

Environmental protection and the European Convention on Human Rights

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Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter “the Convention”) dates from 4 November 1950. Signed in Rome within the framework of the Council of Europe, it enshrines essentially classical rights and freedoms. Since then, other rights have been added by means of different Protocols (Nos. 1, 4, 6, 7, 12 and 13 – No. 12 not yet in force) but no mention of any right to the environment can be found in them.¹ It has been suggested that the decision by the Convention drafters to guarantee civil and political rights, instead of social, economic or even the so-called rights “of solidarity”, was due to their desire, according to the Preamble of the treaty, “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.² Thus, it grants individuals direct access to the review system subjected to thorough reform by Protocol No. 11 to the Convention, which entered into force on 1 November 1998. As of that date, individuals

1. On 27 June 2003 the Parliamentary Assembly approved Recommendation 1614, “Environment and human rights”, emphasising how pertinent it would be for the Committee of Ministers to “draw up an additional protocol to the European Convention on Human Rights concerning the recognition of individual procedural rights intended to enhance environmental protection, as set out in the Aarhus Convention” (para. 10 of Recommendation 1614 of 27 June 2003 which can be found on the Council of Europe’s Web site, <http://www.coe.int/>). For a general approach to the environmental protection in the framework of the Council of Europe see: Déjeant-Pons, M., “Les droits de l’homme à l’environnement dans le cadre du Conseil de l’Europe”, *Revue Trimestrielle des Droits de l’Homme*, No. 60, 2004, pp. 861-888, and the bibliography there included.
2. Carrillo Salcedo, J.A., *El Convenio Europeo de Derechos Humanos*, Tecnos, Madrid, 2003, p. 19.



can apply directly to the European Court of Human Rights (hereafter “the European Court”) even against the State they are nationals of, if they consider themselves to be the victim of a breach of any right or freedom guaranteed by the Convention (Article 34 of the Convention) – on condition that the admissibility criteria in Article 35 of the Convention are fulfilled.³

In the early years of the Convention’s life, any individual seeking to have their right to environment protected under the European Convention – when the decision as to admissibility was the responsibility of the European Commission of Human Rights (hereafter “the Commission”) – would have seen his application being dismissed by this European body as ill-founded *ratione materiae* because no right to environment is proclaimed as such in the Convention nor in its Protocols.⁴ As will be shown below, as time has gone by, this fact has not been an insurmountable obstacle to a creative approach by the European bodies to protect indirectly some connotations of a human right to environment, thanks to an exercise of judicial activism and judicial self-restraint.

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3. These criteria of admissibility have been substantially affected by Article 12 of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004, not yet in force). The said provision allows the European Court to declare inadmissible any individual application submitted under Article 34 where the applicant has not suffered a significant disadvantage, providing respect for human rights as defined in the Convention or the protocols thereto would not require an examination of the merits of the case and that it had been duly considered by a domestic tribunal.
 4. As the Grand Chamber of the European Court itself has reiterated in paragraph 96 of its judgment of 8 July 2003 in the *case of Hatton and others v. the United Kingdom*.



Chapter 1.

Environment and human rights

Analysis of the creative reading by the European bodies of the environmental dimension of the European Convention on Human Rights and Protocol No. 1

I. Early applications dismissed as incompatible *ratione materiae*

The Convention and the Additional Protocols do not cover any environmental rights or any interest in the preservation of the environment. This is not surprising taking into account the date of its signature, the early 1950s, clearly some time before international concern for the global protection of environment emerged in the United Nations Conference on Environment of 1972.⁵ The first applications before the Commission were consequently rejected as being incompatible *ratione materiae* with the Convention: *Dr S. v. the Federal Republic of Germany*, Application No. 715/60, Decision of inadmissibility of 5 August 1969 (unpublished); *X and Y v. the Federal Republic of Germany*, Application No. 7407/76, Decision of inadmissibility of 13 May 1976, *Decisions and Reports* ("DR") No. 5, p. 161.

5. See the Declaration of Stockholm collating the final conclusions of the UN Conference: UN Doc., A/CONF.48/14/Rev. 1.



However, the Commission soon warned that bad environmental conditions could sometimes interfere with the effective enjoyment of the individual's rights and freedoms guaranteed in the Convention, so this body began to declare admissible individual applications complaining of environmental abuse. See, e.g.: *Arrondelle v. the United Kingdom* (noise), Application No. 7889/77, Decision of 15 July 1980, DR 19, p. 186; *G. and Y. v. Norway* (not specified by applicants), Application No. 9415/81, Decision of 3 October 1983, DR 35, p. 30; *Baggs v. the United Kingdom* (noise), Application No. 9310/81, Decision of 19 January 1985, DR 44, p. 13; *Powell and Rayner v. the United Kingdom* (noise), Application No. 9310/81, Decision of 16 July 1986, DR 47, p. 22; *Vearncombe and others v. the Federal Republic of Germany* (noise), Application No. 12816/87, Decision of 18 January 1989, DR 59, p. 186; *X v. France* (noise and other inconvenience), Application No. 13728, Decision of 17 May 1990; *Zander v. Sweden* (water pollution), Application No. 14282/88, Decision of 14 October 1992.

At the same time, and without any difficulty, the Commission also began to receive individual complaints regarding to restrictions in Convention rights which, according to paragraph 2 of Articles 8 to 11 of the European Convention and Article 1 of Protocol No. 1, pursued a legitimate aim, namely, that of safeguarding good environmental conditions as a general interest. See, e.g.: *Hakansson and Sturesson v. Sweden*, Application No. 11855/85, Decision of admissibility of 15 July 1987; *Fredin v. Sweden*, Application No. 12033/86, Decision of admissibility of 14 December 1987; *Pine Valley Development Ltd and others v. Ireland*, Application No. 12742/87, Decision of admissibility of 3 May 1989; *Allan Jacobsson v. Sweden*, Application No. 16970/90, Decision of admissibility of 15 October 1995.

Thus was created an indirect way of protecting this right (protection "par ricochet"). As Professor Déjeant-Pons has written, individuals began to see their right to environment protected in connection with the Convention in two different ways: on the one hand, the effective protection of their rights guaranteed to them in the Convention might require in some cases the safeguarding of an environment of quality.⁶ On the other hand, the general interest in a democratic society would permit the restriction in



the exercise of some rights and freedoms, namely those in Articles 8, 9, 10 and 11 of the Convention.

As a representative example of the latter, in the case of *Muriel Herrick v. the United Kingdom* there was at stake a restriction in the use of a bunker owned by the applicant on the island of Jersey. The restrictive measure consisted of the refusal of an official permit to authorise her owning it as a summer residence. It was justified on the grounds of the general interest to safeguard a landscape of particular interest, a so called “green zone”, reputed to be one of the most outstanding features on Jersey.⁷

For some commentators, the Commission’s confirmation that land development regulations are necessary with a view to preserving areas of outstanding beauty for the enjoyment both of inhabitants of Jersey and of tourists would imply that the right to environmental protection should be seen as an individual right, although collectively protected by the European bodies. Accepting this reading one may assume from the case of *Muriel Herrick v. the United Kingdom* that an indirect protection of the environment, by imposing a limitation on rights defined in Article 8, under the conditions envisaged in paragraph 2 of this provision, will be easy. However, such “serendipity” for granting collective protection to a right to environment would be contradictory to the difficulties that the European bodies have found in granting indirect protection to environment in connection with some rights and freedoms guaranteed by the Convention.

Thus, in my view, in these cases dealt with by the Commission and subsequently by the European Court, we are not witnessing the indirect protection of any collective right to environment, but an example of national authorities’ exercising their margin of appreciation to consider environmental policies as a matter of general interest justifying interference in the exercise of Convention rights. The focus must be placed on the discretion

6. Déjeant-Pons, M., “L’insertion du droit de l’homme à l’environnement dans les systèmes régionaux de protection des droits de l’homme”, *Revue universelle des droits de l’homme*, 1991, Vol. 3, No. 1, p. 461.

7. “According to Article 8 of the Convention ... for the protection of the rights of others, where those rights are clearly identified and directly at risk”, European Commission’s Decision on admissibility of 13 March 1985, DR 42, p. 280.



of Contracting States in responding to the vague notion of “rights of others” as a legitimate aim for land-planning and any other measures which can affect individuals’ rights as guaranteed in the European Convention.

II. Emerging case-law concerning environmental protection as part of the general interest justifying restrictions in the exercise of Convention rights

In this respect, it is pertinent to refer, among many others,⁸ to the judgment of 23 October 1986, in the case of *Gillow v. the United Kingdom*, very similar to *Muriel Herrick*. The applicants’ main complaint concerned the refusals of licences to occupy their house in Guernsey, “Whiteknights”, and their subsequent prosecution for unlawful occupation relying, *inter alia*, on Articles 6, 8, 14 and 18 of the European Convention, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4. They alleged that they had established “Whiteknights” as their home in 1958. Although they had subsequently left Guernsey, they had retained ownership of the house, to which they always intended to return, and had kept their furniture in it.

The European Court considered that the Guernsey legislature was better placed than the international judge to assess the effects of any relaxation of the housing controls. The statutory obligation imposed on the applicants to seek a licence to live in their “home” could not be regarded as disproportionate to the legitimate aim pursued. There had accordingly been no breach of Article 8 as far as the terms of the contested legislation are concerned. However, as to the manner in which the Housing Authority exercised its discretion in the applicants’ case, the European Court concluded that the decisions taken by this authority as well as the conviction and fining of Mr Gillow, constituted interferences with the exercise of their right to respect for their “home” which were disproportionate to the legitimate aim pursued.⁹ Accordingly, there had been a breach of Article 8 of

8. *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A, No. 52; *Erckner and Hofauer v. the United Kingdom*, judgment of 23 April 1987, Series A, No. 117; *Allan Jacobsen v. Sweden*, judgment of 25 October 1989, Series A, No. 163.

9. Paragraph 57 of the judgment of 23 October 1986.



the Convention as far as the application of the legislation in the particular circumstances of the applicants' case was concerned.

III. First judgments considering environmental pollution as an interference in the exercise of Convention rights

More relevant has been the development made in the first indirect protection “par ricochet” of a human right to environment, that is as a consequence of environmental pollution interfering in the exercise of individual rights contained in Articles 8 to 11 in the Convention, as has happened in judgments in a series of cases begun with *Powell and Rayner v. the United Kingdom* and *López Ostra v. Spain*.

A. Judgment of 21 February 1990 in the case of Powell and Rayner v. the United Kingdom

In their application (No. 9310/81) Mr Powell and Mr Rayner complained of excessive noise levels in connection with the operation of Heathrow Airport. The home of the first applicant, Richard John Powell, at least until 1984, fell just within the 35 Noise and Number Index (NNI) contour,¹⁰ which was considered to be a low noise-annoyance rating. The second applicant's farm, Michael Anthony Rayner, which was regularly overflowed during the day and to a limited extent at night, fell within a 60 NNI contour and was regarded as an area of high noise-annoyance for residents. They invoked Articles 6.1, 8 and 13 of the Convention and Article 1 of Protocol No. 1. The applicants' claim under Article 8, considered by the European Court in connection with Article 13 was that, as a result of excessive noise generated by air traffic in and out of Heathrow Airport, they had each been victim of an unjustified interference by the United Kingdom

10. The NNI (Number Noise Index) is a long-term average measure of noise exposure which is used in the United Kingdom to assess the disturbance from aircraft noise to communities near airports. It takes account of two features of noise, namely the average noisiness and the number of aircraft heard during an average summer day.



with the right guaranteed to them under Article 8. The European Court accepted that

[...] In each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport.¹¹

However, the European Court also pointed out the necessity in the interests of a country's economic well-being of the existence of large international airports, even in densely populated urban areas.¹² Considering that a number of measures had been introduced by the responsible authorities to control, abate and compensate for aircraft noise at and around Heathrow Airport, which were adopted progressively as a result of consultation of the different interests and people concerned,¹³ the European Court unanimously held that the United Kingdom Government could not arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8. It reached the conclusion, consequently, that there had been no violation of Article 13 in respect of the claims of either applicant under Article 8 since no arguable claim of violation of Article 8 and no entitlement to a remedy under Article 13 had been made out in relation to either applicant.

B. Judgment of 9 December 1994 in the case of López Ostra v. Spain

Having exhausted local remedies, Mrs López Ostra applied to the European bodies complaining of the Lorca Municipal authorities' inactivity with respect to the inconvenience caused by a waste-treatment plant situated a few metres away from her home.¹⁴ Relying on Articles 8.1 and 3 of the Convention, the applicant asserted that she had been the victim of a violation of the right to respect for her home that had made her private and family life impossible, and furthermore, to be the victim of degrading

11. Paragraph 40 of the judgment of 21 February 1990.

12. Paragraph 42 of the judgment of 21 February 1990.

13. See paragraphs 43 to 45 of the judgment of 21 February 1990.



treatment. For the European Court the issue was not whether the applicant's daughter's health had or had not been affected, but whether or not the defendant State had struck a fair balance between the competing interests of the individual and of the community (expressed in the waste-treatment plant which was built to solve a serious pollution problem). In its view, the plant had caused inconvenience since it had been set up and the Council's members could not have been unaware of this right to respect for her home and for her private and family life – they even resisted judicial decisions to that effect – and they had not afforded redress to the applicant for the inconvenience suffered for three years.¹⁵ Consequently, no fair balance had been struck between the town's economic well-being and the applicant's effective enjoyment of her rights.¹⁶ Thus, the European Court unanimously declared that there had been a violation of Article 8 of the Convention. As to Article 3 of the Convention the Court also took the unanimous view that although the conditions in which the applicant and her family had lived for a number of years were very difficult, they did not amount to degrading treatment within the meaning of Article 3.¹⁷

By way of a comparative analysis of the judgments in the cases of *Powell and Rayner v. the United Kingdom* and *López Ostra v. Spain*, it could be concluded that in the former there was no breach of Article 8 of the Convention because the competent British authorities had adopted a set of measures which, although insufficient to avoid the interference by noise disturbance, were enough to reduce it partially. Thus, in the *Powell and*

14. The town of Lorca had a heavy concentration of leather industries. Several tanneries there had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land twelve metres away from applicant's home. Owing to a malfunction, its start-up released gas fumes, pestilential smells and contamination, which immediately caused health problems and nuisance to many people from Lorca, particularly those living nearby. On 9 September 1988, following numerous complaints and in the light of reports from the health authorities and the Environment and Nature Agency for the region, the town council ordered cessation of one of the plant's activities – the settling of chemical and organic residues in water tanks – while permitting the treatment of waste water contaminated with chromium to continue.

15. Paragraph 57 of the judgment of 9 December 1994.

16. Paragraph 58 of the judgment of 9 December 1994.

17. Paragraph 60 of the judgment of 9 December 1994.



Rayner case it could be considered that a fair balance between the interests of the individuals and those of the community as a whole had been struck. This was different from the *López Ostra* case, where the Spanish authorities had proved notoriously reluctant to remedy the situation complained of.

With respect to the general thesis put forward in this book, admittedly, the factual situation of individuals in both cases is also of relevance, since it was different in the cases of Messrs Powell and Rayner and Mrs López Ostra. Thus, in my opinion, the failure by national authorities to carry out their positive obligations, although relevant, would not be enough to judge that a fair balance had not been struck; we must examine the European Court's reasoning in the *López Ostra v. Spain* judgment in order to understand why it considered there to be a violation of Article 8.

The only mention of an environmental aspect in relation to the rights guaranteed in Article 8 was in the first part of paragraph No. 51 of the judgment:

Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in a way as to affect their private and family life adversely, without, however, seriously endangering their health.

There are two possible readings of this paragraph. The first one which one could term "progressive", implies that the European Court would accept that although the applicant's health was not affected, the mere fact of her well-being being adversely conditioned by the harmful environmental violated her right to the peaceful enjoyment of her home, and thus was in breach of Article 8. The second, more restrictive, reading considers that both the Commission and Court appreciated that in the circumstances of the case there was a serious risk for the applicant and her family's health based on the numerous medical files brought before it during the proceedings.¹⁸

18. See paragraphs 49 and 11 of the judgment of 9 December 1994.



This second reading is premised upon two facts. The first one is that the European Court refused to state explicitly that serious degradation to the environment, while possibly affecting the well-being of the applicant, *did not* represent a serious risk for her health. The second point to be considered is the different right at stake in the judgments in *Powell and Rayner* – “well-being”¹⁹ – and in *López Ostra* – “health”²⁰ – which, in my opinion, would justify adopting the position that serious risks for health existed since this fact was relevant in ascertaining the interference in the rights guaranteed in Article 8. Thus, to determine whether or not there is a breach of Article 8 in connection with bad environmental conditions for individuals, it would be necessary to take into consideration the nature of the Convention right at issue and, especially, its importance for the individual. The subsequent case-law analysed below in Chapter 2 seems to develop this idea further which, in addition, seems to be confirmed in recent judgments of the European Court.²¹

19. See paragraph 40 of the judgment of 21 February 1990.

20. See paragraph 51 of the judgment of 9 December 1994.

21. See judgment of 16 November 2004 in the case of *Moreno Gómez v. Spain*.



Chapter 2.

Survey of the case-law of the European Court of Human Rights

on the two indirect ways of ensuring environmental protection under the European Convention on Human Rights and Protocol No. 1

I. Environmental protection as part of the general interest

Recalling the distinction made by Professor Déjeant-Pons,²² it is necessary here to analyse the case-law as regards the first indirect way of considering the protection of environment under the European Convention, namely, when the effective protection of the rights guaranteed to individuals in this international instrument for the protection of human rights might require the safeguarding of an environment of quality. Restrictions on the exercise of rights on the ground of preserving environment as part of general interest have been mainly considered by the European bodies in the context of Article 1 of Protocol No. 1.

22. See footnote No. 6.



A. The European Court's cases in the early 1990s

1. *The case of Hakansson and Sturesson v. Sweden (judgment of 23 January 1990)*

On 4 December 1979 the applicants bought an agricultural estate called Risböke 1:3 in the municipality of Markaryd for 240 000 Swedish crowns (SEK) at a compulsory sale by auction. At the auction the public was informed of the regulations contained in section 2, sub-section 10, and section 16 of the Land Acquisition Act 1979 ("the 1979 Act"), whereby a purchaser would have to resell the property within two years unless he had obtained in the meantime from the County Agricultural Board of the same County a permit to retain it, or unless it fell under one of the listed exceptions from the permit requirement.

By letter of 5 February 1980, the County Agricultural Board informed the applicants that the estate had to be considered as a "rationalisation unit" which ought to be used for the purpose of consolidating other properties in the area that were capable of further development. It added that, as neighbours were interested in acquiring the property, the request might be refused under section 4, paragraph 1, sub-section 3, of the 1979 Act. The applicants appealed to the National Board of Agriculture, which rejected their appeals on 5 September 1980 and on 26 February 1981.

Before the European Court, the applicants alleged that the refusal to grant them the permit required and the compulsory sale by auction of the estate in 1985 constituted a serious violation of their right under Article 1 of Protocol No. 1. The aim of the interference in this case was to promote the rationalisation of agriculture, which was considered by the European Court,

... Undoubtedly, a legitimate "public interest" for the purposes of Article 1 of Protocol No. 1, even to the extent that it may imply the compulsory transfer of property from one individual to another.²³

23. Paragraph 44 of the judgment of 23 January 1990.



Regarding the requirement of the proportionality of the interference alleged by the applicants, the European Court asserted that such relation of proportionality was maintained in the circumstances of the case. In its view, the 1979 Act made it quite clear that a person buying an agricultural estate at a compulsory auction needed a permit in order to be able to keep the estate for more than two years. It was not possible to obtain prior to the auction any binding declaration as to the likelihood of obtaining this permit. Prospective buyers thus had to bear in mind the risk that they might be obliged to resell the estate on the conditions laid down in the 1979 Act. Thus, the European Court concluded that there was no violation of Article 1 of Protocol No. 1.

2. *The case of Fredin v. Sweden (judgment of 22 January 1991)*

Mr Anders Fredin and his wife Mrs Maria Fredin owned several plots of land in the municipality of Botkyrka, in one of which there was a farm and a gravel pit. When Mr Fredin's mother bought the land in 1960 – later sold to her son – the commercial exploitation of the gravel pit had been at a standstill since the middle of the 1950s. In 1963 a prohibition on the extraction of gravel without a permit was introduced through an amendment to the Nature Protection Act 1952 and, although on 11 December 1963 the County Administrative Board of Stockholm County granted Mr Fredin's parents the necessary permit, on the grounds of an amendment to the Nature Conservation Act 1964 which empowered the County Administrative Board to revoke permits that were more than ten years old, the County Administrative Board offered in 1980 to redeem the exploitation permit from the applicants for a sum which was not accepted by the applicants. In 1983 the County Administrative Board notified the applicants that, in the interest of nature conservation, the exploitation of gravel should cease by the end of 1987, by which time the area should also be restored. The applicants made an unsuccessful appeal to the Government regarding this decision.

The European Court began recognising that in today's society the protection of the environment is an increasingly important consideration²⁴



and accepted the fact that the applicants had suffered substantial losses having regard to the potential of the gravel pit if it had been exploited in accordance with the 1963 permit. However, it considered that the applicants initiated their investments seven years after the entry into force of the 1973 amendment to section 18 of the 1964 Act which clearly provided for the potential revocation of existing permits after the expiry of the ten-year period that started to run on 1 July 1973. Accordingly, when embarking on their investments, the applicants could have relied only on the authorities' obligation, when taking decisions relating to nature conservation, to take due account of their interests. This obligation cannot, at the time the applicants made their investments, reasonably have founded any legitimate expectations on their part of being able to continue exploitation for a long period of time. Thus, the European Court unanimously concluded that there had not been any violation of Article 1 of Protocol No. 1.

3. *The case of Pine Valley Developments Ltd and others v. Ireland (judgment of 23 October 1991)*

The applicants were Pine Valley and Healy Holdings, a couple of companies which had as their principal business the purchase and development of land and Mr Daniel Healy, the managing director of Healy Holdings and its sole beneficial shareholder. On 15 November 1978 Pine Valley had agreed to purchase for IR £550 000 21½ acres of land at Clondalkin, County Dublin. It did so in reliance on an outline planning permission for industrial warehouse and office development on the site. This permission, which was recorded in the official planning register, had been granted on 10 March 1977 by the Minister for Local Government to the then owner, Mr Patrick Thornton, on his appeal against the refusal, on 26 April 1976, by the planning authority of full planning permission. One of the grounds for that refusal was that the site was in an area zoned for the further development of agriculture so as to preserve a green belt. On 15 September 1980 Dublin County Council refused the detailed planning

24. Paragraph 48 of the judgment of 22 January 1991.



approval On 17 July 1981 Pine Valley sold the land to Healy Holdings for IR £550 000.

The applicants claimed to have suffered a violation of Article 1 of Protocol No. 1 to the Convention. The European Court considered that the impugned measure was basically designed to ensure that the land was used in conformity with the relevant planning laws, and title remained vested in Healy Holdings, whose powers to take decisions concerning the property were unaffected. Thus, it concluded that the annulment of the permission without any remedial action being taken in their favour could not be regarded as a disproportionate measure and that there had been no violation of Article 1 of Protocol No. 1 as regards any of the applicants because the interference was designed and served to ensure that the relevant planning legislation was correctly applied by the Minister for Local Government, not simply in the applicants' case but across the board.

B. Subsequent jurisprudence

The environmental protection as part of the general interest justifying restrictions in the exercise of Convention rights has continued in later case-law of the European, e.g. the judgment of 2 October 2001 in the case of *Coster v. the United Kingdom*.

1. The case of Coster v. the United Kingdom (judgment of 2 October 2001)

The applicants, all of them gypsies, complained that the refusal of planning permission to station a caravan on their land and the enforcement measures implemented in respect of the occupation of their land, although pursuing the legitimate aim of protecting the "rights of others" in the sense of environmental protection under Article 8.2 of the Convention, represented a violation of this provision as it was not "necessary in a democratic society" in pursuit of that aim.

The margin of appreciation granted to national authorities seems to be particularly ample in the case, as can be deduced from paragraph 108 of the judgment. Thus, although the applicants supported their case by



arguing that they belonged to a minority group, and the Framework Convention for the Protection of National Minorities signed by the Contracting States of the Council of Europe recognised an obligation to protect their security, identity and lifestyle, the European Court did not accept the argument that because statistically the number of gypsies was greater than the number of places available in authorised gypsy sites, the decision not to allow the applicant gypsy family to occupy land where they wished in order to install their caravan in itself would have constituted a violation of Article 8. The Court therefore accepted the national authorities' reasoning.²⁵

Regardless of the wide margin of appreciation which the European Court is ready to grant to national authorities in matters of general policy, such as land planning, some procedural guarantees in striking a fair balance between the individual's rights and the general interest must be safeguarded by national authorities if their interferences are to be judged "necessary in a democratic society" to the legitimate aim of protecting environment as part of general interest. This is clear from other judgments: see the cases of *Zvolský and Zvolská v. the Czech Republic*, judgment of 12 November 2002; and *Papastavrou and others v. Greece*, judgment of 10 April 2003, referring to procedural aspects of restrictions in Article 1 of Protocol No. 1.

2. *The case of Zvolský and Zvolská v. the Czech Republic (judgment of 12 November 2002)*

In this case the European Court reiterated that Article 1 of Protocol No. 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises

25. Paragraph 127 of the judgment of 2 October 2001.



that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.

An interference with the right to the peaceful enjoyment of possessions has to achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim of any measure depriving a person of his possessions.²⁶ Thus, in the case under consideration, notwithstanding the fact that the aim pursued by the Real Estate Act on its enactment in 1991 was legitimate, the Court found that the obligation imposed on the applicants to return, without compensation, the land they had acquired in good faith under a deed of gift that was freely entered into in exchange for equivalent consideration amounted to a disproportionate burden that cannot be justified under the second paragraph of Article 1 of Protocol No. 1.²⁷ There was, therefore, a violation of Article 1 of Protocol No. 1.

3. *The case of Papastavrou and others v. Greece (judgment of 10 April 2003)*

The applicants were involved in a long-standing dispute with the State concerning the ownership of a plot of land in Omorphokklisia in Galatsi, part of a wider area called “Veikou Estate” whose ownership is claimed by the State. They complained that in 1934 the Minister of Agriculture decided to reforest a wider region of Attica which included the disputed plot of land.²⁸ On 10 October 1994 the prefect of Athens decided that an area within the Veikou Estate, including the disputed plot of land, should be reforested.²⁹ On 23 December 1994 the applicants challenged unsuccessfully the decision of the prefect of 10 October 1994 before the Council of State. Seised of the applicants’ complaints, the European Court took

26. Paragraph 70 of the judgment of 12 November 2002.

27. Paragraph 74 of the judgment of 12 November 2002.

28. According to that decision, the area “consisted, before the destruction and downgrading of the forest vegetation ..., of pine-tree forest which was progressively downgraded and tended to disappear ...”. Paragraph 10 of the judgment of 10 April 2003.

29. Paragraph 12 of the judgment of 10 April 2003.



note of the Government's arguments that the protection of forests was guaranteed without any time-limit and was not obstructed by any illegal destruction or deforestation. However, it was contested in the case that the prefect's decision to reforest had been taken in the public interest, because – according to the applicants – the geology of the whole area is not appropriate for forestation. In the European Court's opinion, it was a complex issue in the circumstances of the case, and for this reason there was no reasonable balance struck between the public interest and the requirements of the protection of the applicants' rights. The Court felt that, since the prefect's decision of 10 October 1994 was based only on the decision of the Minister of Agriculture, the authorities would be at fault for ordering such a serious measure affecting the position of the applicants and of a certain number of other persons who claimed property rights on the wider area without a fresh reassessment of the situation as depicted in that decision.³⁰ On these grounds, the European Court unanimously held that there had been a violation of Article 1 of Protocol No. 1.

C. Recent case-law confirming that procedural guarantees for individual rights are to be respected

1. The case of Katsoulis and others v. Greece (judgment of 8 July 2004)

As in the case of *Papastavrou and others v. Greece*, the applicants were also involved in a long-standing dispute with the State concerning the ownership of a plot of land in a suburb of Athens which had been included in 1934 by a ministerial decision in a wider area affected by reforestation purposes. The decision was not implemented until September 1994, by a decision of the prefect of Athens. The decision could not be appealed by the applicants on the ground that it was not an operative act since it simply confirmed the decision issued by the Minister of Agriculture in 1934. The European Court noted again that there was a large

30. Paragraph 37 of the judgment of 10 April 2003.



amount of conflicting evidence as to the nature of the land in issue: judicial and administrative decisions, expert valuations and other documents. Although it was not for the European Court to decide such a technical matter, it was surprising that the Supreme Administrative Court rejected the applicants' application on the sole ground that the prefect's decision was not an operative act. In the European Court's opinion,

such a manner of proceeding in such a complex situation in which any administrative decision could weigh heavily on the property rights of a large number of people cannot be considered consistent with the right enshrined in Article 1 of Protocol No. 1 and does not provide adequate protection to people such as the applicants who *bona fide* possess or own property, in particular, when it is borne in mind that there is no possibility of obtaining compensation under Greek law.³¹

Thus, the European Court unanimously declared that there had been a violation of Article 1 of Protocol No. 1.

2. *The case of Zazanis and others v. Greece (judgment of 18 November 2004)*

The applicants were Greek nationals owning a piece of land in Loutraki, which had been designated as building land in the town's development plan in 1971 and entered in the land register as forest land in 1982. In 1992 the applicants signed a contract with a construction company to have a building several storeys high erected on their land. In July 1993 the company was granted planning permission, which was annulled by the Supreme Administrative Court in 1997 on the ground that the company had not obtained prior permission to cut down trees on the land. The company made a number of applications to that effect but permission was refused. The company appealed to the Supreme Administrative Court, which held in a judgment of 17 August 2000 that all the necessary documents had been submitted and referred the matter to the administrative authorities for a decision on the application for permission to cut down the trees. In spite of that judgment, the Loutraki District Council

31. Paragraph No. 34 of the judgment of 8 July 2004.



asked the company to fulfil conditions that were not laid down in the relevant legislation and reduced by half the proportion of the land on which building was permitted. In February 2003 the Ministry of the Environment classified the land as “parkland”.

The applicants complained under Articles 6.1 and 13 of the Convention of the authorities’ refusal to comply with the Supreme Administrative Court’s judgment of 17 August 2000 quashing the decision to refuse planning permission in respect of land owned by them. In considering the circumstances of the case, the European Court noted that the fact that the town-planning department had laid down new conditions amounting to a refusal to comply with the Supreme Administrative Court’s judgment. Furthermore, the reclassification of the land as “parkland” by the Ministry of the Environment three years after the Supreme Administrative Court’s judgment amounted to a formal expropriation order rendering the judgment devoid of purpose. The European Court accordingly held unanimously that there had been a violation of Article 6.1.³² As regards Article 13, the European Court considered that there had been a violation on account of the absence of a domestic remedy whereby the applicants could have obtained the enforcement of the Supreme Administrative Court’s judgment.³³

II. Environmental interferences in the exercise of conventional rights

A. Further developments in the environmental dimension of some conventional rights

Since the judgment of the European Court in the case of *López Ostra v. Spain*, the first environmental dimension of the Convention³⁴ has been enriched thanks to the developments in the case-law of the European

32. Paragraphs 38 and 39 of the judgment of 18 November 2004.

33. Paragraphs 45 to 48 of the judgment of 18 November 2004.

34. Namely, when the effective protection of some rights guaranteed in the Convention and Additional Protocol may require the safeguarding of an environment of quality.



bodies. The most relevant of this environmental jurisprudence is represented by the judgments in the cases of *Guerra and others v. Italy*, *McGinley and Egan v. the United Kingdom*, *L.C.B. v. the United Kingdom*, *Hatton and others v. the United Kingdom*, *Öneryildiz v. Turkey* and, recently, *Moreno Gómez v. Spain*.

1. *The case of Guerra and others v. Italy (judgment of 19 February 1998)*

Alleging a violation of Articles 8, 10 and 2 of the Convention, the applicants, Italian citizens, applied to the European Commission on 18 October 1988, complaining not of an act by the State but of its failure to act, namely, its failure to provide the local population of Manfredonia with information about risk factors and how to proceed in the event of an accident at a nearby chemical factory.³⁵

The European Court in its judgment of 19 February 1998 admitted that severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. In the circumstances of the case, the applicants had waited, right up until production of fertilisers had ceased in 1994, for essential information that would have enabled them to assess risks they and their families might run if they continued to live at Manfredonia, a town whose closeness to the factory left it particularly exposed to danger in the event of an accident. Accordingly, the European Court unanimously reached the conclusion that Article 8 had been violated because the respondent State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life.³⁶

As regards the violation alleged in Article 10 of the Convention, the European Court reached the conclusion that it was not applicable on the grounds that although the right of the public to receive information had

35. The Ministry for the Environment and the Ministry of Health had jointly adopted conclusions on a safety report submitted by the factory. They had provided the prefect of Manfredonia with instructions on an emergency plan, which he had drawn up in 1992, and measures required for informing the local population. However, the District Council concerned had not received any document relating to the conclusions.

36. Paragraph 60 of the judgment of 19 February 1998.



been recognised on a number of occasions in cases concerning restrictions on freedom of the press, the present case was clearly distinguishable from them since the applicants complained of a failure in the system set up pursuant to relevant legislation. In the European Court's view, freedom to receive information basically prohibited a government from restricting a person from receiving information that others wished or might be willing to impart to him and cannot be construed as imposing on a State, in circumstances such as those of the *Guerra and others v. Italy* case, positive obligations to collect and disseminate information of its own accord.³⁷ As far as Article 2 is concerned, having found a violation of Article 8, the European Court did not find it necessary to consider the case under this article.

The interpretation of Article 8 by the European Court in the case of *Guerra and others v. Italy* is fully coincident with that developed in its previous judgments in the case of *López Ostra v. Spain*. Thus, as it did previously, the European Court points out that unhealthy environmental conditions can restrict individuals' rights to have their home respected, and thus their right to private and family life.³⁸ Furthermore, both cases are to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8. Similarly to what happened in the case of *López Ostra v. Spain* regarding the complaints of Article 3 of the Convention, in the case of *Guerra and others v. Italy*, the European Court remained unconvinced as to the environmental dimension of the rights invoked by applicants. In this way, facing the claim of a right to receive environmental information, the European Court said that the Convention does not impose on Contracting States the duty of providing *motu proprio* information to individual.³⁹ The complaint regarding Article 2 was not even taken into consideration by the European Court, although it was certainly well founded: it was alleged that some workers of the factory in question had died of cancer so it

37. Paragraph 53 of the judgment of 19 February 1998.

38. Paragraph 51 of the judgment of 9 December 1994. Paragraph 60 of the judgment of 19 February 1998.

39. Paragraph 54 of the judgment of 19 February 1998.



became open to discussion whether the lack of information about the risks of those living close to the factory would amount to a breach of Article 2 of the Convention by the competent Italian authorities. Unfortunately, the Court avoided pronouncing on this issue. It is worth focusing, finally, on the point concerning the nexus between the environmental damage and the interference in the respect of the right to private and family life of applicants. Again the emphasis is placed on the health of the latter, not on their well-being.⁴⁰

2. *The case of McGinley and Egan v. the United Kingdom (judgment of 9 June 1998)*

At the time of the United Kingdom's nuclear test programme on Christmas Island, the applicants served as plant operator and stoker on a ship, at a distance of some 25 miles and 60 miles from the detonation points respectively. They alleged a violation of Article 6.1 and 8 of the Convention as a consequence of the United Kingdom Government's non-disclosure, on grounds of national security, of documents concerning the radiation levels on Christmas Island. The applicants needed these documents during the course of the pension proceedings they had initiated in order to indicate the nature and physical impact of their participation in the test programme. The European Court considered natural the applicants' uncertainty as to whether or not they had been put at risk, given the fact that exposure to high levels of radiation is known to have hidden, but serious and long-lasting, effects on health. The applicants' anxiety and distress justified their interest, particularly under Article 8, in obtaining access to documents containing information about the radiation levels in the areas in which they were stationed during the tests. Of relevance is the European Court statement:

Where a Government engages in hazardous activities, such as those in issue in the present case, *which might have hidden adverse consequences on*

40. On this point the author agrees with the joint dissenting opinion of judges Costa, Ress, Türmen, Zupancic and Steiner in the Grand Chamber's judgment of 8 July 2003 in the case of *Hutton and others v. the United Kingdom*. See, particularly, point No. 4 of their opinion.



the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.⁴¹ [Italics added.]

The European Court judged, nevertheless, that there had not been a breach of Articles 6.1 and 8 of the Convention, since there was a procedure, provided to the applicants by Rule 6 of the Pensions Appeal Tribunals (Scotland) Rules 1981, which would have enabled them to have requested documents relating to the Ministry of Defence assertion that they had not been dangerously exposed to radiation, and that there was no evidence before it to suggest that this procedure would not have been effective in securing disclosure of the documents sought.⁴²

3. *The case of L.C.B. v. the United Kingdom (judgment of 9 June 1998)*

The applicant's father had served as a catering assistant in the Royal Air Force at Christmas Island during four nuclear tests in 1957 and 1958. He also participated in the clean-up programme following the tests. At the age of ten she was diagnosed as having leukaemia, and in December 1992 the applicant became aware of the contents of a report prepared by the British Nuclear Tests Veterans' Association indicating a high incidence of cancers, including leukaemia, in the children of Christmas Island veterans. Before the Court the applicant complained firstly about the failure of the United Kingdom to monitor the extent of her father's exposure to radiation on Christmas Island. This complaint being based on events which took place in 1958, before the United Kingdom's Articles 25 and 46 declarations of 14 January 1966, the European Court declared that it had no jurisdiction to consider it.

41. Paragraph 101 of the judgment of 9 June 1998. The eventual consequences of such an affirmation seem rather predictable in our societies which are faced with risks under the emerging principle of precaution in international law. See on this question De Sadeleer, N.: *Environmental Principles. From Political Slogans to Legal Rules*, op. cit., pp. 289 and ff. Also: Didier, P.: "Le principe de précaution: une approche communautaire et internationale" *Journal des Tribunaux* 8 (2000) 69, pp. 118 and ff.

42. Paragraph 102 of the judgment of 2 October 2001.



The applicant also complained of the respondent State's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia in October 1970, thus violating Article 2 of the Convention. In this regard the European Court observed that it had not been provided with any evidence to prove that the applicant's father had ever reported any symptoms indicative of the fact that he had been exposed to above-average levels of radiation. Consequently, the United Kingdom could only have been required of its own motion to take these steps in relation to the applicant if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health.⁴³ Nevertheless, since it had not been established that there was a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived, the Court did not hold that, in the late 1960s, the United Kingdom authorities could or should have taken action in respect of the applicant.⁴⁴ Under these circumstances, the European Court did not find it established that the United Kingdom could have been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her. Thus, there had been no violation of Article 2.

4. *The case of Hatton and others v. the United Kingdom (judgments of 2 October 2001 (Chamber) and 8 July 2003 (Grand Chamber))*

The applicants, residents near Heathrow Airport, alleged a violation of Article 8 because of the increase in the level of noise caused at their homes by aircraft using this airport at night after the introduction of a new scheme in 1993. In short, before October 1993 the noise caused by night flying at Heathrow had been controlled through restrictions on the total number of take-offs and landings; but after that date, noise was regulated through a system of noise quotas, which assigned each aircraft type a "Quota Count" (QC); the noisier the aircraft the higher the QC. This

43. Paragraphs 37 and 38 of the judgment of 9 June 1998.

44. Paragraph 39 of the judgment of 9 June 1998.



allowed aircraft operators to select a greater number of quieter aeroplanes or fewer noisier aeroplanes, provided the noise quota was not exceeded. The new scheme imposed these controls strictly between 11.30 p.m. and 6 a.m. with more lenient “shoulder periods” allowed between 11 and 11.30 p.m. and between 6 and 7 a.m.

As in previous cases concerning noise or environmental pollution, the applicants’ complaint was to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure their rights under Article 8.1 of the Convention. As far as paragraph 2 of Article 8 was concerned, the European Court recalled that the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. However, these steps must be proportionate. As a general rule, the Chamber stated that

“in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others.⁴⁵

In the case of *Hatton and others v. the United Kingdom*, it is possible to make a sensible difference between the situation of the applicants and that of those in similar and previous cases concerning noise nuisances judged against the United Kingdom. As the Chamber of the European Court recalls in paragraph 94 of the judgment:

[...] The present applicants complain specifically about *night noise*, whereas the earlier applicants complained generally about aircraft noise.
[Italics added.]

This fact is not irrelevant for the Chamber of the European Court,⁴⁶ especially taking into consideration the test of proportionality to carry out under paragraph 2 of Article 8. Thus, regardless of the margin of national appreciation, the Government specific action to mitigate and alleviate noise nuisance⁴⁷ constituted “modest steps at improving the night noise climate (not) capable of constituting the ‘measures necessary’ to protect

45. Paragraph 97 of the judgment of 2 October 2001.

46. See paragraph 98 in fine of the judgment of 2 October 2001.

47. See paragraph 105 of the judgment of 2 October 2001.



the applicants' position". Of particular relevance for the Chamber of the European Court in judging that the Government had not struck a fair balance between the applicant's effective enjoyment of their rights to respect for their homes and their private and family lives and the United Kingdom's economic well-being was

[...] The absence of any serious attempt to evaluate the extent or impact of the interferences with the applicant's sleep patterns, and generally [...] the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights.⁴⁸

As will be shown below in Chapter Three, the extent of the margin of appreciation depends on a series of factors taken into consideration randomly by the European Court following criteria of judicial policy in the case under consideration. In the case of *Hatton and others v. the United Kingdom*, some of these factors had been alleged by the British authorities to support their request that a wide margin of appreciation be granted: the fact that it was not a direct attack carried out by national authorities but a positive obligation in order to assure the effective respect of such rights; the economic well-being of the country as the legitimate aim of the interference; the fact of having struck a fair balance between the general interest and the interest of individuals affected by the interference.⁴⁹

Thus, the British Government did everything in its power as evidenced by the fact that the interference in the applicants' rights was judged not only relevant but also sufficient by the Chamber of the European Court. Consequently, the British Government claimed that national authorities had considered the rights and interests of individuals, even though they reached the conclusion of having no option but the envisaged interference as the only way to pursue the legitimate aim.⁵⁰ However, it seems that only one factor would have been enough to conclude that the

48. Paragraph 106 of the judgment of 2 October 2001.

49. Paragraphs 82 to 90 of the judgment of 2 October 2001.

50. See for example in the field of planning policy, and as far the pacific enjoyment of possessions is concerned, the judgment of 25 September 1996 in *Buckley v. the United Kingdom*, paragraph 84. More recently, concerning the protection of environment: judgment of 2 October 2001 in the case of *Coster v. the United Kingdom*, paragraph 108, previously commented.



national authorities had not disposed of such a wide margin of appreciation as to justify *de facto* the British Government thesis on the inexistence of other less onerous means for the individuals' rights than the flights during the night to assure the well-being of the country. This factor is the nature of the right affected by the interference⁵¹ and its importance for the individual. What is relevant is not so much the objective gravity of the interference suffered by the individual but if, and to what extent, a right essential to him or her is affected by that interference. As was recalled in the European Court judgment in the case of *Pine Valley Developments Ltd and others v. Ireland*,

The existence of a violation is conceivable even in the absence of detriment.⁵²

Thus, for example, dealing with the freedom of expression of journalists, even a symbolic pecuniary sanction is tantamount to a breach of Article 10 as it could demotivate them from carrying on with their task of watch-dog, vital in a democratic society.⁵³

In the environmental interferences considered in the case of *Hatton and others v. the United Kingdom*, the relevant point for the Chamber of the European Court was for a fair balance to be struck, not only the right to respect of private and family life but also, and in particular, the applicants' right to sleep at night which, undoubtedly, is closely linked to their right to health.⁵⁴ The Chamber held by five votes to two that there had been a violation of Article 8 of the Convention. However, the case was referred to the Grand Chamber by request of the Government on 19 December 2001; and in its

51. Some examples apart from the environmental cases include: the right for a prisoner (or a detainee) to hold a written correspondence with his advocate (*Golder v. the United Kingdom*, judgment of 21 February 1975, and *Campbell v. the United Kingdom*, judgment of 25 March 1992); the relationship between a lawyer and his client outside the prison (*Niemietz v. Germany*, judgment of 16 December 1992); and freedom of expression for journalists informing on issues of general concern (*Jersild v. Denmark*, judgment of 23 September 1994).

52. Paragraph 53 of the judgment of 23 October 1991, in the case of *Pine Valley Developments Ltd and others v. Ireland*. See also, the *Groppera Radio AG and others v. Switzerland* judgment of 28 March 1990, paragraph 47.

53. See, for example, paragraph 31 of the judgment of 23 September 1994, in the case of *Jersild v. Denmark*.

54. See paragraph 105 of the Grand Chamber judgment in the same case of 8 July 2003.



judgment of 8 July 2003 the Grand Chamber held by twelve votes to five that there had been no violation of Article 8.

In its opinion – contrary to that of the Chamber – although the sleep disturbances relied on by the applicants had had obvious consequences for them and other persons in a similar situation, they did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in the case of *Dudgeon* to call for an especially narrow scope for the State’s margin of appreciation. Rather, the normal rule applicable to general policy decisions seemed to be pertinent here.⁵⁵ Thus, the Grand Chamber did not find, according to their wide margin of appreciation in the case, that the authorities failed to strike a fair balance between, on the one hand, the right of the individuals concerned to respect for their private life and home and, on the other, the conflicting interests of others and of the community as a whole. Accordingly, it concluded that there had been no violation of Article 8 of the Convention.⁵⁶

5. *The case of Öneriyildiz v. Turkey (judgments of 18 June 2002 (Chamber) and 30 November 2004 (Grand Chamber))*

The applicant lived with his family in a slum. As a consequence of a methane explosion occurring in 28 April 1993, nine members of his family died and many others were injured. He complained of a violation of Article 2 of the Convention by the Turkish Government as a result of the relevant authorities not informing him of the potential dangers for himself and his family living in the vicinity of a rubbish tip. The Court pointed out that,

[...] The information about the risk of a methane explosion cannot be deemed to have been directly available to the applicant. In truth, the ordinary citizen such as he could not have been expected to know the specific risks inherent in the process of methanogenesis and of a possible landslide.⁵⁷

55. Paragraph 123 of the judgment of 8 July 2003.

56. Paragraphs 129 and 130 of the judgment of 8 July 2003.

57. Paragraph 85 of the judgment of 18 June 2002.



The Court arrived at the conclusion that the administrative authorities knew or ought to have known that the inhabitants of certain slum areas of Ümraniye were faced with a real and immediate risk both to their physical integrity and their lives on account of the deficiencies of the municipal rubbish tip and added that:

The authorities failed [...] to comply with their duty to inform the inhabitants of the Kazm Karabekir area of those risks.⁵⁸

The Grand Chamber agreed with the Chamber when it said that it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in methanogenesis or of the necessary preventive measures, particularly as there were specific regulations on the matter. The Court likewise regarded it as established that various authorities had also been aware of those risks, at least by 27 May 1991, when they had been notified of the report of 7 May 1991.⁵⁹ Since the Turkish authorities had known or ought to have known that there was a real or immediate risk to persons living near the rubbish tip, they had had an obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals, especially as they themselves had set up the site and authorised its operation, which had given rise to the risk in question. However, Istanbul City Council had not only failed to take the necessary urgent measures but had also opposed the recommendation by the Prime Minister's Environment Office to bring the tip into line with the applicable standards. It had furthermore opposed the attempt in August 1992 by the mayor of Ümraniye to obtain a court order for the temporary closure of the waste-collection site.⁶⁰

As to the Government's argument that the applicant had acted illegally in settling by the rubbish tip, the Grand Chamber of the European Court observed that in spite of the statutory prohibitions in the field of town planning, the Turkish State's consistent policy on slum areas had

58. Paragraph 87 of the judgment of 18 June 2002.

59. Paragraph 101 of the judgment of 30 November 2004.

60. Paragraphs 102 and 103 of the judgment of 30 November 2004.



encouraged the integration of such areas into the urban environment and had thus acknowledged their existence and the way of life of the citizens who had gradually caused them to build up since 1960, whether of their own free will or simply as a result of that policy.⁶¹ From 1988 until the accident of 28 April 1993, the applicant and his close relatives had lived entirely undisturbed in their house, in the social and family environment they had created. It also appeared that the authorities had levied council tax on the applicant and other inhabitants of the Ümraniye slums and had provided them with public services, for which they were charged. Accordingly, the Government could not maintain that they were absolved of responsibility on account of the victims' negligence or lack of foresight.⁶² Furthermore, the Government had not shown that any measures had been taken to provide the slum inhabitants with information about the risks they were running. In any event, even if the Turkish authorities had respected the right to information, they would not have been absolved of responsibility in the absence of more practical measures to avoid the risks to the slum inhabitants' lives.⁶³ The Grand Chamber of the European Court accordingly held that there had been a violation of Article 2 in its substantive aspect in a similar way as the Chamber had done in its earlier judgment of 18 June 2002.

B. Recent judgments confirming a cohesive jurisprudence

1. The case of Moreno Gómez v. Spain (judgment of 16 November 2004)

The applicant complained of inaction on the part of the local authorities in Valencia, in particular the City Council, which had failed to put a stop to the night-time disturbances violating her right to respect for her home, as guaranteed by Article 8. The Court noted that the applicant lived in an area that, indisputably, was subject to night-time disturbances which clearly unsettled the applicant as she went about her daily life, particularly

61. Paragraph 104 of the judgment of 30 November 2004.

62. Paragraphs 105 and 106 of the judgment of 30 November 2004.

63. Paragraph 108 of the judgment of 30 November 2004.



at weekends.⁶⁴ In view of the volume of noise – at night and beyond permitted levels – and the fact that it continued over a number of years, the Court found that there had been a breach of the rights protected by Article 8 since the Valencia City Council tolerated, and even contributed to, the repeated flouting of the rules which it itself had established during the period concerned. As a result of the authorities’ failure to take action to deal with the night-time disturbances, Spain failed to discharge its positive obligation to guarantee the applicant’s right to respect for her home and her private life, in breach of Article 8 of the Convention, which consequently had been violated.⁶⁵ It should be noted that the right at stake was the right to sleep at night, understood as an essential part of the right to respect for private life.

2. *The case of Fadeyeva v. Russia (Decision of admissibility of 16 October 2003)*

In the case of *Fadeyeva v. Russia*, pending before the European Court at the time of writing, the applicant complained under Articles 2 and 3 of the Convention that the operation of the steel-plant in close proximity to her home in the city of Cherepovets endangered her life and health, and that the authorities’ failure to resettle her in a safer place was in breach of the above provisions. Nevertheless, since the applicant did not face any “real and immediate risk” either to her physical integrity or her life raising any issue under Article 2, nor had she presented medical records or other *prima facie* evidence showing that the sole fact of her living close to the plant could raise an issue under Article 3 of the Convention, the European Court considered it more appropriate to deal with the complaints in the context of Article 8 of the Convention, and on 16 October 2003 it unanimously declared admissible the application under this article. Here again is an example of the relevance of the right at stake and its importance for the individual.

64. Paragraph 58 of the judgment of 16 November 2004.

65. Paragraphs 60 and 61 of the judgment of 16 November 2004.



III. Pending: an autonomous collective right to environment

One must be cautious when referring to the right to environment. Often, rather than a right, it may cover merely expectations or interests, regardless of how rewarding they may be. This rather cautious approach seems far more satisfactory especially since the international community has not yet identified, at a practical level, the threshold for environmental degradation as a breach of the human right to environment.⁶⁶ This is particularly evident in the European Court's environmental case-law concerning procedural rights (such as those guaranteed in Articles 6 and 13 of the European Convention). As far as the environment is concerned, it seems to be rather difficult for individuals to present themselves before this European body as victims of a breach of such conventional provisions unless they give proof of sharing a right to, rather than an interest in, a clean, free-pollution environment. Some examples are especially pertinent in this regard: the judgments of the European Court of 26 August 1997 and 6 April 2000, in the cases of *Balmer-Schafroth and others* and *Athanasoglou and others*, respectively, both versus Switzerland; and, more recently, the cases of *Taskin v. Turkey*, *Gorraiz Lizarraga v. Spain* and *Fotopoulou v. Greece* (judgments of 10 November 2004 for the first two, and 18 November 2004 for the last).

A. *The case of Balmer-Schafroth and others v. Switzerland (judgment of 26 August 1997)*

The applicants lived in the villages of Wilteroltigen, Deltigen and Gümnenen, situated in containment zone no. 1 within a radius of between four and five kilometres from the nuclear power station at Mühleberg (Canton of Berne). They complained of a violation of Article 6.1 of the European Convention in that they had not had access to a "tribunal" within the meaning of that provision (due to a Federal Council's decision)

66. Sands, P., *Principles of International Environmental Law*, Vol. I. Manchester University Press, 1995, Manchester, p. 222.



to object to the extension of the operating licence in a nuclear power station which had been applied for by Bernische Kraftwerke AG, the company which had operated it since 1971. In paragraph 40 of the judgment the European Court dismisses any attempt of *actio popularis* concerning environmental risks or harms for individuals:

the applicants [...] failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote. Article 6.1 is accordingly not applicable in the instant case.

B. The case of Athanassoglou and others v. Switzerland (judgment of 6 April 2000)

The applicants lived in the villages of Villigen, Würenlingen, Böttstein and Kleindöttingen, situated in zone 1 in the vicinity of unit II of a nuclear power plant in Beznau (Canton of Aargau), situated five kilometres from the German border and consisted of a dual-loop pressurised water reactor. Before the European Court the applicants held that their complaints in the present case and the nature of the decision which they contested – the granting of the extension of the operating licence of a nuclear power plant – were identical to the complaints and the nature of the contested decision in the case of *Balmer-Schafroth and others v. Switzerland*. In the present case, however, so they maintained, Article 6.1 was applicable, since the decision to grant Nordostschweizerische Kraftwerke AG (“NOK”) an operating licence for the Beznau II nuclear power plant effectively “determined” their civil rights to the protection of their property and



physical integrity. The “civil” character of the rights to life and physical integrity followed, in their opinion, from the Swiss legal order, namely, the Civil Code and the Law of Obligations. In the European Court’s view, the applicants appeared to accept that what they were alleging was not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants. Thus, many of the grounds they had relied on related to safety, environmental and technical features inherent in the use of nuclear energy, and in their reply to the questions put by the Court, the applicants had linked the danger to their physical integrity to the alleged fact that

every atomic power station releases radiation during normal operation ...
and thus puts the health of human beings at risk.

Consequently, in the opinion of the European Court, the applicants would be seeking

to derive from Article 6 § 1 of the Convention a remedy to contest the very principle of the use of nuclear energy, or at the least a means for transferring from the government to the courts the responsibility for taking, on the basis of the technical evidence, the ultimate decision on the operation of individual nuclear power stations.⁶⁷

Be this as it may, the Court did not hesitate to state that:

[...] How best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6 § 1 cannot be read as dictating any one scheme rather than another. What Article 6 § 1 requires is that individuals be granted access to a court whenever they have an arguable claim that there has been an unlawful interference with the exercise of one of their (civil) rights recognised under domestic law [...] It is not for the Court to examine the hypothetical question whether, if the applicants had been able to demonstrate a serious, specific and imminent danger in their personal regard as a result of the operation of the Beznau II power plant, the Civil Code remedies would

67. Paragraph 53 of the judgment of 6 April 2000.



have been sufficient to satisfy these requirements of Article 6 § 1, as the Government contended in the context of their preliminary objection [...]⁶⁸

C. *The case of Kyrtatos v. Greece (judgment of 22 May 2003)*

Yet more evident is the necessity of adopting a more cautious approach to the false claim that the European Court will be recognising a human right to environment under the Convention after the analysis of its judgment of 22 May 2003 in the case of *Kyrtatos v. Greece*. The applicants complained, not only under Article 6.1 but also under Article 8 of the Convention, about the failure of the authorities to comply with two decisions of the Supreme Administrative Court annulling two permits for the construction of buildings near their property. As far as this latter Convention provision was concerned, the applicants contended that urban development in the south-eastern part of Tinos had led to the destruction of their physical environment and had affected their life. They relied on Article 8 of the Convention.

On hearing of the applicants' complaint, the European Court distinguished two distinct aspects. First, the applicants complained that urban development had destroyed the swamp which was adjacent to their property and that the area where their home was had lost all of its scenic beauty. Second, they complained about the environmental pollution caused by the noises and night-lights emanating from the activities of the firms operating in the area.⁶⁹ With regard to the first aspect of the applicants' complaint, the European Court asserted that

Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.⁷⁰

Nevertheless, it also reiterated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their

68. Paragraph 54 of the judgment of 6 April 2000.

69. Paragraph 51 of the judgment of 22 May 2003.

70. Paragraph 52 of the judgment of 22 May 2003.



homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. However, for this to be so, environmental pollution must have adversely affected one of the rights safeguarded by paragraph 1 of Article 8. That is, there must exist a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment.⁷¹

As regards the second aspect of the complaint, the Court was of the opinion that the disturbances in the applicants' neighbourhood due to the urban development of the area (noises, night-lights, etc.) had not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8. There had not been, consequently, a lack of respect for the applicants' private and family life.

D. The case of Taskin v. Turkey (judgment of 10 November 2004)

The applicants, ten Turkish nationals living in the district of Bergama, complained of a limited company having been granted a permit to operate a goldmine using a cyanidation process. Before administrative courts, the applicants had successfully got this permit set aside on the grounds of health risks and the risks of pollution of the underlying aquifer and destruction of the local ecosystem. The judicial decisions, however, were not applied by administrative authorities which, particularly, followed direct instructions by the Ministry of the Environment and Forestry. The applicants, consequently, alleged a violation of their rights under the Convention relying on Articles 2, 8, 6.1 and 13.

As far Article 8 was concerned the European Court considered that the administrative authorities' refusal to comply with the judicial decisions protecting the applicants' right to respect for their private and family life had deprived the procedural safeguards protecting the applicants of all useful effect. Consequently, Turkey had failed to discharge its obligation to guarantee the applicants' rights; and the Court unanimously declared there had been a violation of this article of the Convention.⁷²

71. Paragraph 52 of the judgment of 22 May 2003.



Concerning Article 6.1, noting that the judicial decisions had not been enforced within the time prescribed even though their suspensive effects before it became final, the European Court considered that the Turkish authorities had deprived this provision of all useful effect. Thus, unanimously it also held there had been a violation of the Convention in this regard⁷³ and considered it unnecessary to examine separately the applicants' complaints under Articles 2 and 13 of the Convention.

Paragraphs 131 to 133 should be noted, where the European Court dealt with the application of Article 6 to the case. Contrary to the Turkish Government's arguments, the European Court said that the facts under consideration were a real and serious threat to a right guaranteed to the applicants under Article 56 of the Turkish Constitution (right to live in a healthy and balanced environment). The European Court emphasised the fact that the applicants were not complaining of general and undetermined risks for the environment and for the health of people living in the villages nearby the gold-mine. On the contrary, they were invoking real and direct risks for their physical integrity as a consequence of the cyanide leaching process for gold extraction, arguing on the basis of official studies and reports. Clearly, the case was different from others previously dealt with by the European Court, namely the cases of *Balmer-Schafroth and others v. Switzerland*⁷⁴ and *Athanassoglou and others v. Switzerland*,⁷⁵ being, rather, similar to the case of *Gorraiz Lizarraga and others v. Spain*.

E. The case of Gorraiz Lizarraga and others v. Spain (judgment of 10 November 2004)

The applicants were five Spanish nationals who lived in Itoiz (Spain) and an association, Coordinadora de Itoiz, of which they are members. They had brought proceedings against plans to build a dam in Itoiz (province of Navarre) that would result in three nature reserves and a number

72. Paragraphs 123, 125 and 126 of the judgment of 10 November 2004.

73. Paragraphs 135, 136 and 137 of the judgment of 10 November 2004.

74. Judgment of 26 August 1997.

75. Judgment of 6 April 2000.



of small villages, including Itoiz, being flooded. Although the applicants obtained from the Supreme Court a reduction in the scale of the projected dam, on 17 June 1996 the Parliament of the Autonomous Community of Navarre passed Law No. 9/1996 on natural sites in Navarre, which allowed work on the dam to continue. The Constitutional Court, asked to rule on a preliminary question by the applicant association as to the constitutionality of certain provisions of this Law, on 14 March 2000 held it to be in conformity with the constitution.

Relying on Article 6.1 of the Convention, the applicants submitted that they had not had a fair hearing in that they had been prevented from taking part in the proceedings concerning the reference of the preliminary question, whereas the State and State Counsel's Office had been able to submit observations to the Constitutional Court. The five individuals among the applicants also argued that the Autonomous Community law had been enacted with a view to preventing execution of the Supreme Court's judgment reducing the scale of the projected dam, thereby interfering with their right to respect for their private and family life and for their home as guaranteed by Article 8 of the Convention, and with their right to the peaceful enjoyment of their possessions as guaranteed by Article 1 of Protocol No. 1.

On the alleged breach of the principle of equality of arms, the Court observed that all the applicants' pleadings alleging that the Autonomous Community law was unconstitutional had been forwarded to the Constitutional Court, which had formally added them to the case file before giving its ruling. It further appeared that the applicants had not at any time applied to the court to take part in the proceedings. Lastly, the court had fully addressed the arguments they had submitted throughout the proceedings. Thus, the Court held unanimously that there had been no violation of Article 6.1.⁷⁶

On the alleged interference by the legislature with the outcome of the dispute, the Court considered that although the enactment of the Auton-

76. Paragraph 72 of the judgment of 27 April 2004.



omous Community law had indisputably been unsupportive of the applicants' submissions, it could not be said to have been intended to circumvent the principle of the rule of law. The Court therefore held unanimously that there had been no violation of Article 6.1 under that head.⁷⁷

The Court considered it unnecessary to examine separately the complaints under Article 8 and Article 1 of Protocol No. 1.

As happened in the judgment in the case of *Taskin v. Turkey*, of particular relevance are the paragraphs of the judgment in the case of *Gorraiz Lizarraga and others v. Spain* where the European Court dealt with the circumstances under which an individual, or an association on behalf of a group of individuals, can bring applications concerning the environment as having some protection under the Convention, where the environmental interference is real and direct. See in this respect paragraphs 37 and 38, accepting that an environmental association acting on behalf of its members may be a victim of a violation; and paragraphs 44 to 47, particularly 46, concerning the civil nature of the applicants' complaint – a real and specific danger for their possessions and way of living because of the dam project – wherein Article 6 of the Convention is judged to be applicable to the case.

F. The case of Fotopoulou v. Greece (judgment of 18 November 2004)

The applicant, a Greek national, owned a house in Karavostasi on the island of Folegandros (Greece). In 1988 a presidential decree designated Karavostasi as a "traditional village" and imposed specific conditions and building restrictions in order to preserve its character. Neighbours of the applicant began building, without planning permission, a 2½-metre-high wall on 80-centimetre-high foundations. The applicant, whose view of the sea was restricted by this wall, complained about the works to the local police. On 30 March 1993 the commission for the investigation of illegal construction decided that the wall should be demolished, and in May 1994 the governor of the Cyclades region granted a sum of money for the

77. Judgment of 27 April 2004 in the case of *Gorraiz Lizarraga and others v. Spain*.



demolition work. On 22 October 1996 the Minister of the Environment and Regional Planning dismissed an appeal by Mrs Fotopoulou's neighbours and noted that the demolition decision was final. However, the administrative authorities did not demolish this wall. Thus, the applicant complained of an infringement of her right to peaceful enjoyment of her possessions, and of the lack of a remedy whereby she could challenge the inactivity of the administrative authorities, relying on Article 1 of Protocol No. 1 to the Convention and Article 13.

The European Court noted that the demolition decision taken by the commission for the investigation of illegal construction had become final with the decision of the Minister of the Environment. The administrative authorities had therefore been under an obligation to demolish the wall, but had made no attempt to do so.⁷⁸ Therefore, the European Court held unanimously that there had been a violation of Article 1 of Protocol No. 1 to the Convention.⁷⁹

As to the remedies available to the applicant in the face of the administrative authorities' inertia, the Court noted that the Government had referred only to actions that could be brought against the applicant's neighbours, not against the defaulting authorities. Even supposing that the outcome of such remedies might have been favourable to the applicant, they could not be regarded as effective for the purposes of the Convention because to set them in motion the applicant would have had to undertake fresh proceedings against the administrative authorities in question. Consequently, in the absence of remedies whereby the applicant could obtain demolition of the wall in question, the Court held unanimously that there had been a violation of Article 13 of the Convention.⁸⁰

In the case of *Fotopoulou v. Greece* one must pay attention to the application of Article 41 of the Convention.⁸¹ The applicant claimed 19823 euros on account of the loss of value of her possessions since, due to the

78. Paragraph 37 of the judgment of 18 November 2004.

79. Paragraph 38 of the judgment of 18 November 2004.

80. Paragraphs 45 and 46 of the judgment of 18 November 2004.

81. Paragraphs 48 and 51 of the judgment of 18 November 2004.



wall, she could no longer enjoy the sight of the sea. The Greek Government made no submissions on this point; and the whole amount was awarded to the applicant by the European Court.

Thus, as already stressed, it seems convenient to share a cautious view when referring to the right to environment at international level whose full content appears not clearly established. This makes it especially difficult to distinguish the parts belonging to a truly fundamental right from other parts which are mere interests too abstract to be properly enforced.



Chapter 3.

Activism and self-restraint in the Court's approach to the environment

I. Margin of appreciation and positive obligations of states

It was Paul Mahoney who referred to judicial activism and judicial self-restraint in the European Court as both sides of the same coin.⁸² In my view, it would be more accurate to describe it graphically as a moving pendulum in action. On the one hand the doctrine of margin of appreciation pushes the Strasbourg judges towards a judicial self-restraint, as the European Court stated in its judgment of 2 October 2001 in the case of *Coster and others v. the United Kingdom*.⁸³ On the other hand, there is a force pulling this pendulum towards a judicial activism in favour of individuals. This is due to the fact that the Convention is a living instrument of open textured language – containing standards instead of detailed rules – to be interpreted in the context of the present-day society.⁸⁴

82. Mahoney, P: "Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin", in *Human Rights Law Journal*, 1990, Vol. 11, No. 1-2, pp. 57-88. See also Greer, S., *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Human rights files No. 17, Council of Europe Publishing, 2000.

83. Paragraphs 104 and 105 of the judgment. From the same date and with complaints very similar in the facts are four more judgments in the cases of *Beard*, *Chapman*, *Lee* and *Jane Smith v. the United Kingdom*.



Thus, rather than a principle derived from the Convention itself, the margin of appreciation doctrine should be better seen as a voluntary concession made by the European Court in the exercise of judicial restraint.⁸⁵ Why the European Court would concede to the Contracting States in this terrain is, in my opinion, closely linked to the fact that under the Convention scheme of human rights protection there is a shared responsibility for enforcement of rights and freedoms by Contracting States and the European Court. In this way, sometimes the facts of the case involve a problem or situation which requires a European approach and consequently the supervising control by the European Court is strict. In these cases the margin of appreciation is limited and irrelevant as the Court looks to standardise rather than harmonise the Contracting States' approaches on that particular point.⁸⁶ In many other cases, on the contrary, the European Court is respectful of national traditions and permits states a wide margin of appreciation to tackle the enforcement of rights and freedoms guaranteed in the Convention. In this way, the European Court would look for harmonisation instead of standardisation.⁸⁷

The most surprising aspect of this explanation is that the European Court seems not to be guided by any internal logic but rather by an option of judicial policy, provoking in some cases strong reactions by authors and commentators.⁸⁸ Despite these critical comments, this dualistic approach has served the Court well and it has been invaluable for the development

84. See, among many other examples, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161

85. Mahoney, P., "The doctrine of the margin of appreciation under the European Convention on Human Rights: Its legitimacy in theory and application in practice", in *Human Rights Law Journal*, 1998, Vol. 19, No. 1, p. 4.

86. See, for example, the importance given to the role of the press in a democratic society, as a watch-dog informing on issues of general concern, which permit a narrow margin of appreciation to States when interfering in the freedom of expression of journalists.

87. See for instance the wide margin of appreciation given to national authorities to regulate affairs concerning public morals, since there is not an unique European conception of what is morally acceptable, and to deal with controversial issues, such as changes in the civil status of transsexuals.

88. Cohen-Jonathan, G., "Conclusions générales", in *Quelle Europe pour les droits de l'homme?*, Bruylant, Brussels, 1996, p. 485.



of a rich and constructive approach to the protection of a human right to environment under the Convention.

The doctrine of the margin of appreciation is consistently applied in the supervisory work of the European Court regarding the commitments of the Contracting States.⁸⁹ Thus, for the interferences allowed in Articles 8 to 11 of the European Convention to be justified, they must be “in accordance with the law”, pursue a legitimate aim or aims and be “necessary in a democratic society”. The twin concepts of *proportionality* and *a fair balance between the interests* have been used by the European Court in many judgments as a means of assessing the margin of appreciation which Contracting States have to deal with Convention obligations and to determine whether or not there has been a breach of one or more of the rights set out in the Convention. The test of proportionality aims to verify whether two requirements have been accomplished: firstly, the means chosen by the national authorities must be proportionate to the legitimate aim pursued; secondly, the respect of a fair balance between the different competing interests at stake should be assured. In practice, this second requirement implies two things: on the one hand, the requirement of not imposing restrictions (in those articles which permit them) other than those which are strictly necessary; on the other hand, there must not exist other means, involving less severe threats to applicants’ rights, to achieve the legitimate aims pursued by means of the interference. Otherwise, were such less grievous means to exist and not be used, the European Court would have to qualify that interference as not proportionate and, consequently, as a measure not necessary in a democratic society.

That is the logic followed in the Commission’s earlier Reports and Court’s judgments on the progressive configuration of a general interest in safeguarding good environmental conditions as legitimate restrictions

89. On the origins and early judicial construction of the margin of appreciation doctrine see, *inter alia*, Macdonald, R. St-J., “The margin of appreciation”, in *The European system for the protection of human rights*, Macdonald, R. St-J., Matscher, F. and Petzold, H., Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 83-124; Picheral, C. and Olinga, A.-D., “La théorie de la marge d’appréciation dans la jurisprudence récente de la Cour européenne des Droits de l’Homme”, in *Revue trimestrielle des droits de l’homme*, 1995, No. 24, pp. 567-604. More recently, Greer, S., *op. cit.*



on some Convention rights, which made it possible later for the European Court to consider some environmental interferences as not justified under paragraph 2 of Article 8 of the European Convention. This was a consequence of having distinguished between two levels of proportionality. In the first one, proportionality lies between the legitimate aim or the interference and the means by which this is carried out. At this stage, the national margin of appreciation is relevant in the European supervisory mechanism, as is proved by the mere requirement of “relevant” reasons for the interference.

In the second level of proportionality – specifically described as “a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”⁹⁰ – under scrutiny is the contrast between the general interest and the harm suffered by the individual from the point of view of his fundamental rights. This time relevant reasons are not enough for national authorities to justify their interference in Convention rights and freedoms. They will need to provide “sufficient” reasons, which would imply, in practice, the lack of other less grievous means by which the legitimate aim could be attained in the present case.

The key seems to be how to predict in a consistent way what reasons provided by national authorities should be “relevant” or “sufficient”. According to European Court’s environmental case law, whenever an intimate aspect of individuals’ rights is at stake (such, for example, intimacy within private life), the reasons must be particularly convincing and a rather narrow margin of appreciation is left to Contracting States in the matter. In this way, the European Court can easily develop at the same time, both “harmonising” and “standardising” logic according to its own judicial policy options in managing the obligations assumed by forty-six states as dissimilar as San Marino and Russia. When applying the principle of proportionality,⁹¹ the European Court usually asks itself about the extent of the margin of appreciation that, in the concrete circumstances of

90. Paragraph 89 of the European Court’s judgment of 26 June 1989, case of *Soering v. the United Kingdom*.



the case, should be permitted to the state concerned in order to merit the necessity of a restriction in the exercise of European Convention rights. In general, the greater the margin of national appreciation is, the easier it will be for national authorities to justify the non-existence of other means having a less severe impact on individuals' rights – leading consequently to judgments of proportionality by the European Court.

In any case, the margin of national appreciation is by no means limitless.⁹² Its extent depends on a series of factors which can be present or absent in any particular case and which, furthermore, vary in the importance that such circumstances may have for the European Court in that case. It is possible to distinguish between these factors, some of them inducing the European Court to admit a wide margin of appreciation whereas others would seem to make it assume a narrow margin. The former would include the positive nature of the obligation on the defendant state, the fair balance to be struck between the general interest and the interest of the individual suffering the interference in his rights, the differing material and formal peculiarities of the judicial systems of the Contracting States, the legitimate aim justifying the interference and, finally, the context of the case. Examples of the last are the existence or lack of European consensus in the matter under discussion, the teleological interpretation of the Convention, the importance for the individuals of the right affected by the interference and the model of democratic society considered under the Convention. These factors are combined randomly by the European Court in every case judged, consequently, not always producing the same result on the grounds of a judicial policy option.

91. For a general approach to the application of this principle in the reasoning of the European Bodies, see *inter alia*, Eissen, M.-A., "The principle of proportionality in the case-law of the European Court of Human Rights", in *The European System for the Protection of Human Rights*, *op. cit.*, pp. 125-146; Martens, P., "L'irrésistible ascension du principe de proportionnalité", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu (I)*. Bruylant, Brussels, 1992, pp. 49-68.

92. See, e.g., the European Court's judgment of 7 December 1976 in the case of *Handyside v. the United Kingdom*, paragraph 48; judgment of 24 May 1988 in the case of *Müller v. Switzerland*, paragraph 35; and judgment of 29 October 1992, paragraph 68, in the case of *Open Door and Dublin Well Woman v. Ireland*.



II. National discretion and European supervision

Some questions arise in connection with the environmental case-law of the European Court: on the one hand, environmental considerations constitute a general interest which could justify interferences in the exercise of certain rights and freedoms guaranteed in the system of the European Convention; on the other hand, situations arise where the rights and freedoms guaranteed in the Convention have been breached because of bad environmental conditions for individuals.

A. The environment as a general interest justifying interferences in the exercise of some Convention rights

Regarding the first indirect way of protecting the environment, the European Court has repeatedly stated that on the first level of proportionality – specifically called “a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights” – a narrow scrutiny is made between the general interest and the harm suffered by the individual from the point of view of his fundamental rights. Nevertheless, here relevant reasons seem to be enough for national authorities to justify their interference in Convention rights and freedoms. They will not need to provide “sufficient” reasons, which would imply, in practice, the lack of other less grievous means by which the legitimate aim could be reached in the case in question. The relevance of the nature of the right and its importance for the individual in considering the respect by national authorities of a fair balance between the different interests at stake would be, consequently, not so pressing for the European Court with respect to this second indirect way compared to the first one already analysed. It may be thought of as a factor that imposes restrictions on Article 8 of the Convention on Article 1 of Protocol No. 1 and, exceptionally, on Article 9 of the Convention.



1. *Article 8 of the Convention*

To confirm the validity of the previous assertion, one has to focus, firstly, on complaints under Article 8 of the European Convention. In the case of *Buckley v. the United Kingdom*, judgment of 26 August 1996, the applicant was a British citizen of Gypsy origin. She lived with her three children in caravans parked on land owned by her off Meadow Drove, Willingham, South Cambridgeshire, England. In 1988 the applicant's sister and brother-in-law acquired a one-acre site (approximately 4 000 square metres) off Meadow Drove, Willingham, and were granted personal, temporary planning permission for one living unit, comprising two caravans. On 4 December 1989 the applicant applied retrospectively to South Cambridgeshire District Council for planning permission for the three caravans on her site. She was refused on 8 March 1990 on the grounds that, among other reasons, the planned use of the land would detract from the rural and open quality of the landscape, contrary to the aim of the local development plan which was to protect the countryside from all but essential development⁹³.

The European Court has already had occasion to note that town and country planning schemes involve the exercise of discretionary judgment in the implementation of policies adopted in the interest of the community. Accordingly, this body affirmed its reluctance to substitute its own view of what would be the best policy in the planning sphere or the most appropriate individual measure in planning cases. In its view, due to their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In 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.⁹⁴

93. See paragraph 14 of the judgment of 26 August 1996.

94. Paragraph 75 of the judgment of 26 August 1996.



Although the European Court seemed to concur with its previous similar case-law, particularly, with its judgment of 23 October 1986 in *Gillow v. the United Kingdom*,⁹⁵ what the European Court did was the contrary to what was expected: it declared itself satisfied that the reasons relied on by the responsible planning authorities were relevant and sufficient, for the purposes of Article 8, to justify the resulting interference with the exercise by the applicant of her right to respect for her home. In particular, the means employed to achieve the legitimate aims pursued could not be regarded as disproportionate.⁹⁶ Consequently, the European Court held, by six votes to three, that there had been no violation of Article 8 of the Convention.

The approach followed in the *Buckley* case seems to have been confirmed with the judgment in the *Coster v. the United Kingdom* case, where a wide margin of appreciation for the British Government was recognised on the grounds of the complexity of planning issues, together with the fact that the right at stake, under the general framework of “respect of home” in Article 8, was the right of the applicants to park a caravan wherever they chose, environmental sites included.

2. Article 1 of Protocol No. 1

In the case of *Posti and Rahko v. Finland*, judgment of 24 September 2002, the applicants were fishermen operating in the coastal region of the Gulf of Bothnia on the basis of leases contracted with the state in 1989 and renewed in 1995 (for a further period ending in 1999) as well as in 2000 (for the period 2000-2004). By virtue of section 116, subsection 3, of the 1982 Fishing Act, the Ministry of Agriculture and Forestry might restrict fishing, *inter alia*, if this was deemed necessary in order to safeguard future fish stocks.

By Decree No. 231/1994, which entered into force on 1 April 1994 (“the 1994 Decree”), the Ministry prohibited salmon fishing with certain equip-

95. Paragraph 76 of the judgment of 26 August 1996.

96. Paragraph 84 of the judgment of 26 August 1996.



ment during certain periods in the main basin of the Baltic Sea, in the Gulf of Bothnia and in the Simojoki river. The restrictions concerned the fishing of salmon between certain latitudes in the open sea and in coastal waters as well as in certain rivers and their estuaries, and extended to the fishing waters which the applicants were leasing from the state. The Decree was later repealed and replaced by Decree No. 258/1996 (“the 1996 Decree”). In so far as the restriction concerned the applicants, it was maintained on substantially similar terms by Decree no. 266/1998, (“the 1998 Decree”).

Before the European Court, the applicants complained that the fishing restrictions imposed by the state had violated their right to the peaceful enjoyment of their possessions, which allegedly included a right to fish certain coastal waters of the Gulf of Bothnia. The applicants further alleged that they had been discriminated against in comparison with fishermen operating in the open sea of the Gulf. They invoked Article 1 of Protocol No. 1 both in isolation and in conjunction with Article 14 of the Convention. The European Court found acceptable the reasons invoked by the Government and the Ombudsman, and considered that this interference with the applicants’ property rights was justified, being lawful and pursuing, by means proportionate to that aim, the legitimate general interest of protecting the fish stocks. Accordingly, there was no appearance of any violation of Article 1 of Protocol No. 1 applied in isolation.⁹⁷

In summary, when assessing restrictions in some Convention rights – mainly, but not only, those in Article 8 of the Convention and in Article 1 of Protocol No. 1 – aimed at preserving the general interest, the European Court seems to differ from the approach used when considering a right to environment as implicit in those guaranteed in the European Convention. The relevance of the nature of the right, and its importance for the individual in evaluating the respect by national authorities of a fair balance between the different interests at stake, would appear not so important for the European Court.

97. Paragraphs 77 and 78 of the judgment of 24 September 2002.



3. *Exceptionally, Article 9 of the Convention: the case of Vergos v. Greece (judgment of 24 June 2004)*

The applicant was a member of a religious community “True Greek Believers” who wished to build a temple in stone on land belonging to him. When he was not granted the necessary local permit according to the land planning regulations, the applicant claimed before the European Court to be victim of a violation under Article 9 of the European Convention.

The European Court considered the case, not as an example of a restriction by national authorities on freedom of religion, but as a matter of the compatibility of the applicant's wish to erect a stone church with local land-planning regulations.⁹⁸ Having recognised that member states possess a wide margin of appreciation in such matters, the European Court did not find the restrictions contrary to the Convention, inasmuch as there had been a fair balance struck between the general public interest in rational planning of land-use and the applicant's right to demonstrate his religious beliefs.⁹⁹

B. The second indirect way of protecting a right to environment

At the second level of indirect protection of environment it is worth noting the reasons given by the European Court for declaring that there had been a breach of Article 8 in *Hatton v. the United Kingdom* and the way this interpretation contrasts with its previous judgments in *Powell and Rayner v. the United Kingdom* and *López Ostra v. Spain*. As observed above, in the environmental case-law of the European Court, the extent of the margin of appreciation essentially depends on the nature of the right affected by the environmental interference and its importance for the applicant. Both factors are in continuous interaction in the test of proportionality, implicit in the clause “necessary in a democratic society” (second paragraph of

98. Paragraph 39 of the judgment of 24 June 2004.

99. Paragraphs 40 to 42 of the judgment of 24 June 2004.



Article 8) – in short, in evaluating the requirement to strike a fair balance between the competing interests.

Thus, if the right at stake is one of the core rights and freedoms in the Convention (e.g. some intimate aspect of a person or his physical or mental health under Article 8) and not merely the most generic aspect of those (in Article 8, e. g., the right to respect of the home and well-being of a person), the European Court would proceed in the following manner when faced with an environmental interference: firstly, it will grant a narrow margin of appreciation for the national authorities in the “particular circumstances of the case”. Consequently, secondly, it will carry out a strict review of the way these authorities have complied with their positive obligations under Article 8 of the Convention, in order to ascertain whether a fair balance has been struck.

To do this, the European Court will require that the alleged interference be based not only on relevant reasons (e.g. the economic well-being of the country) but on sufficient ones (reasons more precise and justified). For the European Court, these reasons will only be sufficient if there are no other possible interferences which would be less grievous from the human rights point of view. In practice, in these cases a fair balance implies the particular interest of the individual’s rights prevailing over the general interests of the community as a whole. On the contrary, an environmental interference in a right protected by the Convention but not considered of essential importance for the individual implies a greater margin of discretion for the Contracting States, which are better placed than an international tribunal to judge the most appropriate means of achieving a legitimate general interest in a democratic society. It will be easy for the Government in question to convince the European Court that the reasons for the interference in the individual’s rights are relevant and pertinent and thus the Court will judge that a fair balance has been struck. In these cases, such a fair balance means the general interest of the community as a whole prevailing over the particular interest of the individual.

The theory presented above concerning the relevance of the right at stake, and its importance for individuals in the European Court’s task of



supervising the obligations assumed by Contracting States under the Convention, is based upon a premise: the first two cases decided by the European Court on issues where environmental pollution interfered with an individual's rights guaranteed in the Convention (although they have in common the question of the positive obligations on the national authorities) differed in the nature of the right and its importance for the applicants. Hence, the "well-being" in *Powell and Rayner v. the United Kingdom* and the "health" in *López Ostra v. Spain*.

The cases following these judgments confirm the truth of this statement. In *Guerra and others v. Italy*, the information required by the applicants from the competent national authorities dealt with their right to respect for their home. However, it must be remembered that the anxiety suffered by the applicants did not originate in their fear of a drop in the prices of their homes,¹⁰⁰ but rather in their uncertainty about what best to do in the event of an accident at the chemical factory, since they considered that their health and even lives were in danger. The national authorities did not provide the required information and a fair balance was not struck in the particular circumstances of the case.

One would have expected a similar conclusion to have been reached by the European Court in its judgment in the case of *McGinley and Egan v. the United Kingdom*. The only grounds one can identify for the Court to consider that the British authorities had a wide margin of appreciation, and that in the circumstances of the case a fair balance had been struck, are: *i.* contrary to the case of *Guerra and others v. Italy*, the existence of any relevant document concerning the applicants in the case of *McGinley and Egan* was a matter of speculation and disputed by the Government;¹⁰¹ and, *ii.* in any case, Rule 6 of the Pensions Appeal Tribunals (Scotland) Rules would have enabled the applicants to have requested documents concerning the eventual risks of their exposure to radiation, and they did not try this procedure.

100. An argument used by the Grand Chamber in its judgment of 8 July 2003 in the case of *Hatton v. the United Kingdom*, paragraph 127.

101. Paragraph 98 of the judgment of 9 June 1998.



Apart from the judgment in this case, we must also mention the European Court's judgments in *Hatton and others v. the United Kingdom* (2 October 2001, Chamber, and 8 July 2003, Grand Chamber). In the Chamber judgment of 2 October 2001, the right at stake was not only the applicants' right to have their homes respected, free from noise pollution – as happened in *Powell and Rayner* – but their essential right to rest and sleep at night, as an integral aspect of privacy under Article 8.¹⁰² The reasoning followed by the European Court was, from this premise, fully predictable: no matter what steps were taken by British authorities in order to mitigate the effects of the noise interferences in the applicants' rights, they did not strike a fair balance between their particular interests and that of the nation's well-being in the form of night-flying aircraft.

According to the theories put forward in these pages, the judgment of the Grand Chamber of 8 July 2003 in the case of *Hatton v. the United Kingdom* can be understood, although the author does not agree with it. In a forty-eight-page judgment, merely one paragraph would require attention, paragraph 123. Here the Grand Chamber states:

The Court notes that the introduction of the 1993 Scheme for night flights was a general measure not specifically addressed to the applicants in this case, although it had obvious consequences for them and other persons in a similar situation. *However, the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in Dudgeon to call for an especially narrow scope for the State's margin of appreciation* (see *Dudgeon*, cited above, p. 21, § 52, and paragraph 102 above). [Italics added]

In my opinion, this is the key point of the judgment by the Grand Chamber in *Hatton and others v. the United Kingdom*: this time the European Court does not consider the right at stake as an aspect of the intimacy that forms the nucleus of the right to privacy nor as the respect of home. The applicants' health is not apparently affected in an objective way, as the applicants are just "more sensitive to noise" than other people,

102. As is recalled in paragraph 105 of the Grand Chamber judgment of 8 July 2003.



as can be deduced from paragraph 118 of the judgment.¹⁰³ From this point, the consequences for the European Court are predictable. This approach seems to have been confirmed in the judgment of 16 November 2004 in the case of *Moreno Gómez v. Spain* where the importance for the applicant of the right at stake – the right to sleep understood as lying at the heart of the right to respect for private life – and its relevance in judging that there had been a violation of Article 8 of the Convention has been shown earlier.

III. The environmental cross-dimension of the European Convention on Human Rights

In connection with the environmental case-law of the European Court a question arises with respect to the protection of a right to receive environmental information, not protected as such in Article 10 of the European Convention,¹⁰⁴ which must be seen as an example of a *cross-dimension* as explained below. In this regard, it is worthwhile considering the European Court's approach in the case of *Öneryildiz v. Turkey* compared with its previous judgments in the cases of *Guerra and others v. Italy* and *McGinley and Egan v. the United Kingdom*.

In the case of *Guerra and others v. Italy*, the European Commission, in its report of 25 June 1996, considered the case under Article 10 of the Convention and decided that that provision was applicable and had been breached. The European Court did not subscribe to that view, stating that in cases concerning restrictions on freedom of the press it has on a number of occasions recognised that the public has a right to receive information as a corollary of the specific function of journalists, which is to

103. "The Court has no doubt that the implementation of the 1993 Scheme was susceptible of adversely affecting the *quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes*, and thus their rights protected by Article 8 of the Convention ..." [Italics added].

104. See on this question: Weber, S., "Environmental Information and the European Convention on Human Rights", in *Human Rights Law Journal*, 1991, Vol. 12, No. 5, pp. 177-185; and Maljean-Dubois, S., "La Convention européenne des Droits de l'Homme et le droit à l'information en matière d'environnement", in *Revue générale de droit international public*, 1998-4, pp. 995-1021.



impart information and ideas on matters of public interest. The facts of the case were, however, clearly distinguishable from those cases since the applicants complained of a failure in the system set up pursuant to DPR 175/88, which had transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the “Seveso” directive) on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population.

The conclusion reached by the European Court, as expressed in paragraph 53 *in fine* of its judgment, was that the freedom to receive information referred to in paragraph 2 of Article 10 of the Convention basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. It cannot be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion. However, the European Court concluded there had been a breach of Article 8 of the European Convention because the applicants did not receive environmental information in their interest.¹⁰⁵ Rather than the creation of a “new” right by way of jurisprudence (namely, the right to ask for environmental information retained by local authorities¹⁰⁶) it seems to the author that one is witnessing an example of the environmental cross-dimension of the European Convention on Human Rights. It would be a cross-dimension, in that the right to receive environmental information is not being guaranteed by Article 10 of the Convention but, indirectly, by Article 8. This approach is further developed in *McGinley and Egan v. the United Kingdom* and in *Öneriyildiz v. Turkey*. Interestingly, in the *McGinley and Egan v. the United Kingdom* case the applicants alleged that the non-disclosure of the documents in question (the records of radiation in Christmas Island) amounted to a violation of their rights to respect for their private and family lives under Article 8 of the Convention. Clearly, there was an attempt to establish a parallel between this case and that of

105. Paragraph 60 of the judgment of 19 February 1998.

106. In such a modern way as provided in the Aarhus Convention and its recent follow-ups in the European Union and in the Council of Europe. *Vide supra* note 1, p. 5.



Guerra and others judged by the European Court some months before. The Court stated, however, that

The existence of any other relevant document has not been substantiated and is thus no more than a matter of speculation. For this reason, the present case is distinguishable from that of *Guerra and others* ... where it was not disputed that the inhabitants of Manfredonia were at risk from the factory in question and that the State authorities had in their possession information which would have enabled the inhabitants to assess this risk and take steps to avert it.¹⁰⁷

This is the first explanation why the European Court did not consider that there had been a breach of Article 8 linked to the right to receive environmental information. The second was the existence of an internal procedure before the British Courts at the disposal of the applicants for their purposes.¹⁰⁸ One must bear in mind, nevertheless, the European Court's statement in paragraph 101 of its judgment in the case of *McGinley and Egan v. the United Kingdom*:

... Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.

Here one can identify a further consolidation of the environmental cross-dimension of the European Convention on Human Rights pointed out in the case of *Guerra and others v. Italy*: the right to receive environmental information from the State is not protected as such under Article 10 of the European Convention, but it has a procedural implication in the context of Article 8. Thus, under Article 8 there is a positive duty on States whose Governments engage in hazardous activities to respect private and family life by establishing an effective and accessible procedure

107. Paragraph 99 of the judgment of 9 June 1998.

108. Paragraph 102 of the judgment of 9 June 1998.



which enables interested parties to seek (and obviously obtain) any relevant and appropriate information, including on the environment.

In its judgments in the *Öneryıldız v. Turkey* case, the Chamber and Grand Chamber of the European Court agreed in considering that the information about the risk of a methane explosion cannot be deemed to have been directly available to the applicant. In truth, an ordinary citizen, such as he, could not have been expected to be aware of the specific risks inherent in the process of methanogenesis and of a possible landslide. Such information could not have been imparted to the public other than by action on the part of the administrative authorities which were in possession of it. The fact that the applicant was in a position to assess some of the risks, particularly health risks, to his family's existence – but failed to complain of those risks to the national authorities – cannot absolve the authorities from the responsibility they incurred for letting the members of the Öneryıldız family continue to expose themselves to real and imminent dangers or from failing to comply with their duty to impart information about those specific dangers, of which only they had knowledge, and which the applicant cannot knowingly have accepted at the cost of the death of his relatives.¹⁰⁹

The Court therefore arrived at the conclusion that in the *Öneryıldız* case the administrative authorities knew, or ought to have known, that the inhabitants of certain slum areas of Ümraniye were faced with a real and immediate risk both to their physical integrity and their lives on account of the deficiencies of the municipal rubbish tip. The authorities failed to remedy those deficiencies and, furthermore, to comply with their duty to inform the inhabitants of the Kazm Karabekir area of those risks, information which might have enabled the applicant – without diverting State resources to an unrealistic degree – to assess the serious dangers for himself and his family in continuing to live in the vicinity of the Hekimbas rubbish tip.

109. Paragraphs 85 and 86 of the judgment of 18 June 2002 (Chamber) and paragraphs 101 and *ff.* of the judgment of 30 November 2004 (Grand Chamber).



Again, a further consolidation of the environmental cross-dimension of the European Convention on Human Rights can be identified: the right to receive environmental information from the State, which is not protected as such under Article 10, is, in addition to its connection with Article 8 (which sometimes implies a procedural connotation) also linked to Article 2 by way of a positive duty on states to inform people on environmental risks to their lives. Another interesting point to be noted is that, contrary to the statement in paragraph 101 of the judgment in the *McGinley and Egan case*, this positive duty on states is of a general nature and not restricted to "Governments engaged in hazardous activities".

On this point it is too soon to draw firm conclusions. At the time of writing there are cases pending before the European Court which can be of relevance. See, e.g. the decision on admissibility of 23 May 2002 in the case of *Michael Roche v. the United Kingdom*. The applicant maintained that he suffered from the effects of his exposure to toxic chemicals during tests carried out on him in 1962 and 1963 in Porton Down, a Chemical and Biological Defence Establishment established during the first world war in order to conduct research into chemical weapons including tests of the gases on humans as well as on animals. Before the European Court he complained that inadequate access to information about the tests which were performed on him in Porton Down would constitute a violation of Articles 8 and 10 of the Convention read alone or in conjunction with Article 14 of the Convention. He also complained that the immunity accorded to the Ministry of Defence by a "section 10 certificate" constituted a violation of his right of access to Court guaranteed by Article 6.1 and a violation of his rights guaranteed by Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14 of the Convention. The European Court unanimously declared admissible the applicant's complaints under Articles 8 and 10 of the Convention, together with his complaints under Articles 6, 13 and 14 of the Convention and under Article 1 of Protocol No. 1, since these complaints, particularly, those under Articles 8 and 10 of the Convention, raised serious issues of fact and law under the Convention, the determination of which would require an examination of the merits.



A case very similar to *Fadeyeva v. Russia* is that of *Ledyeva and others v. Russia* (decision of 16 September 2004 unanimously declaring admissible the application under Article 8). The only peculiar distinction between both *Fadeyeva* and *Ledyeva and others* is that in the latter case one of the applicants also complained that the authorities' refusal to confirm the fact that her house was located within the sanitary security zone around the major steel-producing centre of Cherepovets was a violation of freedom of expression as guaranteed by Article 10 of the Convention. The European Court rejected this part of the application as being outside its competence *ratione materiae* since, in its opinion, no element of this right, such as freedom of information or ideas, was engaged in the applicant's claim for a legal declaration on the zoning issue.¹¹⁰

110. Paragraph No. 5 of the Decision of Admissibility of 16 September 2004.



Conclusion

The following conclusions can be drawn about the environmental protection and the European Convention on Human Rights.

1. Not surprisingly, the European Convention and its additional protocols do not cover any environmental rights or any interest in the preservation of the environment. However, environment has merited the protection of the European bodies when these judicial organs considered it as implicit in the rights and freedoms already guaranteed or when they analysed individual complaints regarding restrictions in Convention rights pursuing the safeguarding of good environmental condition as a general interest and, thus, as a legitimate aim in a democratic society. In any case, this second way of protection should not be read as recognising any collective right to environment.
2. This has been clearly an indirect way of protection (protection *par ricochet*) developed throughout the judgments analysed in this book, which must be seen as stages in the process of enforcing the human right to environment in Europe. In such a process one can identify clearly both judicial activism and judicial self-restraint. The judicial activism is reflected by a dynamic interpretation, which develops the existing definitions of the rights to respect for private life and family life as guaranteed by Article 8, by way of a progressive concretion of the environmental cross-dimension of the European Convention on Human Rights, as far as the right to receive information. According to this dynamic and teleological interpretation, it could be considered



that implicitly recognised in these articles is a right to live in a healthy environment and to receive information including from competent authorities about any real or eventual harm to the environment which may affect those individuals entitled to enjoy the rights guaranteed in both articles in the Convention. This activism is in no way contradictory to the fact that to date the Court has not expressly stipulated as being guaranteed in the Convention any right to environment. The Court is not a legislator and the states, having taken part in creating the Convention, are themselves required to include this right in those already listed.

Judicial self-restraint in the Court's environmental case-law is equally expressed by the Court's refusal to accept the environmental dimension of rights other than those guaranteed in Article 8 of the Convention and in the fact that it restricts the protection of Article 8 to cases where the nucleus of the right guaranteed is clearly affected by an environmental interference (e.g. health). The nature of the right at stake and its importance for the individual seems to be the main factor which would reduce the margin of national discretion. For instance, not only the right to respect for private and family life but also, and in particular, the applicants' right to sleep at night which, undoubtedly, is closely linked to their right to health. Thus, what is relevant is not so much the objective gravity of the interference suffered by the individual but whether, and to what extent, a right essential to him is affected by that interference. In this sense, until a substantive additional protocol to the European Convention concerning environment and human rights is signed, this "ecological" reading of the Convention requires, for greater effectiveness, in my opinion, a dual development: horizontally, by considering other rights in the Convention as susceptible to being associated with an environmental harm (e.g., the right to physical integrity (Article 3) or the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1)); and also vertically, that is, assuming that those rights which the European Court has confirmed could be the object of interference as a consequence of environmental pollution, and



that there may be a violation not only when the core of the right is affected but also in its normal and broader content. Thus, where Article 8 is affected, not only environmental interferences in the applicants' health but also in their well-being should be considered when judging a breach of such provision.

3. It is perhaps too early to predict whether judicial self-restraint will or will not prevail over the judicial activism in this environmental case-law of the European Court which, consequently, leaves a "bitter-sweet" taste with the commentator. On the one hand, it seems to confirm the Court's appreciation of the link between the environment and the Convention (at least as far as Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 are concerned). On the other hand, it would prove, regrettably, that the European Court is far from developing a more dynamic perception of the environmental dimension of other rights and freedoms guaranteed in the Convention.¹¹¹ Undoubtedly, we are not witnessing the creation and crystallisation of a new right, individual or collective, that enlarges those guaranteed in the European system for the protection of human rights. On the contrary, one is in agreement with the evolving perception of the environmental dimension of some Convention provisions at the two levels: firstly, as part of a general interest in protecting the environment and, secondly, as part of the content of some "classic" rights guaranteed in it, namely the right to respect for private and family life and the right not to be deprived of life unlawfully. Hence, what we may be witnessing is an unstopped process of complementing "step by step" the content of some "traditional" rights guaranteed in the Convention as a result of a growing awareness and concern for environmental issues, making real the classical statement that the European Convention is a living instrument to be interpreted and applied in the context of present-day conditions.

111. See paragraph 122 of the Grand Chamber's judgment of 8 July 2003 in the case of *Hatton and others v. the United Kingdom*.



References

I. Principal case-law

Page references are to the present volume

Athanassoglou and others v. Switzerland (p. 39), judgment of 6 April 2000, Reports of Judgments and Decisions 2000-IV

Balmer-Schafroth and others v. Switzerland (p. 38), judgment of 26 August 1997, Reports of Judgments and Decisions 1997-IV

Coster v. the United Kingdom (p. 20), judgment of 18 January 2001, HUDOC

Fadeyeva v. Russia (p. 37), admissibility decision of 16 October 2003, HUDOC

Fotopoulou v. Greece (p. 45), judgment of 18 November 2004, HUDOC

Fredin v. Sweden (p. 18), judgment of 18 February 1991, Series A, no. 192

Gorraiz Lizarraga v. Spain (p. 43), judgment of 27 April 2004, HUDOC

Guerra and others v. Italy (p. 26), judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I

Hakansson and Sturesson v. Sweden (p. 17), judgment of 21 February 1990, Series A, no. 171-A

Hatton and others v. the United Kingdom (p. 30), judgments of 2 October 2001 (Chamber) and 8 July 2003 (Grand Chamber), Reports of Judgments and Decisions 2003-VIII

Katsoulis and others v. Greece (p. 23), judgment of 8 July 2004, HUDOC



- Kyrtatos v. Greece (p. 41), judgment of 22 May 2003, Reports of Judgments and Decisions 2003-VI
- L.C.B. v. the United Kingdom (p. 29), judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III
- López Ostra v. Spain (p. 12), judgment of 9 December 1994, Series A, no. 303-C
- McGinley and Egan v. the United Kingdom (p. 28), judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III
- Moreno Gómez v. Spain (p. 36), judgment of 16 November 2004, HUDOC
- Öneryildiz v. Turkey (p. 34), judgments of 18 June 2002 (Chamber) and 30 November 2004 (Grand Chamber), HUDOC
- Papastavrou and others v. Greece (p. 22), judgment of 10 April 2003, Reports of Judgments and Decisions 2003-IV
- Pine Valley Developments Ltd and others v. Ireland (p. 19), judgment of 29 November 1991, Series A, no. 222
- Powell and Rayner v. the United Kingdom (p. 11), judgment of 21 February 1990, Series A, no. 172
- Taskin and others v. Turkey (p. 42), judgment of 10 November 2004, HUDOC
- Vergos v. Greece (p. 57), judgment of 24 June 2004, HUDOC
- Zazanis and others v. Greece (p. 24), judgment of 18 November 2004, HUDOC
- Zvolský and Zvolská v. the Czech Republic (p. 21), judgment of 12 November 2002, Reports of Judgments and Decisions 2002-IX

II. Council of Europe source documents

Yearbook of the European Convention on Human Rights, Vols. 1- , 1959- , Martinus Nijhoff Publishers, The Hague/London/Boston. Contains selected decisions of the European Commission of Human Rights; selected summaries of the judgments of the European Court of Human Rights; and selected human rights (DH) resolutions of the Committee of Ministers.



European Commission of Human Rights

Collection of decisions of the European Commission of Human Rights, Vols. 1-46, 1960-1974, Council of Europe.

Decisions and Reports (DR), Vols. 1-94, 1975-1998, Council of Europe.

European Court of Human Rights

Series A: Judgments and decisions, Vols. 1-338, 1961-1995, Carl Heymanns Verlag, Cologne.

Series B: Pleadings, oral arguments and documents, Vols. 1-104, 1961-1995, Carl Heymanns Verlag, Cologne.

Reports of judgments and decisions, 1996- , Carl Heymanns Verlag, Cologne.

Committee of Ministers

Collection of resolutions adopted by the Committee of Ministers in application of Articles 32 and 54 of the European Convention on Human Rights, 1959-1989, 1993, and supplements, Council of Europe.

Gazette – Committee of Ministers from January 1999-2000.

Internet

Council of Europe's Web site: <http://www.coe.int/>

Human Rights Web, Directorate General of Human Rights: http://www.coe.int/human_rights/

HUDOC: database of human rights case-law, including that of the European Court of Human Rights: <http://hudoc.echr.coe.int/>

European Court of Human Rights: <http://www.echr.coe.int/>

Committee of Ministers of the Council of Europe: <http://wcm.coe.int/>

Parliamentary Assembly of the Council of Europe: <http://assembly.coe.int/>



III. Analysis and commentaries

- CARRILLO SALCEDO**, Juan Antonio, *El Convenio Europeo de Derechos Humanos*, 2003, Tecnos, Madrid.
- COHEN-JONATHAN**, Gérard, "Conclusions générales"; in *Quelle Europe pour les droits de l'homme ?*, Bruylant, Bruxelles, 1996, p. 485.
- DÉJEANT-PONS**, Maguelone, "L'insertion du droit de l'homme à l'environnement dans les systèmes régionaux de protection des droits de l'homme"; in *Revue universelle des droits de l'homme*, 1991, Vol. 3, No. 11, pp. 461-470.
- "Les droits de l'homme à l'environnement dans le cadre du Conseil de l'Europe"; in *Revue trimestrielle des droits de l'homme*, 2004, pp. 861-888
- DE SADELEER**, Nicolas, *Environmental principles. From political slogans to legal rules*. Oxford University Press, 2002.
- DIDIER**, Pierre, "Le principe de précaution : une approche communautaire et internationale"; in *Journal des Tribunaux* 8 (2000) 69, pp. 118-120.
- EISSEN**, Marc-André, "The principle of proportionality in the case-law of the European Court of Human Rights"; in *The European system for the protection of human rights*, Macdonald, R. St-J., Matscher, F., Petzold, H., Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 125-146.
- GARCÍA SAN JOSÉ**, Daniel, "Derecho al medio ambiente y respeto a la vida privada y familiar. Comentario a la sentencia del Tribunal Europeo de Derechos Humanos de 9/12/1994"; in *Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía LA LEY*, 1995, Vol. 4, pp. 1199-1215.
- "El derecho humano al medio ambiente: algunas reflexiones en torno a su concretización"; in *Derechos y Libertades*, 1999, No. 7, pp. 233-251.
 - *Los derechos y libertades fundamentales en la sociedad europea del siglo XXI*. Secretariado de Publicaciones de la Universidad de Sevilla, 2001.
 - "Ruido nocturno e insomnio: los derechos a la vida privada y familiar y al respeto del domicilio frente al interés general de los vuelos de aviones durante la noche" in *Revista Española de Derecho Constitucional*, No. 64, 2002, pp. 239-260.
 - *Enforcing the human right to environment in Europe*, Kronos Publisher, Sevilla, 2004.



- GREER**, Steven, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2000.
- HAMPSON**, Françoise J., "Restrictions on rights of action and the European Convention on Human Rights: the case of Powell and Rayner", in *The British yearbook of international law*, 1990, LXI, pp. 279-310.
- LAMBERT**, Pierre, "Le droit de l'homme à un environnement sain", in *Revue trimestrielle de droits de l'homme*, No. 43, 2000, pp. 565-580.
- LAURENT**, Catherine, "Un droit à la vie en matière environnementale reconnu et conforté par une interprétation évolutive du droit des biens pour les habitants de bidonvilles", *Revue trimestrielle de droits de l'homme*, No. 53, 2003, pp. 279-297.
- MACDONALD**, Robert St-J., "The margin of appreciation", in *The European system for the protection of human rights*, Macdonald, Robert St-J., Matscher, F., Petzold, H., Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 83-124.
- MAHONEY**, Paul, "Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin", in *Human rights law journal*, 1990, Vol. 11, No. 1-2, pp. 57-88.
- "The doctrine of the margin of appreciation under the European Convention on Human Rights: Its legitimacy in theory and application in practice", in *Human rights law journal*, 1998, Vol. 19, No. 1, pp. 1-6.
- MALJEAN-DUBOIS**, Sandrine, "La Convention européenne des Droits de l'Homme et le droit à l'information en matière d'environnement", in *Revue générale de droit international public*, 1998-4, pp. 995-10.
- MARTENS**, Paul, "L'irrésistible ascension du principe de proportionnalité", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu (I)*. Bruylant, Bruxelles, 1992, pp. 49-68.
- MERRILLS**, John G., "Decisions on the European Convention on Human Rights during 1995", *The British yearbook of international law*, 1995, LXVI, pp. 527-528.
- PATHAK**, Robert S., "The Human Rights System as a conceptual framework for Environmental Law", *Environmental change and International Law*:



New Challenges and Dimensions. Edited by E. Brown Weiss, United Nations University Press, 1992, pp. 205 and ff.

PICHERAL, Caroline and **OLINGA**, Alain-D., "La théorie de la marge d'appréciation dans la jurisprudence récente de la Cour européenne des Droits de l'Homme", in *Revue trimestrielle des droits de l'homme*, 1995, No. 24, pp. 567-604.

SANDS, Philippe, *Principles of International Environmental Law*, Vol. I. Manchester University Press, 1995, Manchester, p. 222.

WEBER, Stefan, "Environmental information and the European Convention on Human Rights", *Human rights law journal*, 1991, Vol. 12, No. 5, pp. 177-185.

WOODS, Lorna, "Decisions on the European Convention on Human Rights during 1998", in *The British yearbook of international law*, 1998, LXIX, pp. 370-375.

- "Decisions on the European Convention on Human Rights during 1998", in *The British yearbook of international law*, 2001, LXXII, pp. 516-519.



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