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ANALYSIS

ANALYSIS OF THE RIGHT TO HOUSING SITUATION IN EUROPE

A year marked by the pandemic

Housing Rights Watch



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AUTHOR
Maria J. Aldanas

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1

Introduction

Housing is a fundamental right, on which several other rights rest, such as the rights to health, safety, private life and family life, as the Covid-19 pandemic has clearly shown. Access to adequate and affordable housing for all has become a real test of the economic, social and environmental sustainability of the Union. It is an important political issue in Europe. In fact, even before the pandemic, the housing crisis was endemic throughout Europe and more than 700,000 people are now on the streets or in emergency shelters.¹ The pandemic has merely served to pull back the curtain on the pre-existing housing crisis.

The Pandemic: the Right to Life and the Right to Housing

As staying at home and social distancing have become the first defence against the virus, we quickly realised the importance of having “a place of one’s own”. In dealing with the pandemic, the lack of access to housing was not only a risk to the lives of homeless people, but also a risk to the population in general.

As a result of this realisation, governments and associations worked together to protect homeless people and ensure that nobody was left to sleep on the streets. Thanks to this rapid response, the majority of people were accommodated within a very short time period. The measures taken to achieve this were varied and very creative: hotels, student halls, empty buildings, Airbnb apartments.

Homeless people are a particularly vulnerable

population with regard to the pandemic. The conditions in which homeless people live do not enable them to adhere to the recommended protective measures. Furthermore, homeless people face many obstacles regarding access to healthcare, hygiene measures, and public health information.

Housing is a platform through which fundamental rights such as the right to life and the right to health protection can be respected. We now have a unique opportunity to develop a policy based on the right to housing. The political will exists and the EU authorities have the resources to change how we address the needs of homeless people and those experiencing housing exclusion.

From the Covid-19 Crisis to the Social Crisis: the Growing Risk of Evictions

This pandemic has aggravated an already fragile housing situation and has brought about a real social emergency, with thousands of people finding themselves without adequate income to pay for their housing or basic supplies. Currently, the most pressing issues include preventing people returning to the streets, preventing rental evictions and preventing evictions from shanty towns. These must remain our primary focus in the months to come.

Governments have taken measures to prevent evictions, guarantee incomes and support people who are struggling to pay their rent or mortgage. These measures have indeed offered some respite,

but the problems could become even more acute as long as the most vulnerable households continue to face job insecurity, increased indebtedness, and potential evictions or repossessions. All the temporary measures will gradually stop in Europe and we are concerned that an abrupt end to these could put thousands of people on the streets.

We are pleased to see the recent measures to continue protecting renters beyond the deadline that had been set. For example, the legislation announced in France in July by the Minister for Housing, Julien de Normandie, aiming to prevent rental evictions without alternative housing being in place and to avoid returning homeless people to the street from emergency and temporary accommodation.²

In the United Kingdom, Scottish reforms extended – by a further six months – the protection for renters which had been due to expire on 30 September 2020. The government just announced that they are extending the measures to protect renters against eviction during the Covid-19 pandemic until March 2021. England granted a last-minute extension to the suspension of evictions until 20 September as a result of lobbying by stakeholders, who were predicting thousands of rental evictions³.

European governments absolutely must learn the lessons from how the last economic crisis was managed. The EU's public authorities must continue to protect people against evictions for an extended period while providing legal and financial support to renters. Extending the ban on evictions is not enough; the measures must include other protections, particularly for the many people who have accumulated rent arrears and who need debt relief in order to keep their homes.

We had expected that this renewed sense of urgency would lead to a new determination to end homelessness and evictions, to improve shanty towns, to increase protection of renters from unaffordable rents, and to regulate the global financial institutions that have ravaged the housing sector since the global financial crisis. Several months on from the beginning of the pandemic, not only have the effects of the housing crisis been inadequately addressed, they risk becoming even worse.

This year, we have seen some progress in

advancing the right to housing, particularly within the systems of the UN and the Council of Europe.

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The UN System

End of Leilani Farha's mandate as Special Rapporteur on the Right to Housing

Leilani Farha presented the last reports of her mandate in March, notably her guidelines for bringing about the right to adequate housing and the report on her official visit to France.⁴ When the pandemic began, her message included several guidance notes on Covid-19 regarding banning evictions, protecting residents of informal settlements (shanty towns and camps), and protecting homeless people.⁵ Organisations continue to use these documents to bolster their advocacy. Her successor – Mr Balakrishnan Rajagopal – is building on the previous work done, and in June called for cities, governments and civil society to collaborate with him to create a better understanding of the impact of the Covid-19 crisis on the right to housing for his report to the General Assembly. The responses to the questionnaire (including our own) are available here.

New decision from the UN's ESCR committee: López Albán v. Spain

In October 2019, a new judgement by the UN's Economic, Social and Cultural Rights Committee (Co-ESCR) decided that Spain had violated article 11.1 of the OP-ICESCR. The legal decision states: "The authority's eviction of the family without assessing proportionality constitutes a violation of the right to housing. Furthermore, the Committee considers that the state party's refusal

of the request for social housing without taking their precarious situation into account and solely because Ms López Albán occupied the home without title constitutes in itself a violation of the right to adequate housing. More than a hundred communications from people/families who consider that their right was disregarded by the State are still being examined by the Committee, which is a vital body for enforcing international law at domestic level.

The ESCR Committee reacted to the pandemic with a "Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights" in which it stated: "In this difficult context, access to justice and to effective legal remedies is not a luxury, but an essential element to protect economic, social and cultural rights, especially those of the most vulnerable and marginalized groups."⁶

3

Case Law of the European Court of Human Rights

Analysis of proportionality in private rental accommodation: F.J.M. v. United Kingdom

Case law of the European Court of Human Rights (ECHR) establishes a distinction between private and public landlords regarding application of the proportionality test in article 8 (right to respect of private and family life). This test only applies in cases where the applicant lives in social housing where there is no other private interest at play. In the private rental sector, a balance between the rights of tenants and private landlords must be ensured by the legislation. The case of F.J.M. v. United Kingdom⁷ is in accordance with this case law. The case concerns a possession order against a tenant after the landlords had stopped repaying their mortgage. The Court states that the domestic legislation had already taken the current interests into play and that the applicants in question had consented to a contractual relationship in respect of which the legislature has set down a prescribed fashion in which their Convention rights are to be respected.

Tension between the right to property and the right to housing

The Case of Casa di Cura Valle Fiorita v. Italy concerns a company's inability to recover possession of a building that has been occupied

without legal title since 2012 by housing activists. A legal decision was made ordering the eviction of the occupants but it remains unenforced to this day due to social reasons (absence of rehousing solutions for the occupants, lack of adequate resources) and fears around public order. The Court recognised that the social reasons and the fears for public order could justify difficulties in enforcing the order and a delay in evacuating the premises. Nevertheless, it believes that the total and extended inaction by the Italian authorities was unjustified, noting that a lack of resources does not in itself constitute acceptable justification for failing to enforce a legal decision.

In several countries, occupying property without legal title is used by housing activists as a means of demanding affordable and social housing, in order to be able to guarantee, for instance, the rehousing of vulnerable people. They call on public authorities to take greater action to increase the social housing stock. Behind this case lies a tension between limiting the right to property, in favour of the idea of attaching a social function to the right to property, which is not always recognised.

ECHR case law: evolving to guarantee better living conditions for vulnerable people

In the Khan v. France decision,⁸ the Court's judgement is in accordance with its own case law

which states that conditions contrary to human dignity are a violation of art. 3 of the Convention, for very vulnerable people (children, lone women, asylum seekers, etc.).

In this case, several unaccompanied minors spent several months living in unacceptable conditions in a shanty town in Calais (France) known as 'La Lande'. The ECHR judged that the public authorities' lack of intervention, prior to the decision of the Youth Judge, to identify and guarantee the care of unaccompanied minors living in the camp represents a failure in the State's obligations according to art. 3 of the European Convention on Human Rights. The Court decided that the public authorities had not done everything in their power to fulfil their obligations regarding the care of unaccompanied minors.

A more recent decision, in the case of N.H. and others v. France,⁹ was made on young single men without children (still considered less vulnerable according to the Court's case law) living in conditions contrary to human dignity such that there is a violation of art. 3 (166).

The Court began by stating that the asylum seekers were, in fact, vulnerable people. On the contrary, it can be said that a person with the same profile but who is not in exile is not, in fact, vulnerable. To characterise the violation of article 3, the Court listed several factors: being without financial means, not having permission to work (§167), living on the streets (§174), living in fear of being arrested and deported (§172), not having access to sanitation, not having food aid, living in fear of attack (§179), not having effective responses despite several appeals (§184).

The Court here looked at extending the protection of article 3 (against inhuman and degrading treatment) to vulnerable people, including some homeless people. According to the Court, the person must belong to a vulnerable group, lack resources and have no possibility of work, which does not apply to all homeless people. An important - but insufficient - step because for the rest of the homeless population, the only route left is to emphasise the inalienable nature of the fundamental rights of homeless people, trapped on

the streets in a situation that contravenes human dignity.

Interim measures applied in the case of P.H. and others v. Italy

The European Court of Human Rights decided to introduce an emergency measure concerning three Bosnian citizens of Roma origin who were evicted, along with their minor children, from a camp in Ponte Riccio in April 2019.¹⁰ The Mayor ordered the eviction of all camp inhabitants for public safety and public health reasons. The applicants made a request for provisional measures to the Court under article 39 of its regulation, in order to ask the State to provide them and their families with adequate accommodation and to suspend further evictions. The Court adjourned examination of the request pending the provision of more information from the different parties. Given that the government's response to the Court's questions does not indicate clearly whether the applicants have been rehoused or not, the Court decided to introduce provisional measures requiring the Italian government to provide temporary accommodation to the minors and their parents without separating them.

4

European Committee of Social Rights

Several collective complaints regarding the right to housing have been made using the additional Protocol of the European Social Charter and are deserving of our attention:

Collective complaint against Greece for non-respect of the right to housing

In November 2018, the International Commission of Jurists (ICJ) and the European Council on Refugees and Exiles (ECRE) made a collective complaint against Greece for violation of the rights of migrant children and asylum seekers under the Social Charter.¹¹ The ICJ and the ECRE alleged that Greece is not ensuring the protection of unaccompanied migrant children in Greece and accompanied minor children in the north-eastern islands of the Aegean Sea, due to the reception facilities being heavily over-subscribed. In May 2019, the Committee unanimously declared the complaint to be valid, and decided to establish immediate measures to ensure the appointment of a tutor, access to food, water, education and to appropriate accommodation and to ensure access to healthcare and medical assistance.

Collective complaint against Italy on the housing situation of the Roma community

In March 2019, Amnesty International lodged a

complaint¹² in response to the situation of the Roma community in Italy. The complaint presented fairly comprehensive data showing that the housing situation of Roma communities in Italy comprised a series of violations of the Charter. The data related to forced evictions, continued use of segregated camps which contain precarious housing, and the lack of equality regarding access to social housing. In July 2019, the European Committee of Social Rights unanimously declared the complaint to be valid and decided to recommend immediate measures to ensure that evicted people are not without shelter and that they are not rehoused in unacceptable living conditions.

The 2019 Conclusions of the European Committee of Social Rights

The Committee examined within the Charter's reporting system, the right to housing under articles 16 and 31 in 2019, and published its conclusions in March 2020.¹³ In spite of their significance, the conclusions did not have the desired impact due to the pandemic but they remain relevant in terms of understanding the situation prior to the pandemic. The Committee's conclusions show the rather weak level of compliance with the provisions of article 31. The majority of the conclusions on non-compliance under article 31§1 (adequate housing) are related to the unfit housing conditions of Roma and travelling communities (France, Greece, Italy, Latvia, Portugal, Turkey, and Ukraine). Others are related to unfit housing (France) or to monitoring housing

standards (Lithuania).

With regard to article 31§2 (reducing homelessness), eight countries are not complying with this provision of the Charter due to their inadequate legal protection of people threatened with eviction (forced eviction), including on specific issues such as banning evictions in winter (Andorra, France, Greece, Lithuania, Portugal, Turkey, and Ukraine).

The conclusions on non-compliance with article 31§3 are mainly related to the lack of social housing (in France and Portugal) and the lack of equal treatment of legally resident foreigners with respect to social housing and housing benefits. Two conclusions of non-compliance regard the Roma, travelling and Sinti communities' access to social housing and to housing benefits (in France and Italy). For more information on the latest conclusions of the European Committee of Social Rights on article 31 or 16, please consult the country-by-country evaluation in the HUDOC Social Charter database.

The European Committee of Social Rights adopted a statement of interpretation in April 2020 on the

right to protection of health in pandemic times.¹⁴ Although this declaration centres on the right to protection of health, the Committee highlighted the fact that the pandemic could pose significant risks to other social rights in the Charter. The statement emphasises that "historic and ongoing shortcomings in state efforts to secure Charter rights such as the right to housing (Article 31) and the right to freedom from poverty and social exclusion (Article 30) feed directly into the vulnerability of particular social groups in a pandemic." The Committee announced that it would focus on the right to protection of health for its examination of State reports for the 2021 Conclusions.

5

The EU Court of Justice and affordable housing

In the context of high tourist flows in European cities and a growing debate on the impact that short-term rental platforms have on affordable housing, many homes previously available on the private rental market are currently rented out to tourists through platforms such as Airbnb, Home Away, etc. As these short-term tourist rentals can cause increased rental prices of homes in cities, local governments are forced to regulate these businesses. One of the main issues in this area is whether these local regulations are in compliance with European legislation.

In a recent decision by the CJEU on 19 December 2019,¹⁵ the Court had to decide, insofar as the Airbnb platform does not simply put hosts in contact with potential clients but also provides a large range of other services, whether it should be considered a traditional real estate agent and get a professional licence, in accordance with the requirements of French legislation. The CJEU decided that Airbnb should be considered an “information society service” and not a traditional real estate agent. The services provided in France by Airbnb therefore enjoy the freedoms of service provision stated in the Directive on e-Commerce, and France cannot subsequently oblige Airbnb to obtain a professional real estate licence as the Commission had not been notified of this condition in accordance with the Directive.

The recent conclusions of Advocate General Bobek in another case brought before the CJEU involving a platform, stated that a severe lack of affordable

housing constitutes an overriding reason of public interest that can justify measures requiring authorisation to be obtained for the letting of residential accommodation for short periods, for example through Airbnb.¹⁶ The judgment of September 22, 2020, confirmed the possibility of imposing an authorization regime on landlords provided that this regime is justified by an overriding reason of general interest, proportional to the objective pursued, transparent and accessible.¹⁷

6

Advances at national level

Ireland: An Innovative Law Adopted By Parliament Protects Homeowners Experiencing Difficulty In Paying Their Mortgage

New legislation was adopted by the Oireachtas [Parliament] that protects homeowners experiencing difficulty in paying their mortgage. This law¹⁸ obliges the Irish courts to examine if the repossession order is “proportional” and if it fully respects the rights of the borrower. The courts must examine if the creditor engaged with the borrower, by establishing conditions in which the borrower could stay in their home. The courts must also examine any potential proposal by the borrower aiming to enable the household to remain in the home, and the courts can take any other point they deem appropriate into account. This law builds on existing measures taken by the State, but also integrates human rights standards in Irish legislation. The issues regarding proportionality had previously been applied to evictions from social housing but were not taken into consideration by the courts in mortgage foreclosure proceedings.

The Irish Court confirms that European legislation offers protection for people at risk of losing their home

In the case of Grant v. County Laois Registrar in April 2019, the Irish High Court confirmed that European legislation on human rights and consumer rights

must be respected in cases of mortgage foreclosures where the people concerned risk losing their homes.¹⁹ Irish judges and registrars must, on their own initiative, study the mortgage documents for abusive clauses or, in other words, evaluate whether the mortgage conditions are in compliance with European legislation.

Affordable housing: Berlin and rent ceilings

For the first time in Germany, Berlin's regional parliament adopted a text planning a freeze on rent increases as of 2020 and for a period of five years. The “Law on the Limitation of Rents in the Berlin Housing Sector” (MietenWoG Bln), known as the rent cap (Mietendeckel), has been in force since 23 February 2020. The text also allows for particularly high rents to be lowered. The regulation on the rent cap only applies to non-social housing, so concerns all older housing in the private rental stock, i.e. some 1.6 million units.

The rent ceiling is a general limit on rental price that freezes rents at the level they were on 18 June 2019. For rental contracts completed after this key date, the maximum rental demanded is the previous rent for the same apartment or the upper rent limit, if lower. From 2022, the law allows for adjustments in rent of up to 1.3% per year.

On 17 April 2020, Berlin's Senate Department for Urban Development and Housing published an implementing regulation clarifying in greater detail some interpretation issues of the law on rent caps. The implementing regulations define the framework in which the administration can operate and also provide detail on the fines applicable. These

are not binding for courts. The full text is available on the Official Journal for Berlin (in German only).²⁰

7

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CONTACT DETAILS

Maria Aldanas, FEANTSA
194, Chaussée de Louvain
1210 Brussels - Belgium
Tel: +32 (0)2 538 66 69

www.housingrightswatch.org

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