

Number: U-I-64/14-22

Date: 6 November 2017

Concurring opinion of Judge Dr Matej Accetto to Decision No. U-I-64/14, dated 12 October 2017

1. I supported the Decision without any particular reservations and I absolutely agree with its main message: the Constitution protects the right to respect for home in the sense of undisturbed residence in a specific building and the protection of the existence of such building, and every interference with this right must pass the proportionality test. In this concurring opinion I merely wish to add some thoughts on the question of which constitutional provision protects this right. During the discussions thereon, three potential paths for substantiating this right took shape: the first would derive the right to respect for home from Article 35 of the Constitution; the second, which was finally selected and included in the Decision, would derive this right from Article 36; and the third, which I will attempt to present in this opinion, would recognise it as a right that is justified and substantively filled by both of the mentioned constitutional provisions. In addition, thanks to Judge Pavčnik, during discussions the idea arose that this right is also an expression of the principle of a social state or at least that it is tightly connected with this principle. Whereas the final Decision does not refer to the principle of a social state, below I will devote some attention to the role of this principle in the context of the present Decision, as it is nevertheless connected with its main message to a certain extent.

2. Is the right to respect for home an expression of the inviolability of individuals' privacy, which is protected by Article 35, or rather of the inviolability of dwellings, which is protected by (the first paragraph and the first part of the second paragraph of) Article 36 of the Constitution? As the conditions for a review of a potential interference with this right are the same in both instances, the choice does not seem particularly difficult if considered from a pragmatic point of view; however, from a conceptual perspective, the choice becomes more difficult if we compare the European Convention on Human Rights, which protects privacy in a single, albeit extremely open-textured, provision, to the Constitution, which contains a general definition in Article 35 as well as a number of provisions on the protection of certain aspects of privacy (the mentioned inviolability of dwellings, protected by Article 36, is thus followed, *inter alia*, by communication privacy, protected by Article 37, and information privacy, protected by Article 38). I believe that, similarly as in instances of the right to a fair trial, which is encompassed by a number of constitutional provisions,¹ we are dealing here with a right that is expressed

¹ See, e.g., Constitutional Court Decision No. U-I-92/96 ("*Contamination by Inadmissible Evidence*"), dated 21 March 2002 (Official Gazette RS, No. 32/02, and OdlUS XI, 45), Para. 28 of the reasoning (which places the right to a fair trial in Articles 22 and 23 of the Constitution); No. U-I-319/00 ("*United by the Linden Tree of Reconciliation*"), dated 11 September 2003 (Official Gazette RS, No. 92/03, and OdlUS XII, 74), Para. 21 of the reasoning (which places the fundamental right to a fair trial in Articles 22 and 23 of the Constitution, in that case also linking it to Article 29 of the Constitution, which determines defendants' minimum rights in criminal cases); and No. Up-460/14 ("*Godec*"), dated 5 March 2015 (Official Gazette RS, No. 28/15), Para. 6 of the reasoning (which recognises the right to a fair trial as a legal standard guaranteed by a number of constitutional provisions, primarily Articles 22 and 23 of the Constitution).

through a number of constitutional provisions, in the case at issue namely through Article 35 as well as Article 36 of the Constitution.

3. It is already possible to find decisions in the existing Constitutional Court case law in which the Constitutional Court recognised specific aspects of privacy in both Article 35 and Article 36 of the Constitution.² In my opinion, the same applies to the right to respect for home that protects an individual's right to reside in a specific place as well as the home as such, in the sense of both the right of an individual and the existence of a building. In the light of the circumstances of individual cases, the focus might shift more towards an individual's ties to his or her home as a part of the individual's identity or his or her physical or mental integrity and the general conception of privacy as protected by Article 35 of the Constitution, while in other cases it might shift more towards the spatial aspect of privacy and protection against inadmissible interferences with one's home, which are included in the first paragraph and the first part of the second paragraph of Article 36. If, in the circumstances of the case at issue, I were compelled to choose between these two provisions, I myself would also choose the position that the Constitutional Court adopted in its Decision, i.e. that a decision on the removal of a building concerns the mentioned right determined by Article 36 of the Constitution. In different circumstances, however, other aspects of the right to respect for home that originate from Article 35 might be in the foreground; however, both mentioned Articles substantiate the right to respect for home as a legal standard.

4. Moreover, as were a number of other Judges, I too was drawn to the idea that the right to respect for home is concurrently also an expression of the principle of a social state; however, while I have some sympathy for this conclusion, I also have some doubts about it.

5. To illustrate this, I will briefly summarise the decision of the Constitutional Court of South Africa from 2000 in the related, although not completely identical, *Grootboom* case,³ Albie Sachs, a judge of that court at the relevant time, also wrote about it in his renowned book.⁴ The applicants in that case fled from poor living conditions and the danger of flooding to land situated higher that had not been built on. On this land they constructed temporary dwellings that the authorities demolished as illegal buildings and forcefully removed more than a thousand residents, among them both adults and children. These persons, who were left with almost nothing, then requested that the city authorities at least provide them with temporary shelter in accordance with the constitutional provision regarding the right of access to adequate housing, and, following a negative reaction by the authorities, they sought justice in the courts. The regular court decided in their favour and recognised the positive duty of the authorities to

² See, e.g., Constitutional Court Decision No. Up-32/94 ("*Joint Tenancy of an Apartment*"), dated 13 April 1995 (OdUS IV, 38), Paras. 12–14 of the reasoning; and No. U-I-115/14, Up-218/14 ("*The Privacy of Attorneys*"), dated 21 January 2016 (Official Gazette RS, No. 8/16), Paras. 26–30 of the reasoning (wherein the Constitutional Court found that the privacy of attorneys comprises a number of aspects and that it is protected by Articles 35, 36, and 37 of the Constitution). Cf. also Constitutional Court Decision No. Up-1293/08 ("*Ilibašić*"), dated 6 July 2011 (Official Gazette RS, No. 60/11), Paras. 21–23 of the reasoning (wherein the Constitutional Court rooted protection from an inadmissible search of a vehicle in Article 35 of the Constitution by referring to Article 36 thereof).

³ *Government of the Republic of South Africa and Others v. Grootboom and Others*, [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

⁴ See A. Sachs, *The Strange Alchemy of Life and Law*, Oxford University Press, Oxford 2009, pp. 161–194.

provide them at least the most basic means of living (tents, portable latrines, and water supply); however, it did not ground its decision in the constitutional provision on the right of access to adequate housing, which (only) required the state to adopt reasonable measures for the progressive realisation of this right in light of the available resources, but on the constitutional provision regarding the right of children to shelter, which, although weaker as regards its content, is unconditional. The competent state authorities lodged an appeal against that judgment before the Constitutional Court, which went even further in its decision: although it granted the authorities a wide margin of appreciation in determining the “reasonable measures” for the gradual implementation of the right of access to adequate housing, it held that a regulation which – contrary to the fundamental principles or values of human dignity, equality, and freedom – disregards the position of the poorest residents who live in particularly appalling circumstances due to homelessness, natural disasters, or the threat that their dwellings will be removed, is not reasonable. The decisive highlight of that decision might be that, as (all) constitutional rights are inter-related and mutually supporting,⁵ the reasonableness of state measures must also be assessed in the light of human dignity.⁶

6. In my assessment, a comparison of both cases outlines the conceptual attraction as well as the substantive limitations of the link between the right to respect for home, as the Constitutional Court substantiated it in the case at issue, and the principle of a social state. As summarised by Slovene legal theory following the German model, the concept of a social state is closely linked with the obligation of the state to protect human dignity and ensure living conditions worthy of human dignity.⁷ Although this is (too) rarely emphasised in such manner, the case law of the Constitutional Court also recognises the principle of a social state as an important constitutional good that is, *inter alia*, connected to the issue of human dignity.⁸ Also in Slovene legal practice, it is likely that this principle will be emphasised most markedly in connection with the positive obligations of the state, *inter alia*, in connection with the provision of Article 78 of the Constitution, which is similar to that referred to in the cited South African case and according to which the state shall create opportunities for citizens to obtain proper housing.⁹

7. In such cases, the principle of a social state, as well as human dignity, can be seen as a sort of bridge between individualistic and communitarian approaches to fundamental rights or an attempt to attain the peaceful co-existence of the comprehension of the individual as an independent (and sometimes completely egoistic) holder of rights and the comprehension of the community as that which directs and limits the individual’s life. In other words, as was eloquently phrased by Sachs in connection with the *Grootboom* case, “[r]espect for human dignity united the right to be autonomous with the need to recognize that we all live in communities” and “the right to freedom with the right to bread.”¹⁰

⁵ The *Grootboom* Judgment, *op. cit.* at fn. 3, Para. 23 of the reasoning.

⁶ *Ibidem*, Para. 83 of the reasoning.

⁷ A. Bubnov Škoberne and G. Strban, *Pravo socialne varnosti* [Social Security Law], GV Založba, Ljubljana 2010, pp. 28–29.

⁸ See, e.g., Constitutional Court Decision No. U-I-339/98 (“*The Existential Minimum*”), dated 21 January 1999 (Official Gazette RS, Nos. 72/98 and 11/99, and OdlUS VIII, 13), Paras. 10–12 of the reasoning.

⁹ See Constitutional Court Decision No. U-I-109/15 (“*Subsidised Rent*”), dated 19 May 2016 (Official Gazette RS, No. 38/16), Para. 22 of the reasoning; and No. U-I-144/14 (“*Non-profit Housing*”), dated 9 March 2017 (Official Gazette RS, No. 14/17), Para. 15 of the reasoning.

¹⁰ A. Sachs, *op. cit.*, p. 173.

8. The right to respect for home, as recognised by the Constitutional Court in the Decision at issue, does not include all such state obligations.¹¹ In accordance with the case law of the European Court of Human Rights, it is particularly emphasised as the protection of the individual from inadmissible state interferences with the individual's protected living space.¹² However, such a negative conception of the right to respect for home can also be imagined within a system that otherwise does not accord particular significance to the principle of a social state (or the category of economic and social rights). Therefore, I have reservations with regard to the conclusion that this right is a direct derivation from the principle of a social state.

9. On the other hand, this right cannot escape the aspects of a communitarian approach to fundamental rights that indicate their relativity: they are limited by the rights of others and, subject to certain conditions, by the public interest. However, in the event of such balancing of conflicting rights or an assessment of the proportionality of an interference by public authorities with the right to respect for home, the assessment of a court must also take into account the principle of a social state and human dignity, including the concrete social position of the affected individuals.

10. Whereas the principle of a social state is thus, in my opinion, not inseparably linked with the existence of the right to respect for home as such, it may help in establishing or broadening the scope of this right, whereby the direct constitutional basis of this right is to be found in Article 35 as well as Article 36 of the Constitution.

Dr Matej Accetto
Judge

¹¹ There is a reference, although brief (in Para. 8 of the reasoning), to the link between the individual and the community or the position that settling in a specific place enables an individual to form a relationship with the community surrounding him or her.

¹² Para. 9 of the reasoning.