CHAPTER FOURTEEN

THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A-SOCIO-ECONOMIC RIGHTS CHARTER?

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A. INTRODUCTION

The European Court of Human Rights has shown significant weariness in interpreting the European Convention on Human Rights (ECHR)[1] as protecting socio-economic rights.[2] Issues of political legitimacy, judicial proprietary and resource allocation would play more heavily on an internationalised court than may be the case within domestic court systems.[3] There are increasing signs that the European Court of Human Rights (ECtHR)

[1] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, *E.T.S* 5.

[2] To some extent, Article 1 of Protocol 1 (protection of property) and Article 2 of Protocol 1 (education) are exceptions to this rule. For an accessible overview of what is meant by socio-economic rights, see Thornton, L. "What are Economic, Social and Cultural Rights?", Irish Constitutional Convention Briefing Paper, 22 February 2014, available at www.constitution.ie [last accessed, 30 June 2014].

[3] For a discussion on resource allocation and judicial interventions in the context of the United Kingdom, see Palmer, E. "Resource Allocation, Welfare Rights: mapping the Boundaries of Judicial Control in Public Administrative Law" [2000] 20(1) *Oxford Journal of Legal Studies* 63-88 and Palmer, E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford: Hart, 2007). As regards Palmer's 2007 book, this provides an excellent analysis of how courts in England and Wales are interpreting the socio-economic rights implications of the Human Rights Act 1998. For a discussion on socio-economic rights and the ECHR Act 2003 in Ireland, see Whyte, G. "Public Interest Litigation in Ireland and the ECHR Act 2003" in Egan, S., Thornton, L. & Walsh, J. *The ECHR and Ireland: 60 Years and Beyond* (Dublin: Bloomsbury, 2014). In relation to housing, the concept of home and socio-economic rights, see Gregg, M. "From protection to provision? An examination of the unique position of the 'home' under Irish law in relation to recent European Convention of Human Rights jurisprudence" (2013) 2 *Socio-Legal Studies Review* 69.

is now recognising the interdependent and indivisible nature of civil and political rights and socio-economic rights.[4] This chapter examines the extent to which the ECHR as interpreted by the European Court of Human Rights (ECtHR) has led to a more nuanced understanding and interplay between economic and social rights and civil and political rights.[5] Recent *substantive* socio-economic rights jurisprudence suggests that the impact of the ECHR in this area has yet to be fully realised. This chapter examines the jurisprudence of the ECtHR under Article 2, the right to life, Article 3, protection from inhuman and degrading treatment and Article 8, right to private and family life, of the ECHR in dealing with socio-economic rights.[6] While this jurisprudence is developing, it cannot be said definitively that socio-economic rights are protected by the ECHR. However, the interpretation of the ECHR by the ECtHR seems to suggest that the neat division of socio-economic rights from civil and political rights is waning. While there is much to commend a re-focus on the discourse on socio-economic rights towards budget

[4] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/Conf.157/23 (12 July 1993). For further discussion on indivisible and interdependent nature of all human rights, see, Arambulo, K., *Strengtening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Oxford: Hart/Intersentia, 1999), in particular Chapter 1 and Baderin, M.A. & McCorquodale, R. "The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development" in Baderin, M.A. & McCorquodale, R. (eds) Economic, Social and Cultural Rights in Action (Oxford: OUP, 2007).

[5] This chapter does not examine socio-economic rights (that are explicitly protected) in the European Social Charter Revised (03 May 1996, *E.T.S* 163) or the European Union Charter of Fundamental Rights (EUCFR, [2000] *Official Journal of the European Union* C.364/1).

[6] The potential socio-economic rights impact of Article 6 (determination of civil rights and obligations), Article 1 of Protocol 1 (protection of property) and Article 2 of Protocol 1 (education) will not be considered in this chapter. In addition, the concept of non-discrimination (either as the anciallary Article 14 ECHR right, or the standalone Protocol No. 12 right) has not been considered significantly in relation to the cases discussed in this chapter.. See generally, J. Kenny, "European Convention on Human Rights and Social Welfare Law" (2010) 5 *European Human Rights Law Review* 486, along with some of the following cases: *Gaygusuz v Austria* (1996) 23 EHRR 230; *Koua Poirrez v France* (2005) 40 EHRR 34 and *Stec and Others v United Kingdom* (2006) 43 EHRR 47. The ECtHR has noted that Article 2 of Protocol 1 is worded in the same way as Article 2(1), Article 3, Article 4(1) and Article 7(1) ("No one shall….") as the right to education plays is indispensable within democratic societies to the furtherance of human rights, see *Timishev v Russia* (2007) 44 EHRR 37 at para. 64.

analysis,[7] the focus on this chapter is within the narrow confines of judicial engagement with individual claims that socio-economic rights were violated.

B. THE ECHR: A RELUCTANT SOCIO-ECONOMIC RIGHTS CHARTER?

The *travaux preparatoires* for the ECHR show that the plenipotentiaries had decided against inclusion of socio-economic rights within the Convention. The debate surrounding the inclusion of property rights brought about some comment on the protection of socio-economic rights in general. Mr. Roberts for the UK, in refusing to agree on a right to property within the main Convention document stated that to do so would open the Council of Europe to "…the charge that the Assembly considers property the most important of the social rights."[8] This was countered by Mr. Bastid, France, who, argued about the special nature of the social right to property:

> "Property is an expression of the man and man cannot feel safe if he is exposed to arbitrary dispossession."[9]

Examples of social rights provided were "…the right to work, the right to leisure, and adequate standard of living and social security…" In relation to the right to work, the then Irish Taoiseach, Mr. De Valera (Ireland) stated that

> "[u]ndoubtedly, the right to work and to obtain a livelihood is a fundamental human right, but also there is a duty to work if suitable work is available…"[10]

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[7] See, Nolan, A., O'Connell, R and Harvey, C. *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart, 2013).

[8] Sir David Maxwell-Fyfe in *Collected Edition of the* Travaux Preparatoires *of the European Convention on Human Rights* (The Hague; Martinus Nijhoff Publishers, 1985) at p. 88.

[9] *Ibid.* at p. 118.

[10] *Ibid.* at p. 154.

Since its foundation in 1959, the European Court of Human Rights (ECtHR)[11] has been the guardian of the Convention. The ECtHR has played a pivotal role in developing the key principles of Convention law. The ECtHR has emphasised that the rights protected under the Convention are to be "practical and effective" and not merely "illusory."[12] The ECHR is traditionally seen as a civil and political document. States must generally not take action to bring about a Convention violation through their agents. This argument frames the ECHR in 'negative', non-interference terms. However, the ECtHR has emphasised that certain positive obligations inhere within Convention rights. Positive obligations have been described as a requirement for Contracting States to take action[13] or to regulate certain types of conduct.[14] In *Ilascu*[15] the Court emphasised that in pronouncing upon the extent of positive obligations a fair interest has to be struck between an individual's Convention rights, the general community interest and the choices which elected governments must make in terms of priorities and resources. Positive obligations must not place an impossible or disproportionate burden on the State.[16]

There has been some engagement amongst academics as to whether the ECHR protects economic and social rights (at the Strasbourg level). Warbrick argues that the ECHR does not protect socio-economic rights either explicitly or impliedly.[17] Merrills, while acknowledging that there is no water tight division between social and economic rights

[11] Article 19 of the ECHR.

[12] See *Airey v Ireland* (1979) 2 EHRR 305, para. 24.

[13] For a general overview of how positive obligations have developed under the Convention system, see Mowbray, A. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford; Hart Publishing, 2004).

[14] Ovey, C. & White, R. *Jacobs and White, The European Convention on Human Rights* (Oxford; OUP, 2006), at p. 51.

[15] *Ilascu et. al. v Moldova and Russia* (2004) 40 EHRR 1030, para. 332.

[16] *Özgür Gündem v. Turkey* (2001) 31 EHRR 1082 at para. 43.

[17] Warbrick, C. "Economic and Social Interests and the European Interests and the European Convention on Human Rights" in Baderin, M.A. & McCorquodale, R. *Economic, Social and Cultural Rights in Action* (Oxford; OUP, 2007), pp. 241-256 at 241.

and civil and political rights, cautions against the ECtHR from re-interpreting Convention provisions which would result in socio-economic protection.[18] O'Connell, taking a somewhat different approach, notes that views on taxation levels, public expenditure, and how social goods are distributed in society are part of the "substantive vision of the sort of society we want to see".[19] Therefore, questions surrounding democratic legitimacy do come to the fore when assessing the degree to which courts should/can be the final arbitrators of whether socio-economic rights are violated due to government action or inaction. Nolan notes that legal challenges are but one tool for challenging violations of socio-economic rights,[20] and there exists significant limitations in relying on judges, who are "predominantly members of social elites" in tackling issues of poverty, deprivation, homelessness and lack of food and water in Council of Europe states.[21] There is an argument that while rights protected under the ECHR should be 'effective' rather than 'illusory', the ECtHR should not seek to embellish the substantive content of rights provisions within the Convention.[22] Others, such as Palmer have argued that the ECHR is capable of opening avenues

> "for the protection of vulnerable individuals….to receive a minimum standard of living consistent with their basic human dignity."[23]

Although Palmer does note that the ECtHR has failed to offer

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[18] Merrills, J.G. *The Development of International Law by the European Court of Human Rights* (2nd edition, Sheffield; Manchester University Press, 1993) at p. 102.

[19] O'Connell, P. "Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity" in Nolan, A., O'Connell, R and Harvey, C. *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart, 2013), p. 75.

[20] Nolan, A. *Children's Socio-Economic Rights, Democracy and the Courts* (Oxford: Hart, 2011), p. 220.

[21] Nolan, A. *Children's Socio-Economic Rights, Democracy and the Courts* (Oxford: Hart, 2011), p. 234.

[22] In a dissent in *Airey v Ireland* (1979) 2 EHRR 305, Judge Vilhjalmsson stated that "[t]he war on poverty cannot be won through a broad interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms."

[23] Palmer, E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford: Hart, 2007), p. 50.

> "a unified theory to explain the expansion of affirmative duties" upon the State, due to their obligations under the ECHR.[24]

O'Cinneide, writing in 2008, argued that the ECHR did protect socio-economic rights to an extent, and only where, there was a distinct relationship of dependency between and individual and the State, whereby State inaction could result in inhuman and degrading treatment or where there was a "direct and immediate link" between State action and a violation of the right to private or family life.[25]

I argue that the underlying feature of socio-economic rights recognition and protection under the ECHR is, in effect, another means of upholding the *rule of law* in contracting States. As is explored below, the general tenor of decisions of the ECtHR, has sought to emphasise that where the State has legislated to grant, respect or protect some form of social and economic benefit, the State must ensure that a failure to grant such a benefit, which a person must be entitled to under domestic legislation, may result in the violation of rights protected under the ECHR.

The first significant suggestion that the ECHR may be able to protect, to some degree, socio-economic rights, was made by the ECtHR in *Airey*.[26] The Court found that in some, but not all, cases, Article 6(1) obliges a State to provide for the assistance of a lawyer "…when such assistance proves indispensable for an effective access to the Court." The ECtHR stated that

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[24] *Ibid*., p. 62.

[25] O' Cinneide, C. "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights" (2008) 5 *European Human Rights Law Review* 583 at 585.

[26] *Airey v Ireland* [1979] 2 EHRR 305. For further background and discussion of this case, see: Thornberry, P. "Poverty, Litigation and Fundamental Rights-A European Perspective" (1980) 29/30 *The International and Comparative Law Quarterly* 250. The *Airey* case is also discussed by Egan, S. and Forde, A. "From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court" in Egan, S., Thornton, L. and Walsh, J., *The ECHR and Ireland: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).

> "while the realisation of social and economic rights is largely dependent on the situation-notably financial-reigning in the State …the Convention must be interpreted in light of present day conditions."[27]

At the turn of the millennium, the ECtHR seems to be definitive in stating that socio-economic rights are not protected under the ECHR. In *Jazvinsky* the applicant complained about the bureaucratic workings of the Slovak social welfare authorities. The applicant stated that his right to work, social security and health were all violated. This, the applicant argued, was contrary to human dignity. The ECtHR stated that the Convention does not guarantee against violations of the rights complained of. The complaint was found to be incompatible *ratione materiae* with the Convention.[28] While the ECtHR has been reluctant to interpret substantive socio-economic rights into ECHR provisions, there seems to be emerging judicial consensus in the Strasbourg Court for protecting those who are exceptionally vulnerable.

C. SUBSTANTIVE SOCIO-ECONOMIC RIGHTS PROTECTION & THE ECHR

1. The Right to Life and Socio-Economic Rights

Can there be a violation of Article 2 ECHR where the danger arises from material deprivation of resources? Article 2 ECHR protects a person from the intentional taking of life by the State[29] and, in certain circumstances, from third parties.[30] States have a very

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[27] *Ibid.*

[28] *Jazvinsky v Slovakia*, Application no. 33088/96 (7 September 2000), for a very brief summary of the case see, Council of Europe, Working Group on Social Rights "Overview of the case-law of European Court of Human Rights in social matters" GT-DH-SOC (2005)001, paras. 81 and 82. See also Gomez Heredero, A. *Social Security as a Human Right: The Protection Afforded by the European Convention on Human Rights* (Human Rights Files, No. 23) (Strasbourg, COE Publishing, 2007), at p.46.

[29] One of the more well known cases in this area would be *McCann v UK* (1996) 23 EHRR 97. In this case, the UK was found to have violated their positive obligation under Article 2 of the Convention. The UK's

broad discretion in the arena of socio-economic rights protections under Article 2 ECHR.[31] Where a State does not intentionally put the life of an individual at risk, the Court must ascertain whether the State did all it could do to prevent the risk to the applicants life.[32] The mainstay of the socio-economic cases under Article 2 is within the field of access to medical treatment. [33] In *X v Ireland*,[34] the European Commission on Human Rights declared inadmissible an attempt to rely on Article 2 ECHR so as to claim free medical treatment for a severely disabled child.[35] In *Anguelov*, Bulgaria was found to have violated Article 2 in that, amongst other things, there was a delay in the provision of medical treatment to an applicant who had subsequently died.[36] In *Cyprus v Turkey*, the Cypriots argued inter alia that the lack of adequate health care available to the Cypriot and Maronite populations within Turkish occupied Cyprus violated Article 2 of the Convention. The ECtHR stated that an issue may arise under Article 2 where treatment is

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security forces had shot dead three members of the Provisional Irish Republican Army (PIRA) who were suspected of being involved in terrorist actions in Gibraltar. The Court found that the operation of the UK's security forces fell short of what was expected under Article 2 (paras. 202 *et seq*.) The UK could have prevented the terrorists from travelling to Gibraltar in the first place or have arrested them upon arrival (para 213). The ECtHR found it was not "…persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) of the Convention." (para. 213).

[30] In *Osman v UK* (1998) 29 EHRR 245, the ECtHR found that in certain circumstances (however not in this case), Article 2 of the Convention imposes a positive obligation on States to take preventative measures to protect those whose life is at risk from a criminal. It must be shown that the risk must be real and immediate and the authorities failed to take reasonable measures so as to avoid the risk.

[31] Taylor, K. *Article 2* in Lester, A. & Pannick, D. (eds.) *Human Rights Law & Practice* (3rd edition, London; Lexis Nexis, 2009), at p. 150, paras. 4.2.15.

[32] *LCB v United Kingdom* (1998) 27 EHRR 212, at para. 36.

[33] *Anguelova v. Bulgaria* (2004), 38 EHHR 31.

[34] Application 6839/74, *X v Ireland* (4 October 1976).

[35] The application was declared inadmissible after the patient received the necessary treatment. See, fn. 31 at para. 4.2.13, note 1.

[36] In addition, the ECtHR found beyond reasonable doubt, that police officers had caused injury to the applicant and the delay in the provision of medical treatment was to ensure that independent medical experts could not examine the applicant and ascertain how the injuries came about, (2004), 38 EHHR 31 at paras 125-130.

denied to a person, where such treatment is available to the population generally.[37] The ECtHR felt that it would be inappropriate to comment on the extent to which Article 2 ECHR imposes on a State an obligation to provide a certain standard of health care.[38] The ECtHR in *La Parola*[39] stated that Article 2 could not be relied on in a case regarding a severely disabled child's health care or the assistance given to the child's parents. The ECtHR noted that the parents already received a permanent social assistance benefit and "the scale of that benefit showed that Italy was already discharging its positive obligations."[40] In *Nitecki*[41] the ECtHR found no violation of Article 2 where Poland agreed to pay 70% of the treatment price of a medical treatment, despite the evidence that the applicant may not have been able to pay the 30% contribution. In this case, failure to provide the treatment free of charge or at a more heavily discounted level did not engage or violate Article 2.

One of the only substantive judgments on the issue of lack of food, warmth, adequate shelter to date, that relates directly to the right to life and social provision, is the recent judgment of *Nencheva et al v Bulgaria*.[42] In *Nencheva*, the applicants were the parents of a number of children and young people who were cared for (due to their profound disabilities) in a state institution. Due to a significant recession in Bulgaria, the manager of the state institution did not have sufficient funds to provide food, light, sanitation or medical treatment for the applicants' children.[43] Fifteen children died, and while it could

[37] *Cyprus v Turkey* (2002) 35 EHRR, para. 219. In this particular case, the Court failed to find that Turkey had deliberately withheld medical treatment from the Cypriot or Maronite minority.

[38] *Ibid.* Turkey were found to have violated the rights of the Cypriot and Maronite minorities in a number of instances including those in relation to educational rights and property rights.

[39] *La Parola v Italy*, Application no. 39712/98 (30 November 2000), See, Gomez Heredero, A. *supra.* fn.28 at p. 38.

[40] *Ibid.*

[41] *Nitecki v. Poland*, Application No. 65653/01 (21 March 2002), See, Gomez Heredero, A. *supra.* fn. 28 at p. 39.

[42] Application No 48609/06, *Nencheva and others v Bulgaria* (Unreported decision of the ECtHR, June 18 2013). The decision is available in French only from Hudoc, see http://hudoc.echr.coe.int/ (last accessed, 30 June 2014).

[43] *Ibid*, paras 26-31.

not be definitively proven, it was accepted that the lack of food, heat and cleanliness of the institution contributed to the children's deaths.[44] Despite attempts by those working in the care home and the mayor of the locality to gain funding from central government, only limited funding was made available.[45] One of the issues that the ECtHR had to decide on,[46] was whether the failure by Bulgaria to provide adequate food and nourishment, heating and medical care, was a violation of Article 2. The ECtHR found that the State had failed to protect the lives of vulnerable children under their care that placed them at an imminent risk of death, violating Article 2 of the ECHR.[47] In finding Bulgaria had violated Article 2 ECHR, the ECtHR noted throughout the judgment, the exceptional circumstances, at play.[48] Bulgarian authorities had an obligation under domestic law to care for the children.[49] The State failed to respond to requests for assistance from the director of the care home and the town mayor.[50] The ECtHR noted that the State had "precise knowledge of the real and imminent risk"[51] to the lives of the children and young persons due to the lack of food, health and medical treatment.[52] In making this finding, the ECtHR went to great lengths to distinguish this case from issues of force majeure or from isolated cases of death in such facilities due to medical error.[53]

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[44] Ibid. para. 120.

[45] *Ibid*, paras 32-40.

[46] The ECtHR also discussed the positive obligation on states to conduct an adequate investigation where an individual in State care dies in controversial circumstances, see Ibid, paras 126-141. The Court rejected arguments made under Article 13 ECHR, taken with Article 2 & Article 3 ECHR and alleged infringement of Article 6 ECHR.

[47] See paras. 160-169. The ECtHR awarded damages to two of the parents of €10,000 (as they had maintained a relationship with their son throughout), with the other applicants receiving 'just satisfaction' from the delivery of the judgment.

[48] *Ibid*. paras, 10-25, 37, 39 and 124.

[49] See paras. 63-67 and para. 118.

[50] Ibid., para. 121.

[51] Ibid, para 124, "…alors qu'elles avaient une connaissance précise des risques réels et imminents pour la vie des personnes concernées." Author's translation.

[52] See further, paras. 122-124.

[53] See in particular *Ibid*. paras 117-122.

2. *Inhuman and Degrading Treatment and Socio-Economic Rights*

If a 'real and imminent' risk is the test for protection of socio-economic rights that impact on the right to life, how has the ECtHR engaged with arguments under Article 3 ECHR?[54] From the jurisprudence of the ECtHR, all torture is in essence inhuman and degrading. Inhuman treatment includes that which has been deliberately inflicted and causes sever mental or physical suffering which is unjustifiable.[55] While usually Article 3 violations will take place due to the actions of public officials or non-State actors, given its fundamental nature, the Court has stated that there may nevertheless be a violation of Article 3

> "where the source of the risk…stems from factors which cannot engage either directly or indirectly, the responsibility of the public authorities of that country…"[56]

For treatment to be degrading it must 'grossly humiliate' or require a person to act against will or conscience.[57] Suffering from a naturally occurring illness may be covered by Article 3 where

> "it risks being exacerbated by treatment, whether flowing from conditions of detention, expulsion or *other measures, for which the authorities can be held responsible*."[58]

The case law under Article 3 and socio-economic rights has been developed within three different areas. Firstly, there are the cases wherein applicants failed to convince the Court that a certain minimum standard of living should be provided so as to avoid treatment

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[54] This part of the chapter will only focus on inhuman and degrading treatment, for discussion on the ECtHR's approach to the definition (and differentiation) between torture, inhuman and degrading treatment, see generally: *Greek Case* 12 (1969) Yearbook of the European Convention on Human Rights, 186; *Ireland v UK* (1978) 2 EHRR 25 at para. 167; *Tyrer v United Kingdom* (1978) 2 EHRR 1; *Selmouni v France* (2000) 29 EHRR 403; *Chahal v United Kingdom* [1997] 23 EHRR 413, para. 79; *Pretty v UK* (2002) 35 EHRR 1.

[55] *Ibid.*

[56] *D. v United Kingdom* (1997) 24 EHRR 423 at para. 49. See also, *Pretty v UK* (2002) 35 EHRR 1.

[57] *Greek Case* 12 (1969) Yearbook of the European Convention on Human Rights, 186-510 at p. 186.

[58] *Ibid.* (Author's emphasis).

which would be regarded as inhuman or degrading. There have been some exceptionally limited successes in arguing the right to medical treatment as being inherent within Article 3 protections. The area wherein the Strasbourg Court has substantially developed principles which are inherently socio-economically laden are within their conditions of detention jurisprudence. The case law under these three heads shall now be examined and analysed to see whether this jurisprudence indicates a shift towards protection of socio-economic rights by the ECtHR.

i. Article 3 and minimum standard of living

The former European Commission on Human Rights had rejected any interpretation of Article 3 as requiring everybody to have the most basic goods to ensure human dignity.[59] In *van Volsem* the applicant suffered from a number of ailments which were aggravated by her low means.[60] Due to her lack of means, the applicant was unable to pay her electricity bill when it came due. The applicant had been disconnected from the main electricity grid for a significant period of time during a particularly harsh winter. It was argued that Article 3 guarantees the right to certain basic goods which are "indispensable for ensuring human dignity."[61] The applicant was not arguing entitlement to free electricity, but simply highlighting the fact that she could not pay the large bills. The Commission found that the cutting off the electricity, did not reach the level of humiliation that was necessary so as to engage Article 3.[62]

In *Pancenko*[63] the applicant had had a deportation order against her, however by the time she had come to the court, this order was cancelled and she was granted permanent

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[59] Cassese, A. "Can the Notion of Inhuman and Degrading Treatment be applied to Socio-Economic Conditions?" (1991) 2 *EJIL* 141-145.

[60] Application no, 14641/89, *Van Volsem v Belgium*, 9 May 1990.

[61] Cassese, *supra*. fn. 59 at p. 142.

[62] Cassese, *supra*. fn. 59 at p. 143.

[63] Application No. 40772/98, *Pančenko v. Latvia*, Decision of the ECtHR, 28 October 1999,. This is an unreported admissibility decision, however, the United Nations High Commission for Refugees (UNHCR) has a summary of the case at the following link, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=3ead2e584&tbl=PUBL, see pp. 17-18, [last accessed, 30 June 2014].

residency in Latvia. Mrs. Pancenko had also argued that she suffered socio-economic problems due to the denial of a residence permit from Latvia. In particular, she suffered from unemployment, lack of free medical care and had no financial support. The claim was based on article 3 and the 'inhuman and degrading punishment' which arose from her socio-economic difficulties. The ECtHR stated categorically that:

> "The Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living."

In this particular case the applicants living conditions did not attain the minimum level of severity required to amount to inhuman or degrading treatment contrary to Article 3. In *Larioshina*[64] an old age pensioner argued that the amount of her old age pension was insufficient for her to live on and breached her rights under the ECHR. This claim however failed. The Court specifically recognised that

> "a complaint about a wholly insufficient amount of social benefits may, in principle, raise an issue under Article 3…"

The severity threshold in this case was not reached. Therefore, the possibility that Article 3 may give rise to potential socio-economic obligations upon contracting States remains; however, the threshold which applicants would have to reach seems quite high. However, this threshold was met in the case of *M.S.S. v Belgium and Greece.*[65]

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[64] Application no. 56679/00, *Larioshina v Russia*, decision of the ECtHR, 23 April 2002.

[65] Application no. 30696/09, *M.S.S v Belgium and Greece*, Decision of the ECtHR, 21 January 2011. For further exploration of this case, see Thornton, L. "Law, Dignity and Socio-Economic Rights: The Case of Asylum Seekers in Europe" (2014) FRAME Working Paper No. 6, available at http://www.fp7-frame.eu/working-papers/ (last accessed, 30 June 2014). For a discussion of a related case (within the field of EU law and the European Union Charter of Fundamental Rights), see Joined Cases C-411/10 and C-493/10 *N.S./M.E*. [2011] ECR I-865. This case is discussed in, Kingston, S. "Two-speed rights protection? Comparing the Impact of EU Human Rights Law and ECHR Law in the Irish Courts" in Egan, S., Thornton, L. & Walsh, J. *The ECHR and Ireland: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).

M.S.S was an Afghan asylum seeker. The applicant first entered Greece, where he was detained for a number of days.[66] He was then ordered to leave the state and made his way to Belgium. The applicant had not applied for asylum in Greece at this stage. Upon arriving in Belgium, M.S.S made an application for asylum. Implementing the Dublin Regulation,[67] Belgium returned the applicant to Greece and received assurances that the applicant would be allowed to enter the Greek asylum process. The applicant was detained for a further seven days when he re-entered Greece, and eventually his asylum claim was processed and he was released with an entitlement to work and medical care. The ECtHR noted that Greece had transposed the EU Reception Conditions Directive (RCD),[68] after the Court of Justice of the European Union (CJEU) had ruled that it had not transposed the RCD within the prescribed transposition period.[69] M.S.S lived in extreme poverty while awaiting the outcome of his asylum claim, which had been lodged in June 2009 and still had not been decided upon on the date of the ECtHR judgment.[70] No information on accommodation or subsistence was provided to M.S.S.[71] The applicant was living in a park with other Afghan asylum seekers, did not have any sanitation or opportunities to maintain his appearance or hygiene, and relied on churches and other individuals and organisations for food.[72] Greece argued that the applicant had a 'pink card' which enabled him to work and also to obtain medical assistance free of charge. Greece stated that had the applicant remained in the country, rather than going to Belgium (from which he was later returned), he would have had ample resources to rent

[66] *Ibid*., para. 205.

[67] Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national [2003] *O.J.* L.222/3. Regulation 343/2003 is also known as *Dublin II*.

[68] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] *O.J.* L.31/18.

[69] Case C-72/06, *Commission v Greece*, Decision of the European Court of Justice, 19 April 2007.

[70] *Supra*. fn. 65 at para. 235.

[71] *Ibid*., para. 236.

[72] *Ibid*., para. 238.

accommodation and cater for his needs.[73] Greece further argued that to find that the applicant's Article 3 rights were violated by a failure to provide for material reception conditions, would place an undue burden on the state in the midst of its worst ever financial crisis.[74]

The ECtHR began by emphasising that Article 3 does not provide the right to a home[75] or the right to a certain standard of living.[76] The ECtHR stated that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers is due to "positive law", namely the RCD.[77] The ECtHR also noted their decision in *Budina v Russia*,[78] where it was stated that in a situation of severe deprivation, a contracting state may have obligations under Article 3 ECHR. The ECtHR emphasised that asylum seekers were a particularly vulnerable group[79] and while the 'pink card' gave the applicant the opportunity to work, this was not realisable due to his poor command of Greek, the administrative hurdles in being registered as an employee, and the general unfavourable economic climate in Greece.[80] It is important to note that the ECtHR only found such a violation due to Greece's legal obligations under the RCD. Judge Roazakis, in a concurring opinion, stated that the RCD 'weighed heavily' on the court.[81] The distinctions made between asylum seekers and other persons, who may not have a legislative right to accommodation or means of subsistence, was crucial. The ECtHR held that the Greek authorities did not have due regard to the vulnerability of the applicant who has spent several months sleeping in a park with no regular or guaranteed access to

[73] *Ibid*., paras. 240-243.

[74] *Ibid*., para. 243.

[75] Repeating the sentiments expressed in *Chapman v UK* (2001) 33 EHRR 399 at para. 99.

[76] See, *Muslim v Turkey* (2006) 42 EHRR 16.

[77] *Supra*. fn. 65 at para. 250.

[78] Application No. 45603/05, *Budina v Russia*, Unreported judgment of the ECtHR, 18 June 2009.

[79] *Supra*. fn. 65 at para. 251, see also Application No. 15766/03, *Orsus v Croatia*, Unreported judgement of the ECtHR, 16 March 2010 at para. 147.

[80] *Ibid*., para. 261.

[81] Individual concurring opinion of Judge Roazakis, *supra*. fn. 65. There are no paragraph numbers to which direct reference can be made.

food. This was degrading treatment, which violated Article 3 ECHR.[82] Belgium was also found liable for the living conditions of M.S.S in Greece. The ECtHR stated that the expulsion of an asylum seeker by a contracting state can result in a violation of Article 3, even if the state is operating under the Dublin Regulation.[83] Since Belgium should have been aware of the general living conditions that M.S.S would be living under, Belgium had knowingly transferred to Greece, exposing him to living conditions that amounted to degrading treatment.[84]

Judge Roazakis emphasised that not everybody can claim the right to a minimum level of subsistence under the ECHR, as the RCD provided an "advanced level of protection" to asylum seekers.[85] In a partly dissenting opinion,[86] Judge Sajó was of the view that neither Greece nor Belgium had any obligation as regards the living conditions of M.S.S under the ECHR. Rejecting the finding that asylum seekers were a vulnerable group *per se*, Judge Sajó argued that the majority within the Grand Chamber were constitutionalising welfare rights, something that could only be done by state legislators or constitutional courts of the contracting states to the ECHR. Judge Sajó also stated that the obligations of EU member states under the RCD are 'fundamentally different' to the positive obligations upon contracting parties under Article 3 ECHR. In Judge Bratza's partly dissenting opinion,[87] he stated that Belgium should not be held liable under Article 3 ECHR for returning M.S.S to Greece.[88] In December 2008, the ECtHR had ruled in *K.R.S. v United Kingdom*[89] that returning an asylum seeker to Greece under the Dublin II Regulation would not violate Article 3. K.R.S was challenging his return to Greece claiming that the asylum determination process and reception conditions in Greece

[82] *Supra*. fn. 65 at para. 263.

[83] *Ibid*., para. 365.

[84] *Ibid*., para. 367.

[85] *Supra*. fn. 81.

[86] Partly concurring and partly dissenting opinion of Judge Sajó, *supra*. fn. 65. There are no paragraph numbers to which direct reference can be made.

[87] Partly dissenting opinion of Judge Bratza, *supra*. fn. 65.

[88] *Ibid*., para. 1.

[89] *KRS v United Kingdom* (2009) EHRR SE8.

violated Article 3.[90] In dismissing this claim, the fourth chamber of the ECtHR stated that Greece had an adequate refugee status determination system and the EU

> "… asylum regime so created protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance."[91]

Judge Bratza noted that the deficiencies in the Greek asylum and reception system were known to the court in *K.R.S.*[92] The Grand Chamber was relying on many of the reports from international organisations and non-governmental organisations that the fourth chamber in *K.R.S* had already rejected.[93] The Belgian authorities had specifically referenced the *K.R.S.* judgment when they decided to transfer M.S.S back to Greece.[94] Given the close proximity in time between the *K.R.S* decision and the application of M.S.S to the ECtHR for immediate Rule 39 measures (which were not granted), Belgium was simply implementing known ECHR law in relation to the transfer of M.S.S. to Greece.[95] Therefore, Belgium should not have, in Judge Bratza's opinion, been found liable for the degrading treatment suffered by M.S.S in Greece.

This judgment raises some interesting questions on how the ECtHR reached its decision that both Belgium and Greece violation Article 3 due to the reception conditions for those seeking asylum in Greece. Prior case law set a very high threshold before a lack of basic state social supports would engage Article 3 ECHR. The decision in *M.S.S* goes some way to dealing with the question of when state inaction in the field of socio-economic rights protection, can lead to a violation of Article 3 ECHR. However, this decision also raises important questions regarding the extent to which Article 3 ECHR can prevent destitution for all persons in a state. The decision in *M.S.S* relied heavily on Greece's membership of the EU and the obligations upon it due to the requirements of the RCD.

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[90] *Ibid*., pp. 129-132.

[91] *Ibid*. pp. 142-143.

[92] *Supra*. fn. 87 at para. 3.

[93] *Ibid*.

[94] *Ibid*., para. 6.

[95] *Ibid*., paras. 9-16.

The RCD only applies to those who seek asylum and not other forms of complementary protection. While in Ireland and the UK, most who seek asylum or protection are provided with reception conditions that safeguard against destitution, it is unclear whether contracting states, which do not provide any form of reception for those seeking complementary forms of protection, will be found to have violated Article 3 ECHR. This raises a more fundamental issue on the 'absolute' nature of Article 3 in relation to socio-economic rights protections.[96]

Given that a slim majority of contracting states to the ECHR are not members of the EU (and Denmark and Ireland are not bound by the RCD), to what extent can asylum seekers in these states rely on Article 3 ECHR? It is likely, that *if* asylum seekers and those who claim subsidiary forms of protection can rely on Article 3, then the most that this would ensure would be a very basic level of socio-economic protection, extending no more than to the provision of shelter, food and other basic means of subsistence. There is no suggestion within *M.S.S* that there is a requirement to provide a right to shelter, food, subsistence and social assistance payments at a level enjoyed by nationals or legal residents within a contracting state. The decision in M.S.S leaves a lot of questions unanswered in relation to the level of support that must be maintained. However, given previous decisions in *Pancenko*, *Larioshina* and *Budina*, it is unlikely that the ECtHR would delve into the modalities of reception or question the level of monetary payment received by an individual claiming asylum or subsidiary protection. In *Limbuela*,[97] the House of Lords in the United Kingdom found that the withdrawal of all form of social supports for an asylum seeker, coupled with the denial of the right to be self-sufficient would give rise to a violation of Article 3 where

[96] The ECtHR, in Application no. 44689, *Safaii v Austria*, judgment of the European Court of Human Rights, 12 May 2014, made clear that transfers to Greece, prior to the release of the M.S.S. decision, did not violate Article 3 ECHR.

[97] *R (Limbuela, Tesema & Adam) v Secretary of State for the Home Department* [2006] QB 1440. For a full (and contrasting) discussion of this case, see, O' Cinneide, C. "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights" (2008) *European Human Rights Law Review* 583; Warbrick, *supra*. fn. 17 at pp 252-256 and Palmer, supra. fn. 23, pp 265-270.

> "it appears on a fair and objective assessment of all relevant facts … that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life…"[98]

Without substantively discussing *Limbuela*, both courts relied on concepts of positive law,[99] however the tenor of *Limbuela* seems to suggest that providing reception conditions for those seeking asylum (or subsidiary protection) was inherent within Article 3 ECHR to ensure that an individual did not suffer inhuman or degrading treatment due to a states actions or inactions. Nevertheless, the limited remit of these judgments must be emphasised in that both permit significant differences in protecting the socio-economic rights of asylum seekers (and potentially those seeking other forms of protection) in comparison with citizens or legal residents of a state. In any case, once material conditions for subsistence protect against destitution, it is likely that the ECtHR would not entertain a challenge arguing that reception conditions were inadequate for Article 3 ECHR purposes. When discussing positive obligations, the ECtHR, while wary of interfering with how a government allocates resources,[100] nevertheless has proved willing to intervene where prison conditions were wholly inadequate. This would have a knock on effect on other government priorities. However, the Court does not appear to have an appetite to set down precise degrees of protection for socio-economic rights. In general, the ECtHR has adopted a cautious approach when assessing the degree to which Article 3 ECHR can be seen as providing individuals with a certain minimum standard of living as evidenced in *M.S.S* where the ECtHR noted that the only reason the applicant was protected was due to Greece violating EU law. Nevertheless, it needs to be emphasised that states obligations under Article 3 ECHR would not extend to ensuring equality in the provision of welfare rights to asylum seekers or those seeking protection.

ii. The medical treatment cases

[98] [2006] QB 1440 at p. 1441, per Lord Bingham.

[99] In the case of *Limbuela*, section 95 of the Immigration and Asylum Act 1999.

[100] See *supra*. fn. 15 and accompanying text.

The ECtHR has not pronounced on a general right to medical treatment.[101] The *AIDS cases* may be instructive as to how the ECtHR views socio-economic rights in general. In *D*[102] it was argued that the withdrawal of medication from a patient in an advanced stage of the AIDS virus, and removing him to St. Kitts would be a violation of *inter alia* Article 2,[103] Article 3 and Article 8[104] of the Convention. Article 2 and Article 8 were not considered by the ECtHR. The ECtHR found that, if removed, D would be subject to inhuman and degrading treatment contrary to Article 3. The fact that the applicant would suffer in St. Kitts and this suffering could not be attributable to the British authorities did not mean that Article 3 could not be engaged.[105] In coming to that decision, the ECtHR emphasised that alien ex-prisoners in general do not have a right to remain in the State in order to benefit from medical, social or other forms of State assistance.[106] However, the Court noted the exceptional circumstances in this case: the advanced stage of the applicant's illness and the lack of any societal or familial support in St Kitts for D. The ECtHR therefore found that to remove D would be a violation of Article 3.[107] However, there is not a general right for those suffering with HIV or AIDS to remain in a country in

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[101] *Supra.* fn. 17 at p. 251.

[102] *D. v United Kingdom* (1997) 24 EHRR 423.

[103] The applicant argued that the UK government had a positive obligation to protect his right to life. Since his removal to St. Kitts would bring about a quicker death, there would be a direct causal link between his expulsion from the UK and his death (para. 56). The UK Government retorted with the suggestion that the UK could not be held responsible since his death was brought about by his illness combined with a lack of medical treatment (para. 57).

[104] D. argued that his removal would constitute an interference with his private life in that any removal would result in an attack on his physical integrity (para. 61). The UK in response stated that D could not claim a violation of Article 8, as any link with the UK was due to D's committal of a crime. Even if D could claim to enjoy the right to a private life in the UK, his removal was necessitated due to the serious nature of the crime committed (drugs offences) and to protect the economic well being of the UK (para. 62).

[105] (1997) 24 EHRR 423 at para. 49.

[106] *Supra.* fn. 102 at para. 54.

[107] *Ibid.*

which they have no right to be present.[108] In *S.C.C v Sweden*[109] the applicant claimed that she should be entitled to remain in the country given the lack of treatment for HIV in Zambia. The applicant claimed that if returned to Zambia, her right to life would be violated. In addition, she stated that she would be subject to inhuman and degrading treatment and a violation of her respect to private life in that she would not have access to necessary medications so as to contain her illness. The Court distinguished between the *D* and *B.B* cases in that within both these cases, the applicants' illnesses were in an advanced stage and if returned, both would have no social or moral support from their families or communities. The Court found as a matter of fact that AIDS treatment was available in Zambia. In addition, the applicant could rely on familial and other support. The expulsion of the applicant was provided for by law, and the State party has a legitimate aim in protecting the countries immigration system and the 'economic well-being of the country.' The ECtHR found that the applicants claim of an article 3 violation were she returned to Zambia was "manifestly unfounded."

The *Bensaid*[110] case did not concern a terminal illness like AIDS, but an issue arising from the applicant's mental health. The applicant was an Algerian national. He argued that if he was returned to Algeria, he would face a real risk of relapse of psychotic symptoms which would violate his rights *inter alia* under Article 3 and Article 8 of the Convention. In relation to Article 3, the ECtHR stated that due to its fundamental importance, it can examine the applicant's claim even where the source of the violation may not be directly or indirectly attributed to the public authorities of the country to which the applicant is to be returned.[111] Otherwise, the absolute nature of Article 3 would be undermined. However, in this case, the applicant failed to substantiate a real risk of an

[108] In 1998, the ECtHR gave judgment in *B.B. v France* (7 September 1998). This case revolved around B.B.'s danger of deportation to the Congo, where he alleged he would not have access to anti-retroviral drugs. B.B was at a late stage of his illness. Any removal, the applicant argued, would be contrary to Article 3 and Article 8 of the Convention. The case was however struck out as the ECtHR accepted that France no longer intended to remove the applicant from the country.

[109] *S.C.C v Sweden* (Unreported Judgment of the European Court of Human Rights, 15 February 2000).

[110] *Bensaid v United Kingdom* (2001) 33 EHRR 205.

[111] (2001) 33 EHRR 205 at para. 34.

Article 3 violation and the facts of the case were not comparable to the exceptional nature in *D.*[112] While the ECtHR accepted that there may be difficulties for Bensaid in accessing treatment for his mental illness, these burdens were not so big as to find an Article 3 violation.[113] The Court acknowledged the seriousness of the applicant's condition, it also emphasised the high threshold which must be surpassed in finding a violation of Article 3. In *Hukic*, the ECtHR stated that there was no Article 3 violation where a Down's syndrome child was expelled from Sweden with his parents. The applicants had argued that treatment for Down's was much better in Sweden than in their native Bosnia.[114]

iii. Article 3 and detention conditions

In the last decade, the ECtHR have given judgments in a number of cases wherein applicants successfully complained of Article 3 violations with regard to prison conditions. The conditions were so poor, that they constituted inhuman and degrading treatment beyond that which inevitably goes with imprisonment for the commission of a crime. In general a Contracting State

> "…must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure [punishment] do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention…"[115]

In *Dougoz* the applicant complained of poor conditions within a detention centre. These conditions included overcrowding, sparse and intermittent hot-water and a lack of beds and bedding for the inmates. In addition, the applicant claimed that detainees had little fresh air, no exercise yard and no natural light. The applicant argued that these conditions

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[112] (2001) 33 EHRR 205 at para. 40.

[113] The applicant had stated that his family were not very well off; they lived in a two bedroom house and survived on his fathers pension. In addition, his familial home was 70-80 kilometres from the nearest acute mental health hospital, (2001) 33 EHRR 205 at para. 30.

[114] *Hukic v Sweden*, Application no. 17416/05 (07 September 2005)

[115] *Kudla v Poland* (2000) 35 EHRR 198 at para. 94.

violated Article 3 of the Convention. The Greek Government denied these claims.[116] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published a report on the particular detention centre which was highly critical of many aspects of the centre including hygiene, sanitation, the over-crowded conditions and the mixing of those held under aliens' legislation and those convicted of criminal offences.[117] The ECtHR noted that the applicant's description of the detention centre was corroborated by the CPT. Given the length of time the applicant was held in these conditions (18 months), the ECtHR found this to be inhuman and degrading.[118]

In *Kalashnikov* the applicant was on remand in very cramped and over-crowded conditions.[119] Russia, while in part acknowledging problems with its detention facilities, stated that the applicant was not subjected to inhuman or degrading treatment. The conditions experienced by the applicant did not differ, or were no worse, than those prevailing within many Russian prisons.[120] Furthermore, Russia pointed to the very difficult economic circumstances it had encountered during the time of the applicant's detention.[121] The Court however, after examining the effect which such conditions would have on an individual in detention, concluded that the applicant suffered from treatment[122] which diminished his human dignity and aroused feelings of humiliation and

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[116] *Dougoz v Greece* (2002) 34 EHRR 61, paras. 20-23. In the earlier case of *Peers v Greece* (2001) 33 EHRR 51, the Court had found that the failure to separate remand prisoners from those convicted of an offence and the poor conditions of detention, including lack of proper ventilation or private toilet facilities constituted degrading treatment.

[117] (2002) 34 EHRR 61, para. 40.

[118] (2002) 34 EHRR 61, paras. 47-49.

[119] *Kalashnikov v Russia* (2003) 36 EHRR 34 at paras. 13-30. Some of the issues of detention included: sharing a small cell with up to 14 other people where prisoners would sleep in shifts of 8 hours each since there was inadequate sleeping facilities, the applicant contracting a number of diseases, the cell was unsanitary and there was little natural light or fresh air.

[120] (2003) 36 EHRR 34 at para. 93.

[121] (2003) 36 EHRR 34 at para. 94.

[122] Though the Court did note that there was no positive intention on the authorities to violate Article 3 ((2003) 36 EHRR 34 at para. 101).

debasement.[123] In *Poltoratskiy v Ukraine*[124] the ECtHR acknowledged that there is no need for the State to have a positive intention of humiliating or debasing an individual. However, circumstances may be such that the treatment endured by the applicant comes within the realm of Article 3. In *Poltoratskiy* the applicant was found guilty of murdering four individuals. His conditions of detention included a lack of water, which came from a pipe attached to the wall, the walls were covered with faeces, there was no means to flush the toilet and the applicant was kept in a cell where lights were on twenty four hours a day and the radio was only switched off at night.[125] While the economic difficulties for the Ukraine within this period were acknowledged, the ECtHR stated that a lack of resources cannot justify prison conditions which are so poor so as to be contrary to Article 3 of the Convention.[126]

This line of case-law cannot give rise to a certain degree of medical conditions to be present within the place of detention. In *Kudla* the applicant was arrested for a number of criminal offences. He suffered from severe and chronic depression and attempted to commit suicide on a number of occasions.[127] It was argued that the failure to provide the applicant with adequate psychiatric treatment while waiting for trial on remand constituted a violation of Article 3.[128] Poland in response referred to the high degree of medical and other supervision provided to the applicant.[129] The ECtHR found that there was no violation of Article 3 whereby the applicant was detained and had complained of lack of treatment for mental illness while in custody of the State. The Court stated that the ill-treatment complained of did not reach the degree of severity required under Article

[123] (2003) 36 EHRR 34 at para. 101. In addition, the ECtHR found a breach of Article 5(3) and Article 6(1).

[124] *Poltoratskiy v Ukraine* (2004) 39 EHRR 43.

[125] (2004) 39 EHRR 43 at paras. 129-139.

[126] (2004) 39 EHRR 43 at para. 148. In addition, the ECtHR found a violation of Article 8 (revolving around the right to respect for correspondence and the interference with family visits) and Article 9 (the applicant was not allowed receive visits from priests) of the Convention.

[127] *Kudla v Poland* (2000) 35 EHRR 198.

[128] (2000) 35 EHRR 198 at paras. 82-85.

[129] (2000) 35 EHRR 198 at paras. 86-89.

3.[130] Poland had fulfilled its positive obligations under Article 3 by putting in place a system of supervision and monitoring of the applicant's health status and the Court was unwilling to re-assess the nature and level of the supports in place. The cross-applicability of these cases to areas where a State takes responsibility for the care of an individual outside a detention setting has yet to be fully teased out. This may the responsibility of States for conditions within an orphanage, a school, within an elderly care home and may expand to the protection of those who are unemployed, pensioners, or who are legislatively barred from seeking employment and being self-sufficient. In *Mayeka and Mitunga v Belgium*[131] the respondent State was found to have violated Article 3. In this case, one of the applicant's was a five year old Congolese child. She was removed from the DRC by her uncle (a Dutch national) in the hope that she would then go to her mother in Canada. On arrival in Belgium, the applicant's uncle did not have the necessary immigration documentation for the child and so the child was detained. The child was detained for a period of two months in an adult detention centre. The applicants' claimed that this was inhuman and degrading in that this detention centre was unsuitable for minors (it was an adult facility). The young child it was claimed had been denied freedom of movement, had been unable to play or express her feelings, and had been held in precarious conditions in an adult world where liberty was restricted.[132] Belgium, although admitting that the centre was unsuitable, justified the detention on the basis that the child did not have identity documents or necessary entry visa to gain access the country. Furthermore, the child had regular telephone contact with her mother and uncle and was integrated into family life by other mothers at the detention centre. Belgium also stated that staff in the detention centre were attentive to the needs of the child.[133] The ECtHR stated that the child's rights under Article 3 take precedence to any issue regarding her legal or immigration status within Belgium.[134] The applicant was a

[130] (2000) 35 EHRR 198 at para. 99. The ECtHR did however find a violation of Articles 5(3), 6(1) and 13 of the Convention.

[131] *Mayeka and Mitunga v Belgium*, Application no. 13178/03 (12 October 2006).

[132] *Ibid.*, para. 42.

[133] *Ibid.*, paras. 43-47.

[134] *Ibid.*, para. 55.

very vulnerable person to whom "…the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention."[135] The Court was satisfied that Belgium was aware of the plight of the child and demonstrated a lack of humanity to such a degree that it constituted inhuman treatment in violation of Article 3.[136]

iv. Conclusion on Article 3 ECHR

It is clear that Contracting States are to have in place certain conditions of detention and lack of resources cannot generally justify a deviation from these standards. The jurisprudence on a certain minimum standard of living and access to medical treatment is developing. However, it seems only the most serious of socio-economic rights, coupled with pre-existing legislative obligations upon States to meet provide certain minimum social supports are necessary. It will be interesting to see if the Strasbourg Court will expand the reaches of Article 3 any further. Since Article 3 is absolute the judges may be wary of expanding interpretations any further given the possible resource implications this may have for States. When discussing positive obligations, the Court while wary of interfering with how a Government allocates resources,[137] nevertheless has proved willing to intervene where conditions of detention were wholly inadequate or where States failed to comply with legislative obligations that they themselves had set down. However, the Court does not appear to have an appetite in declaring socio-economic principles of general application as being inherent within Article 3 protections.

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[135] *Ibid.*

[136] *Ibid*., para. 58. The ECtHR also found that Article 8 of the Convention was violated as Belgium had interfered with the child and mother's family life by deporting the girl to the Democratic Republic of the Congo. The Court also found that by detaining the child, Belgium had violated Article 5(4) of the Convention. See also, Application No. 58164/10, *Bygylashvili v Greece*, Unreported judgment of the European Court of Human Rights, 25 September 2012 (available in French only).

[137] See *supra*. fn. 15 and accompanying text.

3. *Social and economic rights and Article 8*

i. Introduction

De la Mare and Kennelly describe Article 8 as protecting a rag-bag of personal rights and interests from physical and bodily integrity, to the recognition of an acquired gender, ability to express ones sexual orientation, protection of communications, reputation and preservation of family life.[138] In *Pretty* the ECtHR said that the term private life is

> "…not susceptible to an exhaustive definition…it can embrace aspects of an individual's physical and social identity….a right to establish and develop relationships…[and] the notion of personal autonomy is an important principle underlying the interpretation… [of Article 8]".[139]

When dealing with issues of positive obligations (in particular those which may have a socio-economic tone), the ECtHR has given a wide margin of appreciation to Contracting States. In particular, as the case law below highlights, the Court has stated that national authorities are inherently in a better position than an internationalised court to assess the needs of individuals. The Court has stated that due to a Government's "direct and continuous" knowledge of their State, they are in principle in a better position to evaluate local needs and conditions.[140] The ECtHR therefore will only provide the most general principles of application when ruling on issues which have socio-economic effects. As with Article 3, only in the most extreme circumstances will the Court acknowledge socio-economic protection as coming within Article 8. That said, the ECtHR has always stated that Article 8 (and Article 3) may in exceptional circumstances require positive social

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[138] De la Mare, T. & Kennelly, B. "Article 8" in Lester, A. & Pannick, D. (eds.) *Human Rights Law & Practice* (2nd edition, London; Lexis Nexis, 2009) at p. 359, para. 4.8.2. Moreham has attempted to categorise the protections offered for ones private life under Article 8 of the ECHR as including: (i) Freedom from interference with physical and psychological integrity; (ii) Collection and disclosure of information; (iii) Protection of one's living environment; (iv) Identity and (v) Personal autonomy, see Moreham, N.A. "The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination [2008] *EHRLR* 44-79.

[139] *Pretty v UK* (2002) 35 EHRR 1 at para. 61.

[140] *Buckley v United Kingdom* (1996) 23 EHRR 101 at para. 75.

provision for individuals who are particularly vulnerable. The ECtHR has had to decide cases on issues of social deprivation, social exclusion and healthcare rights under the Article 8. There are generally three typical arguments from case law, sometimes intertwined, which emerges from Article 8 case law to date. Firstly, it has been argued that the positive obligations towards the disabled, ill or infirm have been violated due to State inaction. The second type of argument is that individuals are living in such poor conditions that there right to a private and/or family life is being violated. Thirdly, it is argued that an individual's right to live a traditional lifestyle is not being accommodated by the State. However, the Court has rejected all of these arguments.

ii. Health & Personal Care and Article 8

The ECtHR has rejected that Article 8 necessitates a State to provide a certain degree of accessibility for the disabled. In *Botta* the applicant alleged that a lack of lavatories and ramps so as to enable him to access a private beach had breached Article 8.[141] The Italian government claimed that to interpret the right to a private life to include a positive obligation on the State to provide for recreational activities would render Article 8 unrecognisable from the stated aims of its incorporation into the Convention. The Court accepted the argument of the Italian government. The ECtHR noted that the right to gain access to the sea concerns interpersonal relations that are so broad and indeterminate that there was 'no conceivable direct link' between the applicant's private life and the failure of the State to force private operators to make beach access disability friendly.[142] The case of *Bensaid*, which was discussed above, also raised an issue in relation to the protection of private life under Article 8. The applicant stated[143] that since the National Health Service (NHS) had assumed responsibility for caring for his medical condition, were this treatment to be withdrawn, it would affect adversely his psychological integrity. The UK stated that treatment was available in Algeria, and even if there was an interference with Bensaid's private life it could be justified under Article 8(2) on the

[141] *Botta v. Italy* (1998) 26 EHRR 241.

[142] (1998) 26 EHRR 241 at para. 35.

[143] (2001) 33 EHRR 205 at para. 44.

basis that the State immigration policy was necessary for the economic well-being of the country and the prevention of disorder and crime. In addition, if the ECtHR was to rule in favour of Bensaid, "[i]t would have seriously destabilising effects if the NHS became liable to provide treatment to a potentially open-ended class of non-European Union citizens."[144] The ECtHR, relying on its finding that Bensaid would not face inhuman and degrading treatment and the hypothetical nature of many of the applicant's arguments, agreed with the submissions of the UK, and found that there would be no violation of the applicant's private life.[145]

On 04 June 2014, the ECtHR delivered its decision in *McDonald v United Kingdom*.[146] In July 2008, McDonald was deemed by her local authority in London to be in need of assistance to access a commode at night. Night-time care was initially provided, however was reduced overt-time by the local authority, who stated that incontinence pads were an effective alternative.[147] Ms McDonald argued that as she was not incontinent, using incontinence pads was a grave infringement on her right to dignity and her right to private life under Article 8 ECHR. The ECtHR held (as had the UK Supreme Court) that between 21 November 2008 and 04 November 2009, the local authority was in breach of its statutory duty to provide care i.e. the need for the applicant to have assistance in using a commode at night.[148] This was a breach of Article 8 ECHR, as the limits on effective enjoyment by the applicant of her right to private life, was not in accordance with law. Post 04 November 2009, when the local authority conducted a subsequent needs review assessment, there was no violation of Article 8 ECHR. The ECtHR concluded that since

[144] (2001) 33 EHRR 205 at para. 45.

[145] (2001) 33 EHRR 205 at para. 48. Judges Bratza, Costa and Greve, while agreeing with the findings of the majority, said that the case had raised 'powerful and compelling' humanitarian issues that may merit a reassessment by national authorities.

[146] Application no. 4241/12, *McDonald v United Kingdom*, judgement of the ECtHR, 20 May 2014. The UK Supreme Court decision in this case provides a full outline of pertinent facts and timelines, see *R (McDonald) v Royal Borough of Kensington & Chelsea* [2011] UKSC 33.

[147] Application no. 4241/12, *McDonald v United Kingdom*, judgement of the ECtHR, 20 May 2014, paras 19 and 24.

[148] *Ibid*., paras 51-52.

the process used in determining the level of care for Ms McDonald had been conducted, in consultation with the applicant, the local authority was justified in limiting supports available due to "the wide margin of appreciation afforded to States in issues of general policy, including social, economic and health care policies."[149] As the UK's national courts had adequately balanced the applicant's care needs with obligations to provide care of the community at large, the ECtHR would not substitute its views for that of the municipal courts.[150] The claim of an Article 8 ECHR violation after 04 November 2009, was deemed to be "manifestly ill-founded".[151] While the ECtHR was sympathetic to the difficulties faced by the applicant, the fact that the process used to limit the care provided was done in accordance with law, for reasons of State economic well-being, and was necessary in a democratic society, the response of the local authority was proportionate.[152]

iii. Housing and Article 8

There is no right under Article 8(1) of the Convention to a specified form of accommodation or housing.[153] In *Burton*, the applicant who had lived in local authority rented accommodation could not claim that her right to a private or family life was violated by the local authority's refusal to provide her a caravan in which she wished to

[149] *Ibid*., para. 54.

[150] *Ibid*., para. 57.

[151] *Ibid*., para. 58.

[152] *Ibid*, paras. 55-56.

[153] This paper is only concerned with this issue in the Strasbourg Court. For a more expansive interpretation of Article 8 in relation to housing, private and family life and Article 8 at the domestic level (and in the UK), see, *Doherty v Dublin South County Council* [2007] IEHC 4 (22 January 2007); *O'Donnell v South Dublin County Council* [2007] IEHC 204 (22 May 2007); *O'Donnell (minors) & Others v South Dublin County Council & Others* [2008] IEHC 454 (11 January 2008); *Dooley & Others v Killarney Town Council and Another* [2008] IEHC 242 (15 July 2008). These cases are discussed in Thornton, L. "Human Rights in the Republic of Ireland 2007" (2009) 2 *Irish Yearbook of International Law* 175 at pp. 184-186 and Thornton, L. "Human Rights in the Republic of Ireland 2008" (2011) 3 *Irish Yearbook of International Law* 159 at pp. 168-171. See also, Whyte, G. "Public Interest Litigation in Ireland and the ECHR Act 2003 in Egan, S., Thornton, L. & Walsh, J. *The ECHR and Ireland: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).

see out her remaining days.[154] In *Marzari* Italy was found to have fulfilled its positive obligations towards the applicant after he was offered, but refused to accept, an apartment which catered in part for his disability needs. The applicant suffered from a serious illness and the Court recognised that there was a duty on Italy to ensure respect for his Article 8 rights. The applicant felt that his old apartment, with modifications, would have suited his needs. The Court implied that once offered accommodation, a State fulfils its positive obligations. However, the Court did leave open the possibility that a refusal by the Contracting States to provide 'assistance' to a person suffering from a serious disease may raise an issue under the private life aspect of Article 8.[155] In *O'Rourke* the applicant complained that he was being evicted from his local authority accommodation and being forced to live on the streets.[156] The ECtHR has stated that there is no general obligation to be provided with a home. Any positive obligation to house the homeless must be limited.[157] In this case, the applicant was deemed to be responsible for his continued homelessness and had rejected repeated offers of local authority housing. In *Buckley* the ECtHR stated that regulating the use of land whereby Gypsies were prevented from moving their caravans onto tracts of land without permission, while an interference with family and private life,[158] was 'in accordance with law',[159] pursued a legitimate aim[160]

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[154] *Burton v United Kingdom* (1996) 22 EHRR CD134 at para. 2. The Commission noted that the applicant had been living in rented local accommodation for almost 20 years. The Commission further stated that positive obligations under Article 8 do not extend to the provision of accommodation of an individual's choosing.

[155] *Marzari v Italy* (1999) 28 EHRR CD 175.

[156] *O'Rourke v United Kingdom*, Application No 39022/97, 26 June 2001.

[157] This reasoning reflected an earlier ruling of the ECtHR. In *Barreto v Protugal*, Application no. 18072/91(21 November 1995), (see also "Housing: home-right to possession" [1996] 2 *European Human Rights Law Review* 214-216) the Court said that the social protection of tenants was a legitimate aim in restricting a person from 'reclaiming' a home which they own. Article 8, the Court said, does not require the Government to provide legal protection to enable everybody to have a home. In an earlier Commission case of *X v Germany* (1956) 1 Yearbook 202, it was held that Article 8 does not require the State to provide a home for a refugee, see Ovey, C. & White, R. *Jacobs and White, The European Convention on Human Rights* (Oxford; OUP, 2006) at p. 249.

[158] *Buckley v United Kingdom* (1996) 23 EHRR 101 at paras. 56-60.

[159] (1996) 23 EHRR 101 at para. 61.

and was necessary in a democratic society.[161] The Court would not assess the merits of the decision made by the national authorities, but only assess the reasons provided by the local authority were 'relevant and sufficient' to justify an interference with Article 8.[162] A number of judges issued dissenting or partially dissenting opinions whereby they disagreed with the opinion of the majority in relation to Article 8.[163] The main tenor of the dissents came down to the margin of appreciation which States enjoy, with the minority believing that the actions of the UK in seeking to remove the Buckley family from their plot of land was not proportionate to the aims to be achieved (i.e. proper planning and environmental protection).

In *Chapman*, the ECtHR stated that while it is clearly desirable for every human being to have a home, whether or not everybody has a home with a roof to live under is a matter for political, rather than judicial decision.[164] There is no violation of Article 8 of the Convention where a State prohibits the unlawful parking of a caravan, however does not provide enough sites for gypsies to lawfully park a caravan.[165] To interpret Article 8 as imposing such a requirement would be a "…far-reaching positive obligation of general

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[160] (1996) 23 EHRR 101 at paras 62-63. The legitimate aims the control of use of land achieved were within the realms of *inter alia* planning control, preservation of the environment and public health, public safety and the economic well being of the country.

[161] In relation to this ground, Buckley claimed that while Gypsies should not be immune from planning controls, giving the lack of 'official' quality sites, which would impede her ability to raise her children in a safe and stable environment, the UK in seeking to remove her was acting disproportionately. The UK in response stated that planning laws were necessary to ensure the preservation of urban and rural landscapes. In addition, guidelines had been agreed by whereby local authorities would take the needs and views of Gypsy populations into account. (1996) 23 EHRR 101 at paras. 64-70.

[162] (1996) 23 EHRR 101 at para. 84. In addition, the Court found that the applicant was no a victim of discrimination (in the Article 14 sense) while exercising Article 8 rights.

[163] Judge Repik, Judge Lohmus and Judge Pettiti all stated that they believed that the applicants Article 8 rights had been violated.

[164] *Chapman v UK* (2001) 33 EHRR 399 at para. 99. Furthermore, the ECtHR held that while the UK has a positive obligation to respect gypsies right to practice their cultural life and to accommodate this as best it can in relation to housing practices; general principles of planning and environmental law, which apply to all persons, do not violate the right to a private or family life. The Court found that such laws pursued legitimate aims.

[165] *Chapman v UK* (2001) 33 EHRR 399 at para. 98.

social policy."[166] Where a Contracting Party fulfils a positive obligation to provide housing under the Convention, an applicant cannot claim a right to a specific type of house or a specified type of support. In addition, an applicant's choice of home or lifestyle may be regulated by general planning and policy concerns. In a joint dissenting opinion, issue was taken with (amongst other things) the statement that Article 8 does not give rise to a right to be provided with a home. As in *Buckley*, there was disagreement surrounding the leeway provided under margin of appreciation doctrine.[167]

iv. Conclusion on Article 8 ECHR

As with Article 3, the Court has shown a reluctance to find positive social rights as coming within the protection of private and family life. Within the Article 8 cases, the Court has rejected various attempts to find socio-economic obligations within substantive rights provisions. In earlier cases in relation to housing, there seemed to be a general recognition that in certain, extreme cases dealing with vulnerable individuals, Contracting States may have an obligation to house. In later cases however, the Court seemed to draw back from this approach and seemed to categorically state that it is a political decision as to whether housing is provided or not. As with Article 2 ECHR and Article 3 ECHR, the ECtHR is more concerned with process used to grant/withdraw socio-economic rights, and for Article 8 ECHR this has been recently reaffirmed in the case of *McDonald v United Kingdom*.

D. CONCLUSION

There remains a general reluctance by the European Court of Human Rights to enter into a substantive discourse on the ability of the ECHR to protect socio-economic rights. This is mainly due to concerns regarding usurpation of the inherent powers which Government

[166] *Ibid.*

[167] Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Straznicka, Lorenzen, Fishbach and Casadeval. In this opinion, the minority noted that the in the earlier case of *Marzari*, the ECtHR stated that in certain circumstances, a State may be under an obligation to provide a home i.e. to those in severe need or suffering a disability. The minority felt that this principle should have been restated.

have in the field of social law and policy. The ECtHR is aware that the ECHR was drafted with the specific exclusion of socio-economic rights and the Convention was but the first step to wider human rights protections.[168] Issues surrounding the socio-economic impact of Article 2 have yet to be developed fully, although the recent *Nencheva* decision certainly suggests that the right to life may impose on a State certain duties of a socio-economic nature. As regards Article 3 there is some willingness to find a violation of where material conditions of life are so poor that they reach a certain threshold of severity as seen in *M.S.S.* Through the creation of then doctrine of positive obligations, the Court has to some extent taken a more proactive approach in discovering the latent socio-economic nature of some of the Convention rights. Nevertheless, it is important to note that in both *Nencheva* and *M.S.S.* the ECtHR anchored there decisions in the failure of States to abide by their domestic legal obligations. The ECtHR has stated that Article 8 protections for family and private life cannot be indeterminate and broad. The Court has rejected most attempts to utilise Article 8 to protect socio-economic rights. Indeed, while suggestions were made in past case law about the Court reserving to see whether conditions of life and accommodation provided for vulnerable individuals were adequate,[169] more recent case law has failed to restate this general principle.[170] 60 years ago the ECHR was viewed as a document that solely protected civil and political rights. The ability of the ECHR to protect socio-economic rights remains limited; however the impact of more recent judgments in the field of the right to life and inhuman and degrading treatment and private and family life are significant. What comes across most clearly, is that where domestic law in place is not adhered to by the State or other public bodies, the ECtHR may seek to hold the State to account if a failure to implement legal rights in domestic regiemes result in a violation of Convention rights. It remains to be seen if and how, the European Court of Human Rights will expand upon its current socio-economic rights jurisprudence.

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[168] Premambular para. 6 of the Convention speaks of the protection of the rights contained therein as the "first steps for the collective enforcement of the Rights stated in the Universal Declaration."

[169] *Marzari v Italy* (1999) 28 EHRR CD 175.

[170] *Chapman v UK* (2001) 33 EHRR 399.