No.: U-I-64/14-23
Date: 8 November 2017

CONCURRING OPINION OF JUDGE DR RAJKO KNEZ TO DECISION NO. U-I-64/14, DATED 12 OCTOBER 2017

The common thread running through this case is the application 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) and its position within the constitutional framework. Article 8 of the ECHR regulates, *inter alia*, the *right to home* and belongs to the group of so-called *qualified rights*, meaning that it is neither an absolute nor a limited right. Therefore, (following the establishment of whether a home is in fact at issue) the right itself must be balanced against its restrictions that are necessary in a democratic society. The Decision primarily resolved a procedural issue – whether someone (a member of the Roma community) has the right to judicial protection that will ensure an independent, objective assessment of the potential existence of circumstances that justify the non-enforcement of a decision to remove a building. However, in addition to this, an issue regarding content also arises. As soon as we establish that such a right exists (as is required by the European Court of Human Rights – hereinafter referred to as the ECtHR), the question arises as to the circumstances that prevent the removal of a building and the test under which such circumstances have to be reviewed. The ECtHR also approaches Article 8 of the ECHR, particularly its second paragraph, concurrently as a matter of *procedural* and *substantive* law.[1] This premise will be relevant for understanding this opinion.

However, before turning to these questions, I also wish to clarify that in this concurring opinion I would like to illuminate certain substantive aspects of the Decision, present my understanding of them, and explain why I, consequently, voted for the Decision, even though I was aware of the consequences it will have for administrative authorities and especially for the Administrative Court and the Supreme Court (until the legislature regulates these questions and/or (probably[2]) also subsequently).

I will specifically address three points, namely:

(i) the question of the major premise of the right to home, i.e. Article 35 or Article 36 of the Constitution;
(ii) why it is feasible to treat the Roma and all other residents equally with regard to the question of access to judicial protection, despite the fact that the request for a review

[1] See *McCann v. the United Kingdom*, the Judgment in case No. 19009/04, 13 May 2008, Para. 26, and to the same effect *Yordanova and Others v. Bulgaria*, the Judgment in case No. 25446/06, 24 April 2012, Para. 118(iii).

[2] How the legislature will regulate the right to judicial protection, which is what the Constitutional Court Decision requires, is a matter of its competence.

of constitutionality before the Constitutional Court was submitted by the Administrative Court in judicial proceedings initiated by a plaintiff who was a member of the Roma community; and

(iii) what the approach of the ECtHR to the interpretation of the right to home (which the Constitutional Court followed) thus entails for the workload of the administrative authorities and courts in the Slovene context of massive illegal construction.

Ad (i): What the ECtHR wants to communicate to the contracting states is that the right to home is connected with the right to privacy – i.e. a different comprehension of an individual's home than the mere administrative law approach of permission to build on and use a piece of real property. The latter is merely formalistic and was perceived more or less as such in Slovene law in the past. The ECtHR, however, links the right to home to dignity, to an individual's being, his or her family life, and his or her privacy. Precisely due to the fact that the test and the ECtHR's perception of interferences with an individual's privacy concerning his or her home are so exactly defined and concurrently tightly connected with privacy, which serves as the framework for our understanding of the right to home, the question arises of where within the constitutional framework, which does not specifically regulate the right to home, this right should be positioned. In my opinion, placement under Article 35 of the Constitution would be more closely connected with Article 8 of the ECHR. It would share the same premises with Article 8 that I have mentioned above. These premises are the foundation of the essence of the matter, i.e. privacy (and thus also the aspect of human dignity) in connection with the right to home. Such entails that individuals have, in principle, a right to a shelter that is more than merely a roof above their heads, as it also encompasses their privacy[3] and physical and moral integrity.[4] The spirit of such is reflected more clearly in Article 35 than in Article 36 of the Constitution, which includes elements of penal policy, when repressive authorities are authorised to enter a dwelling or home in specific instances.[5] While it is true that also the content of Article 36 of the Constitution is in fact the content of Article 8 of the ECHR, the framers of the Slovene Constitution divided these two contents and adopted a special regulation of the right to privacy as regards interferences by repressive authorities. As they did not also adopt a special regulation of the right to home, the case raised the question of whither this right gravitates more strongly. While the majority chose Article 36 of the Constitution, I was of the opinion that it should have been Article 35. An additional argument (in addition to gravitating towards the premises of Article 8 of the ECHR) lies in the fact that it would be easier to apply Article 35 of the Constitution in instances when the right to home would also encompass buildings that are not homes in the strict meaning of the word (i.e. business premises, as I will explain hereinafter).

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[3] As the Council of Europe clarifies in the *Guide on Article 8 of the European Convention on Human Rights*: "Given the very wide range of issues which private life encompasses, cases falling under this notion have been grouped into three broad categories (sometimes overlapping) to provide some means of categorisation, namely: (i) a person's physical, psychological or moral integrity, (ii) his privacy and (iii) his identity. Sub-groups and examples of cases are given in each category.", p. 16 (Council of Europe/European Court of Human Rights, 2017, 1st edition).

[4] See *Ivanova and Cherkezov v. Bulgaria*, the Judgment in case No. 46577/15, 21 April 2016, Para. 54.

[5] See also V Jakulin, Commentary on Article 36 of the Constitution, in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [A Commentary on the Constitution of the Republic of Slovenia], Fakulteta za državne in evropske študije, pp. 514–519.

Article 36 of the Constitution does not link the right to home to privacy or personal life and therefore also not to dignity. When (or if) questions regarding the further interpretation of the right to home arise in the future, and are more tightly linked to privacy than the case we decided on, further difficulties regarding an evolutive interpretation of Article 36 of the Constitution might arise. The issue of illegal buildings (and judicial protection in such instances) could have consequences not only for individuals' homes, but also for buildings that are closely connected with someone's ability to exercise his or her right to home (e.g. a workshop for a craftsman, business premises, stables or a barn for a farmer, etc.). The ECtHR has stretched Article 8 of the ECHR to also include business premises,[6] and it would be easier to evolutively interpret Article 35 of the Constitution in this direction than Article 36 thereof. This was one of the reasons why I advocated for a more originalist interpretation of Article 36 of the Constitution (i.e. that we would not have extended this provision to areas outside the framework of criminal law) and the inclusion of the right to home in Article 35 of the Constitution. I did, however, support the inclination of the Constitutional Court to not substantiate the right to home only on the basis of Article 8 of the ECHR, as this right can be substantiated and interpreted in the light of the ECHR on the basis of the major premise from the Constitution.

Ad (ii): The second idea I would like to discuss in this opinion is the issue of the individual position of members of the Roma community and ensuring equal legal protection in instances of interferences with the right to home also when other individuals are concerned. The request for the review of constitutionality submitted by the Administrative Court proceeds from the circumstances of the plaintiff, who is a member of the Roma community, and concentrates on the position of the Roma.[7] The Constitutional Court broadened the review and did not concentrate only on the approach of positive discrimination.[8] I agree with this even though it *prima facie* entails that courts will be burdened by lawsuits challenging measures such as demolition (in instances when inspectors will not grant motions to suspend enforcement). Given the high number of illegal buildings in Slovenia (further regarding such, see ad (iii) hereinafter), this fear is justified. The Decision conveys the message that, in a procedure preceding a demolition, such an interference (provided there is an interference in the sense of

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[6] Similarly also in *Société Colas Est and Others v. France*, the Judgment in case No. 37971/97, 16 April 2002, *Buck v. Germany*, the Judgment in case No. 41604/98, 28 April 2005, *Niemietz v. Germany*, the Judgment in case No. 13710/88, 16 December 1999, etc.

[7] In particular, Para. VII of the request for a review of constitutionality in this case, No. I-U-82/2014-8, dated 6 March 2014.

[8] Such does not entail that the Constitutional Court would deny the possibility of positive discrimination, which has been demonstrating positive results with regard to the integration of different minorities into the environment from a comparative perspective. The more intense the globalisation process becomes, the more importance it gains; whereas some decades ago positive discrimination was merely an exception, instances of good practices regarding such have since become widespread. The fact that the Constitutional Court extended the issue of illegal buildings to everyone does not entail a denial of the significance of positive discrimination. The discussions at the plenary session did not go in such a direction, quite the opposite.

the demolition of a home[9]) with an individual's private sphere must be decided on by an independent and impartial third party – as a general rule, this is a court, not an administrative authority or other representative of the executive branch of power. This, in turn, entails that, in the event of mass lawsuits, the courts will experience an additional factor that might paralyse them in efforts towards attaining the standard of effective adjudication. We are forced towards this decision by the ECtHR's clear position that in such instances the right to judicial protection must be enjoyed by everyone;[10] not only the Roma. However, this is a procedural and not concurrently a substantive aspect. It is important that these two aspects be distinguished. As I wrote at the very beginning of my opinion, the second paragraph of Article 8 of the ECHR has two elements: a *procedural* one and a *substantive* one. The Decision of the Constitutional Court only refers to the procedural aspect, not to the substantive aspect. Whereas I can advocate for the position that the procedural aspect applies to everyone (i.e. that every individual enjoys the right to judicial protection in the framework of which it will be decided whether there exist reasons due to which a demolition should not be enforced), this is not true with regard to the substantive aspect. Let me explain why (I will only provide a phrase or two on such at this point and analyse it more thoroughly below, as I would first like to highlight a consequence that should, at least in my opinion, reduce the pressure on the courts): if the substantive conditions as formulated by the ECtHR with regard to instances of Roma settlements are a reflection of positive discrimination, they cannot be applied in all cases. As I will analyse below, important differences exist between cases concerning members of the Roma community and other types of cases. This entails that although judicial protection is ensured to all, the conditions for such are not the same for all. Cases that do not concern members of the Roma community simply will not be reviewed in accordance with the criteria (i.e. the test) that is applied to members of the Roma community and which is more favourable for them. It further follows from such that judicial protection in the so-called other cases (I have no intention of insulting anyone who is not a member of the Roma community; this designation simplifies the clarification process) will not (should not) be adapted to the more favourable test. In other words, before seeking judicial protection, one should be aware that such protection will not be successful under the criteria developed for cases concerning members of the Roma community in cases that do not concern members of the Roma community. In the latter cases,

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[9] Thus, this does not apply to every piece of real property, such as holiday homes. Some of the buildings I mentioned above as being included in the framework of Article 8 (business premises) do not constitute homes. As the term home is defined by the Decision (in accordance with the jurisprudence regarding Article 8 of the ECHR), no discourse regarding such is necessary. The question of when a home is at issue is also a question of the concrete circumstances.

[10] "Since the loss of one's home is a most extreme form of interference with the right under Article 8 to respect for one's home, any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation." *See Yordanova and Others v. Bulgaria*, the Judgment in case No. 25446/06, 24 April 2012, Para. 118(iv), *Kay and Others v. the United Kingdom*, the Judgment in case No. 37341/06, 21 September 2010, Paras. 67–68, and 74, *Orlić v. Croatia*, the Judgment in case No. 48833/07, 21 June 2011, Para. 65.

This is also consistent with the saying *ustitia nemini neganda*, namely that no one may be denied legal protection (literally: justice).

the state retains a wide margin of appreciation with regard to spatial planning[11] and exceptions that can narrow this margin are not construed as broadly as in connection with Roma communities. In order to facilitate an understanding of the above, the test and the criteria that the ECtHR applies in cases concerning members of the Roma community have to be clarified; concurrently, the difference between these cases and other types of cases will also be clarified.

Article 8 of the ECHR is thus grounded in the right to home, which may be limited or interfered with under the conditions determined by the second paragraph. An interference first requires *(i)* a legitimate aim (such as the urbanisation of a specific area, the preservation of the natural environment or farm land, etc.). Usually this point is not problematic.

Problems generally appear in connection with the second condition *(ii)*, i.e. the issue of a review of whether the interference with the home in question is necessary in a democratic society. This condition is only fulfilled if a societal need for the interference with the home is demonstrated and the interference is not disproportionate. Although the state enjoys a wide margin of appreciation with regard to planning spatial interventions, this margin is narrowed when it collides with the fundamental rights enshrined in the ECHR.[12] In such instances, the relevant state authority (as well as an independent and impartial third party – a court) has to assess whether such an interference is also consistent with the principle of proportionality and whether the right to home must be given precedence over other (legitimate) aims of the state.

What does the above entail for cases concerning members of the Roma community? This was most precisely clarified by the ECtHR in its Judgment in *Yordanova* (wherein it did not stop at only a principled condition of proportionality).[13] Cases concerning members of the Roma community differ from other cases due to the following:

- they are closed communities, frequently not integrated into the broader society, with specific characteristics that distinguish them from the rest of society (e.g. life in a community and strong ties with such; reservations regarding displacement and splitting up the community; due to the closed nature of their community, their integration in cities is more difficult);
- settlements are often built on land that does not belong to the Roma;

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[11] The ECtHR opined that "[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation" (see, e.g., *Buckley v. the United Kingdom*, 25 September 1996, Para. 75 *in fine*, and Ćosić, *op. cit.*, Para. 20); see also *Yordanova*, *op. cit.*, Para. 118(i).

[12] In Paragraph 118(ii) of the Judgment in *Yordanova* (*op. cit.*) the ECtHR expressed this with the following words: "On the other hand, the margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Since Article 8 concerns rights that are of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (see, among many others, *Connors*, cited above, § 82)."

[13] See also 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, 12:4 (2012), p. 791.

- attempts at urbanisation frequently require that a number of homes that are illegal buildings be vacated and demolished – thus mass evictions from a specific area are at issue, which can result in serious consequences due to the loss of homes and, due to the large number of persons affected, significantly interfere with the social character of the community;
- states are specifically bound to resolve the issue of Roma integration also on the basis of international instruments;[14]
- therefore, in contrast to other cases that do not concern members of the Roma community, states are under a positive obligation[15] to resolve their housing difficulties, taking into account their socio-cultural background;[16]
- as an underprivileged group, they may expect, also in light of the international context, that states will help them.

Due to such different circumstances, the Roma have to be treated differently in order to ensure compliance with the principle of equal treatment. This different treatment becomes evident precisely through the principle of proportionality. If applied to cases concerning members of the Roma community, this entails that the positive obligation of the state to examine alternative housing or spatial plans that would enable, if possible, legalisation, to prepare plans that will treat the Roma community as a particularly vulnerable group and to take into account their specificities, also as regards their homes or their right to home, which differs from the right to home in other cases,[17] to determine measures for preventing homelessness,[18,19] and to provide

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[14] As the United Nations Committee on Economic, Social and Cultural Rights determined in its General Comment No. 7 concerning forced evictions and the right to adequate housing under the International Covenant on Economic, Social and Cultural Rights: "[…] *evictions should not render persons homeless or more vulnerable to human rights violations*." See also Paras. 73–82 of the Judgment in *Yordanova*, *op. cit.*, where instruments of the UN, the Council of Europe, and the EU are cited that refer to the position of the Roma as a community that is more vulnerable with regard to human rights violations.

[15] See also D. Gomien, *Kratek vodič po EKČP* [A Brief Guide to the ECHR], Ministrstvo za pravosodje RS, Ljubljana, 2009, p. 79, and the case law cited in connection with the positive obligation of the state.

[16] That an "entirely different obligation" is at issue was also noted by the ECtHR in *Yordanova*, *op. cit.*, at Para. 121: "[…] The principle of proportionality requires that such situations, where a whole community and a long period are concerned, be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property."

[17] Particularly vulnerable groups require assistance and different treatment than other residents with regard to the issue of illegal occupancy. Such is in accordance with the saying *ubi aequitas evidens poscit, subveniendum est*, namely that help should be given where such is clearly dictated by justice.

However, this does not entail that everyone automatically has a right to home – in the sense that he or she must simply be provided the possibility of a home or a home must be procured for him or her. This must be distinguished. Also held by the ECtHR in *Yordanova*, *op. cit.*, Para. 130.

In Roma settlements, the right to property is an inferior right, but such must not be applied to cases that do not refer to members of the Roma community. Similarly, see also A. Remiche, *op. cit.*, p. 796.

[18] This is particularly important in contexts where a state has tolerated, for a long period of time, the occupancy of land owned by others and illegal buildings, and perhaps even provided public services and thereby created the impression that the residents do not have to find legal solutions or that they are safe from eviction.

[19] This condition has been particularly highlighted by the ECtHR; see also A. Remiche, *op. cit*., p. 797.

them with access to social housing and integration programmes, especially in instances when members of a Roma community are being separated,[20] whereby, in instances of (serious) violations of regulations by members of the Roma community, integration programmes must also include repressive measures, as the absence of such must not be compensated for by evictions, demolitions, etc.

To sum up, what the ECtHR requires with regard to the assessment of cases concerning members of the Roma community is that their underprivileged position is taken into consideration and that they are differentiated from other cases on this basis. Due to their underprivileged position, they first require assistance, alternative measures, etc., and only subsequently – and of course potentially, as they might reject such alternative measures, etc. – the process of demolition, eviction, etc., may continue.[21] This in turn entails that the substantive aspect of the second paragraph of Article 8 of the ECHR is not entirely universally applicable to all individuals equally. I will explain below to what extent the cases that do not concern members of the Roma community[22] differ.

In contrast, the procedural aspect (access to court before a demolition in accordance with the principle *ubi ius, ibi remedium*) has to be ensured to everyone universally. This is the reason why I voted for the Decision, even though I fear it might create pressure on the courts. However, there is in fact no other way – access to court before a demolition, eviction, etc., is also a clear requirement according to the ECtHR.[23] It also appears to be important that attention be drawn to the fact that other cases that do not concern members of the Roma community cannot be built on exactly the same objections under substantive law (within the review of an interference with the right to home from the perspective of whether it is necessary in a democratic society and proportionate. In *Ivanova and Cherkezov v. Bulgaria*,[24] which did not concern members of the Roma community and wherein the state required the demolition

[20] The ECtHR also does not expressly problematise the fact that members of the Roma community did not initiate legalisation proceedings (although they could have done so). This follows from Paragraph 131 of the Judgment in *Yordanova*, *op. cit*.: "It is also true that the applicants themselves have not been active in seeking a solution (see paragraphs 13, 43 and 51 above). It appears that they are reluctant to seek social housing at least partly because they do not want to be dispersed, find it difficult to cover the related expenses and, in general, resent the radical change of their living environment that moving into blocks of flats would entail. However, Article 8 does not impose on Contracting States an obligation to tolerate unlawful land occupation indefinitely (see *Chapman*, cited above, § 96, which concerns a very specific and relatively narrow positive obligation to facilitate itinerant way of life which is determinative of an identity)."

[21] See Para. 133 of the *Yordanova* Judgment, *op. cit*.: "In general, the underprivileged status of the applicants' group must be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This has not been done in the present case."

With regard to the possible selection of measures that would conform to the principle of proportionality, see Paras. 120–134 of the same Judgment.

[22] Or instances of other vulnerable groups, e.g. refugees.

[23] See footnote 10 *supra*.

[24] See footnote 4 *supra*.

of an illegal building, the ECtHR adopted the following positions, which are also important for this discourse:

(i) the ECtHR did not agree with the national courts that an illegal building is in itself sufficient to allow the severe sanction of demolition without the need to carry out a proportionality test;[25]

(ii) whereas Article 1 of the First Protocol to the ECHR (protection of property) can allow for severe state measures, such as demolition, this does not apply with regard to Article 8 of the ECHR, which specifically protects the right to home;[26]

(iii) the court must consider less severe (invasive) measures (the principle of proportionality);

(iv) although, on the one hand, the ECtHR deems that the interest of the state that the system of building permits (and thereby the regulations governing spatial interventions) be observed has to be taken into account, it only recognised a serious threat to such a system as a criterion for a potentially justified interference, and in the case at hand it added (in passing) that it trusts that the competent authorities will be able to overcome the threats to this system.[27] It also added that the state could only succeed with such arguments in exceptional cases.[28]

The message of this ECtHR Judgment is surely also that while differences between cases concerning members of the Roma community and other cases continue to exist, they are not such as to render them completely different; both types of cases are subject to a test to establish which interferences with the right to home are still consistent with the principle of proportionality in a democratic society.

However, the ECtHR is also not consistent in this regard. This is confirmed by a partly dissenting opinion in that case.[29] Judge Vehabović could not agree that the test of proportionality would have to be applied in each and every case of a demolition order. He referred to the Grand Chamber Judgment in *Depalle v. France*,[30] and *Hamer v. Belgium*,[31] wherein the ECtHR did not require an immediate assessment.

The latter is significant and I find it difficult to accept this elimination of the borders between cases concerning members of the Roma community as a vulnerable group and other cases. With regard to a home built in bad faith on farmland,[32] in a protected area, or on someone

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[25] *Ibidem*, Para. 53.

[26] *Ibidem*, Para. 54.

[27] I refer to the “give and take away” approach.

[28] See the Judgment in *Cherkezov*, *op. cit.*, Para. 55.

[29] Written by Judge Vehabović.

[30] No. 34044/02 of 29 March 2010.

[31] No. 21861/03, ECHR 2007-V.

[32] I have particularly highlighted farmland because it constitutes the essence of food independence, and, since its establishment as an independent state, Slovenia has lost 100,000 hectares of fertile soil – i.e. one fourth of its farmland – due to unsound planning and illegal construction. As a consequence, over

else's land, the question arises, for example, whether the proportionality test cannot "stop" at a demolition. I will address such in point *ad (iii)* and draw connections with the situation in Slovenia. I will attempt to anticipate the consequences for administrative authorities and especially for the courts in instances of judicial protection against a decision to demolish a home.

Ad (iii): The trend and the messages of the ECtHR in cases regarding the right to home, as well as in cases regarding interferences with the right to property, are frequently that the state is the one who calls all the shots and therefore it bears a greater (positive) responsibility. When a state measure and the right of an individual collide, the effect of the individual acting in bad faith on this right frequently remains unexplained. The individual, e.g., ignores spatial regulations, does not pay for public services, or instances of other violations of laws, etc.[33] As I understand it, the case law of the ECtHR assigns the state the role of the one who calls all the shots, who thus has all the power, and this is in itself sufficient reason that the state may interfere with actions taken in bad faith, without violating any Convention rights (in particular also during assessment from the perspective of the principle of proportionality). In other words, despite the fact that someone acted in a (manifestly) illegal manner with the intention of abusing or circumventing a law (*in fraudem legis agere*) before or during different stages of an administrative procedure or judicial proceedings (e.g. also judicial enforcement proceedings), does not entail that a severe sanction (e.g. the demolition of a house) is allowed. The state will have to find a proportionate sanction – i.e. one that will attain its aim and that in doing so will affect the individual to the least extent possible, and within this framework it will have to decide whether the dwelling at issue may be sold at public auction or when an illegal building may be demolished. This perception is completely different from its traditional comprehension in the legal order – *the severity of the violation is reflected in the severity of the sanction.* I believe that the ECtHR signals that this is not the case when Convention rights are at issue. This also follows from the *Vaskrsić* case, which did not refer to an illegal building but to an interference with property, with regard to which the margin of appreciation regarding authoritative measures

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the last ten years, 16,000 small farms have perished – i.e. four farms per day. For more on this, see A. Komat, *Zemlja, voda, seme* [Soil, Water, Seed], Samozaložba, Buča, d. o. o. The loss of farmland has resulted in Slovenia having the lowest amount of farmland per capita (surpassed only by Finland; interestingly, we have the highest number of m^2 of shops per capita). See also R. Knez, World Soil Day, accessible at: http://www.jm-excellence.si/world-soil-day-4-of-december/ (7 November 2017), and the sources cited therein.

I only wish to add some thoughts in connection with interferences with nature and the environment, although I will not thoroughly discuss them as this would require straying too far from the essence of this opinion; dispersed illegal buildings touch upon systemic questions, such as the socialisation of the costs that arise if illegal buildings in flood areas are flooded, and, *mutatis mutandis*, in landslide areas, if the living space of wildlife is reduced, etc.

[33] I believe that the application of rules, such as *volenti non fit iniuria* – i.e. to the willing comes no injury – and that the *duty to mitigate damage* that has occurred or threatens to occur also applies to the damaged party, has unjustly been omitted in the process of the interpretation of Article 8. For more on this, see R. Knez, Skrb oškodovanca, da se škoda ne poveča *(duty to mitigate)* [The responsibility of the damaged party to prevent an increase in the damage (the duty to mitigate)], *Revizor: revija o reviziji*, 2007, Vol. 18, No. 9, pp. 70–79. I believe that the same applies with regard to the rules *venire contra factum proprium* – i.e. no one may set himself in contradiction to his or her own previous conduct – and *estoppel* – no one may invoke a right on the basis of his or her own mistake.

is even broader than with regard to Article 8 of the ECHR.[34] Whereas in that case the ECtHR established that the individual acted in bad faith, it did not continue to pursue or address such in detail.[35] However, such a discussion regarding *Vaskrsić* is necessary in order to facilitate an understanding of the approach of the ECtHR. The perception of the right to home and of everything an individual needs in his or her private sphere to be able to lead a decent life has a special place in the jurisprudence of the ECtHR.

We thus arrive at a paradox that is accentuated when there is a great number of illegal buildings in a state: on the one hand, the authorities face restrictions on interferences with the right to home and the fraudulent nature of an individual's actions must not be reflected in the sanction, which would manifest itself exactly as an interference with the building that caused the fraudulent state of affairs (the illegal building), and, on the other hand, the number of such buildings, which should not exist at all, is very high. In other words, in order to maintain consistency with the principle of proportionality, the sanctions will not always be allowed to affect the building as such. A case such as *Vaskrsić* could result in a different sanction that would not affect the building and would not be connected to the fraudulent acts. However, with regard to illegal buildings, where the essence is in the construction itself, e.g. on farmland, the restitution of the previous state of affairs should remain a proportionate sanction. In cases that do not concern vulnerable groups, the right to home should not prevail over an illegally acquired home in the sense of the relationship with another individual (e.g. the illegal or even forceful occupation of someone else's apartment or home). However, as I wrote in point *ad (ii)*, the ECtHR is not completely consistent in this regard.[36]

What can be concluded on the basis of the above is that decisions to demolish will be the subject of review, in which the courts will also have to review the proportionality of the measure at issue. I believe that the application of this to Slovene cases will not be easy (for neither the

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[34] See *Vaskrsić v. Slovenia*, the Judgment in case No. 31371/12, 25 April 2017.

[35] This is reflected in two Paragraphs of the Judgment, namely Paragraphs 80 and 81. In the first, the ECtHR established a number of acts performed in bad faith and added that the national court failed to investigate his statements regarding financial difficulties and then continued, in Paragraph 81, as follows: "81. On the other hand, the Court notes that the debt […] was EUR 124 and that, together with the interest and enforcement expenses, it amounted to around EUR 500 […]. During that time the enforcement court did not consider any alternative measures […]."

It thus appears that what was important is what the ECtHR did not say. It did not assess what significance should be assigned to the omission of the payment of a debt and to other fraudulent acts. It was thus also not interested in the fact that the avoidance of payment occurred in the field of the supply of water and sewage treatment. An individual may not be deprived of water, and, with regard to sewage treatment, there is in fact no valve that the supplier of the public service could turn off to coerce the user of the public service who has been avoiding payment to pay his or her debt. The ECtHR simply directly proceeded with a clarification of the disproportionality of the measure.

[36] In addition to *Ivanova and Cherkezov v. Bulgaria, Depalle v. France*, and *Hamer v. Belgium* (all *op. cit*.), where the Court was not consistent in requiring (or not) the application of Article 8 of the ECHR and the proportionality test, which I have addressed above in point (ii). *Cf.* also *Buckley v. the United Kingdom*, the Judgment in case No. 20348/92, 25 September 1996, where the ECtHR was primarily interested in the procedural aspect of a case where an individual possessed no right of residence from the outset (although this case also concerned the Roma, this applies even more to cases that do not concern members of the Roma community). Similarly, see *Lee v. the United Kingdom*, the Judgment in case No. 25289/94, 18 January 2001.

administrative authorities nor for the courts), as the number of illegal buildings is extremely high (I am afraid it might be so high that the official figures are not even an approximation of the actual situation, while the number of pending inspection procedures goes well into the thousands). For years, landscape architects have been drawing attention to the fact that we have had decades of improper spatial interferences,[37] and I would like to add that we have never developed a culture of spatial interventions in the sense of a system in which permits are consistently sought, dispersed construction is limited, and extensive areas of the natural environment (and space for wildlife) are preserved, where no construction would take place or where construction was concentrated, while the remaining space would be preserved as untouched natural space. Moreover, as a consequence we also significantly burden the environment through public infrastructure, which every building requires, whereby the fact that a building is illegal does not prevent such. It is thus not surprising that Slovenia is in the leading position as regards the number of kilometres of motorways per capita in Europe.[38] It is further not surprising that highly dispersed construction patterns prevent the completion of the sewage treatment network and the European Commission initiated an official procedure due to Slovenia's failure to fulfil its obligations as regards waste water treatment (as we were not able to complete the construction of the sewage treatment network, in spite of an extension of the deadline).[39] I could provide numerous further examples and arguments as to why Slovenia has not developed a high culture of interventions with space, which is a finite good, and what consequences this entails, but such is not the primary purpose of this opinion.

I only wish to connect this position to the fact that we are caught in a particular paradox, which I described above, and the perception of the ECtHR, regarding which I wrote above, renders its resolution more difficult: on the one hand, we have a high number of illegal buildings that are concurrently also homes to which public service providers have been supplying services, issuing receipts for such, and creating in their owners the impression that the state accepted their illegal buildings and allowed them the right to home. I do not generalise this statement so as to include everyone, but where it can be applied to an individual case it must be deemed that an individual, by the authorities' tacit consent, established his or her privacy that falls within the ambit of the definition of a home. On the other hand, the interferences of the authorities with such are always limited. We are no longer concerned with the mere formal conduct of an inspection procedure that does not consider the proportionality of the interference and whether it is necessary in a democratic society, and judicial protection does not prevent its enforcement (which is at the core of this case). How the legislature will regulate this review from a procedural aspect, and who is to be competent regarding such, is, of course, a matter of its competence and assessment. In any event, the review of the circumstances of a potentially unjustified state

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[37] It thus does not concern only illegal buildings. However, the sum of the effects of illegal buildings and poor decisions regarding spatial interventions (e.g. too dispersed construction) leads to even worse results.

[38] Slovenia has 4 kilometres of motorway per 10,000 inhabitants, Germany is second with only 1.6 kilometres; we further have 198 kilometres of other roads per 10,000 inhabitants, Germany is second with 150 kilometres; Source: These data were calculated from Eurostat by *Zavod RS za varstvo narave* [Institute for the Protection of Nature].

[39] Procedure No. 20160683 of 15 February 2017, see http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/.

measure will be conducted, already prior to enforcement, before the courts, which will thus be heavily burdened. I believe that to follow the case law of the ECtHR, which, as follows from my above discourse, sets the bar for state interferences very high (i.e. it is strict from the state's point of view), and to follow it also in instances of fraudulent conduct, without a critical consideration of the Slovene particularities, will not always be the best solution; put differently, I believe that the systemic consequences should also be taken into account.[40] This entails that a "dialogue" with the ECtHR would have to be established.

The specific Constitutional Court Decision at issue concerns a vulnerable group and therefore the mentioned "dialogue"[41] with the ECtHR is not necessary; I agree with the latter position of the ECtHR in this case, but I am not sure that I personally would apply the same substantive assessment to every case concerning a decision to demolish that does not refer to vulnerable groups and the illegal buildings at issue interfere with the general interests of the state, the environment, or nature. I find the positions expressed in the partly dissenting opinion in *Ivanova and Cherkezov v. Bulgaria* more convincing.[42]

In order to reduce the problem of numerous proceedings before the courts that will have to assess decisions to demolish, the executive branch of power would have to react quickly – it would of course be best if it ensured that illegal buildings would never be completed, as they would have to be stopped in time, and thus inappropriate spatial interferences (e.g. too much dispersion, interferences with nature and its biotic world, construction in landslide areas or flood areas, etc.) would be prevented, while, once an illegal building is constructed, the situation of the specific individual will have to be considered in the ensuing administrative procedure and judicial proceedings. The formulation of clear positions, such as that the removal of an illegal building from farmland[43] or protected areas does not constitute a disproportionate measure, would also reduce the number of disputes in courts.[44] The "processing" of these cases will namely be a great difficulty, even if the cases are unfounded. And as in such cases protection before the ECtHR will undoubtedly be sought, a "dialogue" with the ECtHR will have to be established, beginning with convincing reasoning as to the greater systemic problems[45] caused by illegal buildings in Slovenia, which I have highlighted in this opinion.

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[40] See footnote 45 *infra.*

[41] A dialog with the ECtHR can take place through judgments of courts and Constitutional Court decisions.

[42] See footnote 4 *supra.*

[43] It is my personal belief that it would be the same if we justified theft through someone's social and economic position.

[44] As the ECtHR argued quite clearly in *Jane Smith v. the United Kingdom*, the Judgment in case No. 25154/94 (Para. 118): "The Court is therefore not persuaded that there were no alternatives available to the applicant besides remaining in occupation on land *without planning permission* in a Green Belt area. As stated in the *Buckley* case, *Article 8 does not necessarily go so far as to allow individuals' preferences as to their place of residence to override the general interest (p. 1294, § 81) […]."*

[45] While this opinion does not raise all of the systemic questions (the available time and space do not allow me to do so), I wish to emphasise that they exist and that they will have to be presented to the ECtHR in a convincing manner. This has to be taken into account in the reasoning of decisions and judgments throughout the entire procedure. The Contracting States do not share identical factual

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Judge

contexts and factual situations that have to be considered when assessing the necessity of measures in a democratic society.