accordance with Article 156a of the CA-1, the filing of an appeal against an order rejecting a suspension of enforcement in accordance with Article 156a of the CA-1, and the filing of a lawsuit before the Administrative Court shall result in the suspension of the inspection measure determined by Article 152 of the CA-1, whereby enforcement may be suspended multiple times. In accordance with the statutory regulation currently in force (the first indent of the second paragraph of Article 156a of the CA-1), enforcement may namely only be suspended once and only for a period of up to five years. This entails that upon the expiry of these five years a person who is subject to an inspection does not have another possibility to request a suspension of enforcement and thus no possibility to prevent the loss of his or her home. However, in the opinion of the Constitutional Court, one cannot exclude that in exceptional instances circumstances that are important from the perspective of the right to respect for home may outweigh the requirement of a lawful situation in the field of construction also after the expiry of these five years. Such circumstances could also arise in connection with the consideration of illegal buildings of members of the Roma community as a particularly vulnerable group in instances when the state and municipalities would not effectively implement their obligations on the basis of the RCRSA-1 in the field of spatial planning or in connection with the consideration of buildings of a Roma community that has illegally resided in a specific area over a long period of time with the knowledge of state and municipal authorities.⁵³ By means of

⁵³ Cf. A. Schabas, *op. cit.*, p. 400.

such manner of implementation of this Decision, observance of the right to respect for home in connection with conducted inspection measures will be ensured in judicial proceedings.

35. As the Constitutional Court established the unconstitutionality of Articles 152 and 156a of the CA-1 already due to their inconsistency with the right to respect for home (the first paragraph of Article 36 of the Constitution), it did not review the applicant's allegations as to the inconsistency of the statutory regulation with Article 2 in conjunction with Article 65 of the Constitution.

B – IV

Review of Article 2 of the CA-1E

36. Article 2 of the CA-1E determines that Article 156a of the CA-1 does not apply to instances when construction began after the entry into force of the CA-1E. The legislature thus determined that persons who are subject to an inspection only have the right to file a motion to suspend enforcement in accordance with Article 156a of the CA-1 if they constructed the relevant building before 28 December 2013. Persons who are (or will be) subject to inspections and who have constructed (or will construct) a building following the entry into force of the CA-1E, i.e. after 28 December 2013, do not have this possibility. The legislature thus placed persons who are (or will be) subject to inspections and who have constructed (or will construct) a building after 28 December 2013 in an unequal position with regard to protection of the right to respect for home in comparison with persons who are (or will be) subject to inspections and who constructed a building before 28 December 2013. As Article 2 of the CA-1E causes an inequality in connection with the exercise of a human right, it entails an interference with the right to respect for home, which the Constitutional Court reviews under the strict test of proportionality. As the Constitutional Court established that the regulation contained in Article 156a of the CA-1 already entails a disproportionate interference with the right to respect for home, the interference with the right to respect for home resulting from a provision that denies a specific group of persons who are subject to inspection also such (and therefore any kind of) protection is even more excessive. In light of the above, Article 2 of the CA-1E was also inconsistent with the first paragraph of Article 36 of the Constitution and therefore the Constitutional Court abrogated it (Point 4 of the operative provisions).

C

37. The Constitutional Court adopted this Decision on the basis of Articles 43 and 48 and the second paragraph of Article 40 of the CCA, composed of: Vice President Dr Etelka Korpič – Horvat and Judges Dr Matej Accetto, Dr Rajko Knez, Dr Špelca



Mežnar, Dr Marijan Pavčnik, and Marko Šorli. The Decision was reached unanimously. Judges Accetto and Knez submitted concurring opinions.

Dr Etelka Korpič – Horvat
Vice President