Submission to the Equal Opportunities Committee inquiry - Where Gypsy/Travellers live

The Scottish Human Rights Commission

July 2012

The Scottish Human Rights Commission is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with ‘A’ status by the International Co-coordinating Committee of NHRLs at the United Nations. The Commission is the Chair of the European Group of NHRLs and it is also a representative of Scotland on the Advisory Panel to the Commission on a Bill of Rights. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law policies and practices; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

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Introduction
On 25 May 2012 the Convenor of the Equal Opportunities Committee (the Committee) wrote to the Scottish Human Rights Commission (the Commission) to request a response by 13 July 2012 detailing:

1. The Commission’s contact with Gypsy/Travellers;
2. Any policies or practice guidelines relating to Gypsy/Travellers that the Commission has, including any aimed at other organisations/groups;
3. Any specific training or awareness-raising the Commission undertakes in relation to Gypsy/Travellers;
4. What difficulties Gypsy/Travellers have accessing the Commission’s services/support (or those provided on its behalf or in collaboration with you or by other bodies in your field) and what the Commission has done to address any such difficulties.

The Commission also welcomes this opportunity to submit general evidence to the Committee’s inquiry on Where Gypsy/Travellers live, launched on 27 March 2012.

Responses to the Committee’s questions of the Commission

1. The Commission’s contact with Gypsy Travellers

The Commission has had contact with Gypsy/Traveller communities and those that campaign with or for those communities since its inception. This has included during the nationwide consultation which the Commission undertook on establishment (from December 2008 to March 2009).

In 2009 the Commission then began an ambitious programme of research to assess progress made on the realisation of human rights in Scotland. The research involved an analysis of secondary research¹ as well as primary research which involved more in-depth exploration of a range of themes that

emerged from the secondary research. During the primary research a series of focus groups and in-depth interviews were conducted across Scotland with participants sampled from the Commission’s stakeholder database. In line with the Commission’s statutory mandate, research paid particular attention to those who are known to be marginalised and whose voices are less often heard in mainstream debates. Members of Scottish Gypsy/Traveller communities were directly involved in this stage of the research.

2. Any policies or practice guidelines relating to Gypsy/Travellers that the Commission has, including any aimed at other organisations/groups

In its submission to the United Nations Universal Periodic Review of the United Kingdom on the realisation of all human rights, the Commission made 18 recommendations. Among those was a recommendation:

“that the Scottish Government work with local authorities and all others with responsibilities as well as members of Gypsy/Traveller communities and of settled communities to develop an Action Plan, consistent with international human rights law, to reconcile the human rights of Gypsy/Travellers and settled communities.”

Previously the Commission has expressed concern over the status and treatment of Gypsy/Travellers in Scotland, including in response to a number of petitions to the Scottish Parliament Public Petitions Committee.

The findings of the Commission’s research programme suggest that Scotland needs a more systematic approach to assure and not assume the realisation of human rights in practice. In this respect, the Commission believes that strong human rights based legal and policy frameworks must be translated into more consistent positive outcomes to which every individual is entitled. Using the evidence from this research the Commission will seek to facilitate the process of development and monitoring of Scotland’s National Action Plan for Human Rights.

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2 In order to access more marginalised voices one of the first parts of this mapping research was to create a Stakeholder Database in which the Commission collates information on groups and organisations which implicitly or explicitly promote human rights in Scotland. A specific objective of this project was to collect information on less visible local organisations representing those who are harder to reach. More information on this project can be found here: http://www.scottishhumanrights.com/application/resources/documents/Oct11Mappingresearchbriefing.pdf.


4 SHRC 2010. Letter to the Public Petitions Committee Re Petition PE1333. Glasgow: SHRC. Available at: http://www.scottish.parliament.uk/S3_PublicPetitionsCommittee/Submissions_10/10-PE1333B.pdf

Scottish Parliament Cross Party Group on Human Rights discussion on Scottish Gypsy/Travellers, 4 November 2010;
Scotland’s National Action Plan for Human Rights will be a roadmap that identifies gaps in human rights protection and provides a clear, coherent and systematic way of addressing those gaps. International human rights bodies recommend that countries adopt a National Action Plan for Human Rights which is evidence based, developed in an inclusive way and independently monitored. They include specific, measurable, achievable, relevant and time bound commitments, setting the direction of travel from human rights risks to human rights realisation. Experiences from other countries show the potential of this approach to deliver real and sustainable improvements in the realisation of human rights for all, particularly the most marginalised and vulnerable in society.

Alongside the publication of the findings of its mapping research in October 2012, the Commission will initiate an open and inclusive process to shape the National Action Plan. This will include a National InterAction (a facilitated negotiation of commitments) on Human Rights Day, 10 December 2012 and various other opportunities for involvement until March 2013. The Commission expects this process of engagement to lead to the agreement of Scotland’s National Action Plan later in 2013.

3. Any specific training or awareness-raising the Commission undertakes in relation to Gypsy/Travellers

During the period of its first Strategic Plan (2008-2012) the Commission's awareness raising and capacity building programme focussed principally on its Strategic Priority to promote and protect human dignity in care and its role as an independent mechanism to promote, protect and monitor the implementation of the UN Disability Convention. In addition the Commission has a statutory obligation to ensure it avoids duplication of the work of any other body. As a result the Commission has not undertaken any training or awareness-raising specifically focussed on the rights of Gypsy/Travellers during this period.

In the context of its Second Strategic Plan which runs from 2012-2016, the Commission will develop a capacity building plan to support the implementation of Scotland’s National Action Plan for Human Rights.

4. What difficulties Gypsy/Travellers have accessing the Commission’s services/support (or those provided on its behalf or in collaboration with you or by other bodies in your field) and what the Commission has done to address any such difficulties.

In response to questions 1 and 2 above the Commission has outlined how it has engaged with Gypsy/Traveller communities, in particular in the context of its research programme which will support the development of Scotland’s National Action Plan for Human Rights.

According to section 6 of the Scottish Commission for Human Rights Act 2006, the Commission “may not provide assistance to or in respect of any person in connection with any claim or legal proceedings to which that person is or may become a party” (emphasis added).

In order to assist people to locate organisations that may be able to provide them with advice the Commission has developed a series of signposting resources including a webpage on “help with human rights”. The Commission has also developed an online tool which should help people looking for advice about human rights and related issues in their local area. The map shows information about local third sector, voluntary and specialist organisations who can offer help and advice with subjects such as health, social care, disability rights and environmental campaigning. The map also details information on the type and level of advice the group can offer along with a full description of their activities.

**General response to the Inquiry**

As the Commission indicated in a recent briefing paper entitled *Why Scotland Needs a National Action Plan for Human Rights* its research programme revealed that whilst Scotland has made notable progress in the realisation of human rights, it could do better. Specifically it highlighted that whilst Scotland has a relatively strong legal and institutional framework for human rights and some examples of positive strategy and policy direction, the actual outcomes for people often remain inconsistent. This clearly reflects the experience of Scottish Gypsy/Travellers.

In addition to considering human rights in the broader political, economic, social, technological, legal and environmental context in Scotland, the research highlighted eight thematic areas which were explored in greater depth, namely:

1. Dignity and care.
2. Where we live.
3. Education and work.
5. Private and family life.
7. Living in detention.
8. Access to justice and the right to effective remedy.

Concerns relating to the specific lived experience of Scottish Gypsy/Travellers will feature in most of these thematic chapters. For example the primary and secondary research highlighted, among other things, that:

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7 [http://www.scottishhumanrights.com/abouthumanrights/stakeholdermap](http://www.scottishhumanrights.com/abouthumanrights/stakeholdermap)
8 Available at [http://www.scottishhumanrights.com/actionplan/briefingreport](http://www.scottishhumanrights.com/actionplan/briefingreport)

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• Social attitudes surveys demonstrate continuing negativity towards Scottish Gypsy/Travellers;\(^9\)
• Frequent media misrepresentation and discriminatory attitudes towards Scottish Gypsy/Travellers have been documented;\(^10\)
• Civil society organisations report a lack of recognition of formal care needs and experiences of Gypsy/Travellers informal carers;\(^11\)
• There are well documented concerns regarding the educational outcomes of Scottish Gypsy/Travellers children;\(^12\)
• Members of Gypsy/Traveller communities report a lack of traditional work opportunities & discrimination in gaining and once in work;\(^13\)
• Racial prejudice, harassment and racially aggravated hate crime persist;\(^14\)
• Scottish Gypsy/Travellers continue to face disproportionately poor health outcomes;\(^15\)


13 Participants raised a number of work-related issues that they faced. All participants involved recounted the difficulties they had faced in gaining any employment, despite considering that they were adequately qualified for the jobs they were seeking. This was felt especially to be the case where these individuals were viewed by the settled community as ‘activists’. Parents also reported that they struggled to encourage their children to enter mainstream education, when their experience was that becoming educated and qualified had not made employment any more likely. The ‘digital divide’ was also raised whereby a lack of access to computers and internet access made applying for jobs increasingly difficult.


15 It has been estimated that life expectancy is on average ten years lower than the national average for Traveller men (EHRC 2009. Gypsies and Travellers: Simple solutions for living together. London: Equality and Human Rights Commission.) and can be as low as 55
Members of Gypsy/Traveller communities report an inability to access including legal advice and representation, legal aid and effective remedies. The issues noted above were frequently directly linked to where Scottish Gypsy/Travellers live.

The thematic focus in the Commission’s research on ‘Where We Live’ looks specifically at the need to reconcile the rights of Scottish Gypsy/Traveller and settled communities. Analysis of the secondary data highlighted that Scottish Gypsy/Travellers have long been identified as population groups who face barriers to the realisation of human rights in relation to their living environment. Disputes have centred particularly on accommodation, including a lack of adequate culturally appropriate accommodation and related informal occupation by Gypsy/Traveller communities of alternative land, often resulting in disputes with local communities. Most frequently reported within existing research was the lack of available and suitable stopping places.

Official stopping sites reportedly often continue to be inadequate in terms of habitability with poor sanitation, such as an inadequate number of toilets, and

(LAMBIE, J. 2010. Report of Keep Well Gypsy and Traveller Outreach Service. Edinburgh: NHS Lothian.; MECOPP 2012. Hidden Carers, Unheard Voices: Informal caring within the Gypsy/Traveller community in Scotland. Edinburgh: Minority Ethnic Carers of People Project.) Scottish Gypsy and Traveller mothers are also 20 times more likely than the rest of the population to have experienced the death of a child (ibid.). Research indicates that the conditions of living in the inadequate stopping sites can have a serious detrimental impact on the health of the inhabitants. VAN CLEEMPUT, P. 2008. Health Impact of Gypsy Sites Policy in the UK. Social Policy and Society, 7, 103-117. These findings were also reinforced in testimony of the direct experience of participants in the SHRC research.

This was found to be the direct experience of many participants in the SHRC mapping research, especially in relation to discrimination, planning permission and employment issues as well as the prohibitive cost of potentially losing cases.


a lack of clean water. Participants involved in the Commission’s research also reported persistently poor living conditions and stresses associated with insecurity of tenure, food and employment. Existing research has also questioned the impact of local authority practice on the lived experience of Scottish Gypsy/Travellers with some suggesting that whilst on paper the rights of Scottish Gypsy/Travellers are referred to, in practice little appears to have been done to improve the situation of Scottish Gypsy/Travellers. Where progress has been made, it has been patchy and slow.

Participants involved in the Commission’s research spoke positively about the Scottish Parliament’s Equal Opportunities Committee Inquiry in 2001 and how they had felt a genuine optimism that their situation was being taken seriously by the Scottish Parliament. They did, however, question progress since that inquiry and were extremely disappointed that little had changed by 2004 when the inquiry was revisited. Moreover, some expressed frustration that the current inquiry is in effect asking the same questions. Participants felt that what is required is for responsibility and action to be taken by the Scottish Government and the relevant other public authorities in respect of the 37 points outlined in the 2001 Equal Opportunities Committee Inquiry.

The rights of members of Gypsy/Traveller communities have also been the subject of review by a number of regional and international human rights bodies, which draw attention to the importance of action to respect, protect and fulfil the rights of members of these communities.

In 2004, the European Court of Human Rights (ECtHR) issued a landmark judgment in the case of Connors v UK. In that case the ECtHR found for the first time that under the European Convention on Human Rights (ECHR) there is a “positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life.”

In its most recent opinion on the UK in December 2011 the Council of Europe Advisory Committee on National Minorities noted that:

“The situation of Gypsies and Travellers remains of particular concern, despite measures undertaken by the authorities, in particular in the area of education. They continue to experience significant difficulties in the field of accommodation, due to a persisting shortage of adequate

22 Application no. 66746/01, judgment of 27 May 2004.
23 Ibid, para 84.
permanent and transit sites throughout the country, resulting in frequent evictions and sometimes in tensions with the majority population.\(^{24}\)

The Advisory Committee consequently included among its “issues for immediate action”:

“Take more vigorous measures to meet the accommodation needs of Gypsies and Travellers; increase the delivery of sites, including by improving the coordination of the different levels of authorities involved in sites delivery; ensure that local authorities comply with their responsibilities in sites delivery and find adequate solutions to the accommodation needs of Gypsies and Travellers;\(^{25}\)

Whilst acknowledging that the Scottish Government strengthened the requirements for local authorities regarding new housing provision for Gypsies/Travellers,\(^{26}\) the European Committee of Social Rights concluded in 2012 that the right of members of Gypsy/Traveller communities to housing is not effectively guaranteed across the UK. Moreover, the Committee has asked that the UK’s next report indicates whether the number of available pitches in Scotland meets the needs of Gypsies/Travellers.\(^{27}\)

United Nations human rights bodies have expressed similar concerns and made similar recommendations. These have included the UN Committee on the Elimination of all forms of Racial Discrimination (CERD) in September 2011\(^{28}\) and the UN Committee on Economic, Social and Cultural Rights in May 2009.\(^{29}\)

**Recommendation**

In the light of the research findings and views of international human rights bodies indicating gaps in the realisation of the rights of Scottish Gypsy/Travellers, and the need to reconcile rights of those communities with settled communities, the Commission invites the Equal Opportunities Committee to consider echoing its recommendation:

that the Scottish Government work with local authorities and all others with responsibilities as well as members of Gypsy/Traveller communities and of settled communities to

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24 COE Doc. ACFC/OP/III(2011)006
25 Ibid.
26 They must assess how the housing needs of Gypsies and Travellers are addressed in their local housing strategies, and identify suitable locations for sites for Gypsies/Travellers in their development plans and involve them in decisions about sites for their use.
28 UN Doc. CERD/C/GBR/CO/18-20, para 27.
develop an Action Plan, consistent with international human rights law, to reconcile the human rights of Gypsy/Travellers and settled communities.\textsuperscript{30}

The Commission is currently piloting a process of human rights interaction which may form a useful approach to the development of such an action plan. A human rights interaction is a forum for independent mediation and resolution involving all key actors in finding a way forward within a human rights framework. It is a process where all those affected and all of those with responsibilities are directly engaged in addressing the issue requiring resolution, in this case, the need to reconcile the rights of Gypsy/Traveller with settled communities in Scotland.

A human rights interaction is facilitated by an independent Chair and follows a FAIR framework:

- **Facts**: understanding the key facts, primarily based on views and experiences of those directly affected. This can be complimented by an overview of the existing evidence gathered together in the various research reports and in the course of the Committee’s inquiry.

- **Analysis**: of the human rights at stake.

- **Identification**: of the common framework of shared responsibilities. Who should do what as an outcome of the interaction.

- **Recall**: at a later date to ensure all agreed actions have been taken.

A human rights interaction is participatory in that those affected will be involved, principled in that it is based on the human rights framework, and pragmatic in that it recognises the practical restraints and is aimed at identifying achievable ways to advance human rights.

Annex: a brief overview of the human rights framework

To assist the Committee the Commission includes here a brief summary of some of the principal human rights issues engaged in the present inquiry.

The right to private and family life and home and the right to property

Since the Human Rights Act 1998 came into force, everyone in Scotland has had a legally enforceable right to respect for private and family life, home and correspondence (article 8 of the ECHR) and the right to peaceful enjoyment of property (article 1 of Protocol 1 to the ECHR). Private landowners, including companies, also have a right to peaceful enjoyment of their property. Where anyone feels that their rights are being unjustifiably infringed by an act or omission of a public authority, they can claim a legal remedy.

Article 8 and article 1 of Protocol 1 to the ECHR are not absolute, but qualified rights, meaning that they can be interfered with where such interference is according to the law, in pursuit of a legitimate aim and necessary in a democratic society (where it is a proportionate means of achieving the legitimate aim). When considering any measures which impact on these rights of anyone, public authorities must assure themselves that these three tests are complied with.

As these rights are qualified rather than absolute, the framework for decisions which impact differently on the rights of different people, for example the rights of members of Gypsy/Traveller and settled communities, will be the three tests listed above. In such cases the test of proportionality (is there a pressing social need for this measure? Is this measure the least restrictive of the rights of all of those affected?) will be particularly important. Extreme measures such as eviction should be a last resort and should only be undertaken in a manner which upholds both the procedural and the substantive rights of those affected.

Additionally, public authorities should ensure that non-discrimination and equality are at the heart of such decisions. This will mean avoiding decisions which are directly or indirectly discriminatory, and considering the importance, where justified, of temporary special measures to address inequality in practice. This may mean prioritising the rights of those who are particularly marginalised.

Issues of particular concern - Evictions

Eviction is a particularly serious infringement with the right to respect for private and family life, home and correspondence, as protected by Article 8 of the ECHR. Recent developments in understanding international human rights law have clarified that decisions regarding evictions must comply with Article 8, including assurance that their execution is according to the law, in pursuit of a legitimate aim and necessary in a democratic society (proportionality).
In the *Connors* case (referred to above) the ECtHR found the UK in violation of Article 8 where the eviction of a Gypsy family was:

“not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a ‘pressing social need’ or proportionate to the legitimate aim being pursued.”

In the circumstances the family had been rendered “in effect homeless”, being evicted from a site where they had lived for 14-15 years, had difficulties in finding a lawful alternative location for their caravans, coping with health problems and securing continuity in their children’s education.

The Court found that the lower level of security of tenure guaranteed to Gypsy families was not justified. The UK had argued that the power of summary eviction was a vital management tool in coping with anti-social behaviour - the court rejected this as a justification as such behaviour also occurs on local authority housing estates and other mobile home sites where individuals are only evicted subject to independent court review.

In November 2010 the UK Supreme Court applied a consistent line of ECtHR case law on the application of Article 8 to possession/eviction decisions. Each of the relevant ECtHR decisions had held, in terms, that eviction is a serious infringement of the right to respect for the home, and as such the individual should have the possibility of having:

“the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under article 8.”

This applies even where “under domestic law, he or she has no right to occupy a flat.”

For example in *McCann v United Kingdom*:

“The loss of one’s home is the most extreme form of interference with the right for respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under [article 8], notwithstanding that, under domestic law, his right of occupation has come to an end.”

The Supreme Court concluded,

“If our law is to be compatible with article 8, where a court is asked to make an order for possession of a person’s home at the suit of a local...”

31 Ibid, para 95.
33 *Čosić v Croatia*, ibid, para 23.
34 *Paulić v Croatia*, at para 43.
35 *McCann*, supra, at para 50.
authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact."36

In considering whether eviction is reasonable and justified, the Supreme Court considered that:

“the question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority’s ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.”37

The Court took the view that it would be “burdensome and futile” to require the local authority routinely to prove that the possession order is justified. As it stated,

“in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way.”38

The Supreme Court commented favourably on the submission of the Equality and Human Rights Commission that “proportionality is more likely to be a relevant issue

“in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”; and that “the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases.”39

The Commission respectfully agrees, and considers that the international law prohibition on forced or arbitrary evictions also provides guidance in this

36 Manchester City Council v Pinnock, supra, para 49.
37 Ibid, para 52.
38 Ibid, para 54.
39 Ibid, para 64.
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respect. In particular the authoritative interpretations of the United Nations Committee on Economic, Social and Cultural Rights of the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights outline a number of procedural protections which should be applied in relation to evictions to ensure that they are reasonable and proportionate. These include:

“(a) an opportunity for genuine consultation with those affected;
(b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
(c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
(d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
(e) all persons carrying out the eviction to be properly identified;
(f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
(g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”

Further,

“Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”

The Supreme Court limited its ruling in the Manchester City Council case to possession proceedings brought by local authorities (or other registered social housing landlords who would be public authorities for the purposes of section 6 of the Human Rights Act). The decision does not therefore extend to orders for possession brought by private landowners, however, a recent admissibility

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40 UN Committee on Economic, Social and Cultural Rights, The right to adequate housing: forced evictions: 05/20/1997, General Comment 7, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?OpenDocument. The ICESCR has been legally binding on the UK as a matter of international law since ratification on 20 May 1976.

41 Ibid, para 15. Similar criteria are to be found in Council of Europe Recommendation Rec(2004)14 of the Committee of Ministers on the movement and encampment of Travellers in Europe. This provides that legislation should also strictly define the procedures for legal eviction, that such legislation should comply with international human rights standards and principles including in relation to consultation with the community or individual concerned, reasonable notice, provision of information, a guarantee that the eviction will be carried out in a reasonable manner, effective legal remedies and free or low cost legal assistance for destitute victims.

42 Ibid, para 16.
decision by the ECtHR suggests that such decisions may also be challenged as to their proportionality.43

Economic, social and cultural rights and the prioritisation of resources

Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights requires States parties to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The full realisation of this right is to be achieved progressively, according to the maximum of available resources. In its authoritative interpretation of the right to adequate housing the United Nations Committee on Economic, Social and Cultural Rights outlined the constituent elements to the right to adequate housing.44 These are:

1. Legal security of tenure (and the prohibition of forced or arbitrary evictions or other forms of harassment);
2. Availability of services, materials and infrastructure (such as drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services);
3. Affordable housing (including protection against unreasonable rent levels or unreasonable rent increases);
4. Habitable housing (adequate space and protection against the cold, damp, heat, rain, wind or other threats to health or structural hazards);
5. Accessible housing (housing should be accessible to everyone, including those with disabilities, and those displaced by natural disasters or climate change);
6. Appropriate location (in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. Not on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants);
7. Culturally adequate housing (housing policy and practice must appropriately enable the expression of cultural identity).

Human rights law and standards require some basic principles to ensure fairness in the prioritisation of (increasingly) scarce resources:

- **Absolute rights must be respected absolutely:** no decision should imperil the respect for absolute rights such as the right to life or the right to be free from degrading treatment. Both of these rights are relevant to housing and accommodation. For example the right to life under the ECHR has been held to apply where (Roma)

43 Belchikova v Russia (Application no. 2408/06), 25 March 2010.
communities were living on combustible land, where communities were living in an area at risk of landslide, and in a Scottish case it was considered the right to life could be relevant in situations where the quality of housing or accommodation was so bad that it imperilled the life of residents; the right to freedom from degrading treatment has been applied to housing rights both where conditions of living can be considered degrading, and where forced evictions may amount to degrading treatment.

- **non-discrimination** and the duty to prioritise the most vulnerable: the UN Committee on Economic, Social and Cultural Rights has clarified that the Covenant on ESC Rights requires the prioritisation of action to protect the vulnerable:
  - "Even in times of severe resources constraints...vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs."

- The prioritisation of "**minimum core obligations**": obligations under the Covenant on ESC Rights include immediate obligations to prioritise the realisation of what have been called "minimum core obligations" or "minimum essential levels" of each economic, social and cultural right.
  - "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of... basic shelter and housing... is, prima facie, failing to discharge its obligations under the Covenant... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".

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46 Fadeyeva v. Russia, (Application no 55723/00) European Court of Human Rights judgment of 9 June 2005.
47 Mitchell v Glasgow City Council [2009] UKHL 11; [2009] WLR (D) 65, per Lord Rodger (para 69): "if the Council had allowed their housing stock to fall into disrepair, so that tenants were at risk of suffering life-threatening injuries or of becoming seriously ill, the Council could have been in breach of article 2."
48 In the Hijiri zi et al v Yugoslavia (Communication No. 161/2000, UN Doc CAT/C/29/D/161/2000, para 9.2), the UN Committee against Torture found that the failure of the authorities to protect residents from violent eviction from their houses constituted cruel, inhuman or degrading treatment or punishment.
50 Ibid, para 10.
• There is a **presumption against retrogression** in the realisation of economic, social and cultural rights. Retrogression (moving further away from the realisation of rights) must be carefully justified by reference to all the resources which are in fact available to the state (which may be more than those that have been exploited and included in the budget pot) the full range of human rights obligations – i.e. where hard choices have to be made which result in a retrogression in the realisation of one or more human rights, this must be justified with reference to human rights based prioritisation and respect for non-discrimination.

The principle of **“reasonableness”** is at the core of human rights obligations – both the right to respect for private and family life, home and correspondence and the right to adequate housing. The South African Constitutional Court has developed the principle of reasonableness to assess government decisions on prioritization of resources and the steps it has taken to realize economic, social and cultural rights.\(^{51}\)

"A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."\(^{52}\)

In applying this principle, the Constitutional Court of South Africa considered whether the policy or programme was comprehensive, coherent and coordinated; balanced and flexible; allowed for short, medium and long-term needs; was reasonably conceived and implemented; and was transparent.\(^{53}\)

The Court considered that the obligation to fulfil the right to adequate housing was violated where housing policy did not prioritize the improvement of the housing condition of those living "with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."\(^{54}\)

Likewise when the government of South Africa claimed that it lacked resources to provide anti-retroviral drugs to pregnant women, the

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51 This test now has a place in international human rights law as it is included as the test for the merits of a communication alleging violation of ESCR under the Optional Protocol to the International Covenant on ESCR (Article 8(4)).
Constitutional Court did not accept the claim. The Court’s position was that the government could not argue that it lacked the resources to provide the drugs without developing a plan to determine the cost of “rolling out” provision across the country, and without assessing the various resources at its disposal.\textsuperscript{55}

Selected references


SHRC 2010. Letter to the Public Petitions Committee Re Petition PE1333. Glasgow: SHRC.