

## European Court of Human Rights

### Third party intervention in *Garib v. the Netherlands* (Application no. 43494/09)

#### Written submission by the Human Rights Centre of Ghent University and the Equality Law Clinic of the Université Libre de Bruxelles

These written comments are submitted by the Human Rights Center of Ghent University (Belgium) and the Equality Law Clinic of the Université Libre de Bruxelles (Belgium), pursuant to leave granted by the European Court of Human Rights in its letter of 17 November 2016 in accordance with rule 44 § 3 of the Rules of the Court.

#### Executive summary

The case of *Garib v. the Netherlands*<sup>1</sup> raises issues under the freedom to choose one's residence (Article 2 of Protocol No. 4), taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). We respectfully submit that this case provides a momentous opportunity for the Court to clarify standards in the area of human rights, poverty and non-discrimination. The first part of the intervention invites the Grand Chamber to avoid the overbroad application of the *Animal Defenders* line of reasoning concerning the acceptability of general measures.<sup>2</sup> Instead, we argue in favour of engaging with the concrete realities of the case under the proportionality test. The second part discusses the importance of examining whether the applicant, a single mother living in poverty, should be qualified as belonging to a vulnerable group in the sense of the Court's case-law. Finally, in the last part, the intervention invites the Grand Chamber to scrutinise the measure contested in this case from the viewpoint of Article 14 in conjunction with Article 2 Protocol No. 4. We respectfully submit that the Court may take on this important opportunity to develop standards in the field of discrimination on the grounds of poverty or 'social origin' as well as on their intersection with other prohibited grounds.

#### **I. On the unsuitability of the *Animal Defenders* line of case-law and the need for a proportionality analysis**

We respectfully argue that by adopting the general measures approach used in the *Animal Defenders* judgment, the Chamber mischaracterised both what is at stake in the present case and the applicable standard of review. The Chamber found that "[i]n order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it" and that "the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case".<sup>3</sup> This framing allowed the Court to apply an extremely deferential review, focusing primarily on the justification given for the general measure underlying the case, while overlooking the concrete application of that measure to the applicant. For the reasons set out below, we respectfully submit that the Grand Chamber should take a different approach.

First, we would like to point out that the majority in the Chamber judgment applied the general measures approach without regard for the accompanying criteria formulated by the Grand Chamber in *Animal Defenders*, specifically in §§ 108 and 109 of that judgment. In § 108, the Grand Chamber found that

<sup>1</sup> ECtHR, *Garib v. the Netherlands*, no. 43494/09, Judgment of 23 February 2016.

<sup>2</sup> ECtHR, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08 Reports 2013 (extracts).

<sup>3</sup> ECtHR, *Garib v. the Netherlands*, cited above, para. 113.

general measures were “more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty (...), of litigation, expense and delay (...) as well as of discrimination and arbitrariness (...).” None of the situations mentioned in § 108 are relevant in the present case.

Secondly, the application of the general measures approach appears to be rather artificial in situations such as the present one, which – in comparison to the *Animal Defenders* case – does not concern a form of collateral damage resulting from the application of a general measure that has a more general or broad aim. In the instant case, the general measure is directly aimed at and has an immediate impact on individuals such as the applicant. The application of the measure automatically leads to the interference with individual rights complained about in the present case. As a result, the general measures approach is not appropriate here. This approach is appropriate instead for cases in which the interference with individual rights results as a sort of collateral damage from a more general measure. It is more fitting, thus, in cases such as the present one, to directly apply the proportionality principle on the individual level. By nonetheless applying *Animal Defenders* to the present case, the Chamber pushes the interference with the applicant’s rights into the background and adopts an extremely deferential stance.

Thirdly, and in connection with the above, we draw the Court’s attention to the consequences of adopting the *Animal Defenders* approach and its ensuing application of a wide margin of appreciation. It should be noted that the margin accorded to the State on account of the “complex social, economic and political issues” involved in the case extends to whatever the legislature judges to be in the “public” or “general” interest “unless that judgment is *manifestly* without reasonable foundation.”<sup>4</sup> A first problematic outcome of this line of reasoning is that it downplays the individual impact of the contested measure, rendering the experience of the applicant invisible and denying her agency. Preventing the applicant from accessing the more suitable accommodation that she had managed to obtain for herself and her children on account of her socio-economic disadvantage not only adds to her material difficulties (she could not improve her living conditions), it also lowers her empowerment. In other words, this paternalistic measure negated the applicant’s agency and overlooked the harm that she faced.<sup>5</sup> The applicant was furthermore required to justify the exercise of her rights, thus contradicting the character of Article 2 of Protocol 4 as an autonomy right. As the dissenting Judges pointed out, the way the Convention is structured, it is for the State to justify any restriction of the applicant’s rights, and not the other way around.<sup>6</sup> Agency must be a central consideration for the Court when examining this case.<sup>7</sup> In fact, we submit that people in vulnerable positions, such as persons living in poverty, are particularly at risk of being deprived of their agency.<sup>8</sup>

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<sup>4</sup> ECtHR, *Garib v. the Netherlands*, cited above, paras. 116 (a) and 127 (emphasis added).

<sup>5</sup> In this vein, see the blogpost by Laurens Lavrysen, “Strasbourg Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty”, *Strasbourg Observers* blog, 10 March 2016, available at <<https://strasbourgobservers.com/2016/03/10/strasbourg-court-fails-to-acknowledge-discrimination-and-stigmatization-of-persons-living-in-poverty/>>.

<sup>6</sup> ECtHR, *Garib v. the Netherlands*, cited above, Joint Dissenting Opinion of Judges López Guerra and Keller, para. 19.

<sup>7</sup> In this regard, it should be recalled that, in the *Animal Defenders* case, a group of dissenting judges wrote that “[a] robust democracy is not helped by well-intentioned paternalism.” See ECtHR, *Animal Defenders International v. the United Kingdom*, cited above, Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano, para. 14.

<sup>8</sup> This reaffirms the importance of acknowledging the vulnerability of these persons without paternalism or agency negation. In this sense, the focus should be on the conditions that render certain individuals and groups vulnerable, instead of “reducing applicants to pure victims [and] stigmatizing their vulnerability.” See Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 *International Journal of Constitutional Law* 1056, p. 1073.

Among other reasons, such agency denial is often linked to stigmatizing views about the supposed inability, irresponsibility or incapacity of people living in poverty.

In view of these considerations, we are also critical of a second consequence of adopting the ‘general measures’ approach. That is, allowing a very lenient review to substitute the analysis of proportionality that should be applied to individual restrictions of human rights. This proportionality analysis involves an inquiry into the impact of the challenged measure on the individual and on the relationship between the measure and its purported aims. Accordingly, we respectfully submit that the Chamber should have paid greater attention to information casting doubts on the appropriateness of the Inner City problems Act to achieve the stated goals: improvement of the quality of life and reversing the decline of impoverished inner-city areas. Notably, according to the 2009 evaluation report mentioned in the judgment, there has been a decrease and at best no increase in the perception of public safety following the application of the housing permits scheme in the designated areas.<sup>9</sup> Likewise, the report indicates that the policy in question has only had a limited effect on the improvement of the quality of life in the areas concerned.<sup>10</sup> A 2015 evaluation report similarly finds that the Act has not contributed to any improvement of either safety or quality of life in the designated areas.<sup>11</sup>

Moreover, it is submitted that a proportionality test also encompasses the question of whether less restrictive means would have equally served those legitimate aims.<sup>12</sup> However, the Chamber did not really address this point, despite the availability of alternative measures, as pointed out by the Equal Treatment Commission.<sup>13</sup> As a consequence, we submit that the general measure approach – as in *Animal Defenders* – cannot be convincingly applied: a control of proportionality should be adopted instead. Moreover, as argued below, this control should be strict, given the particular vulnerability of the applicant. What is more, as explained later in this intervention, given the risk of discrimination involved in this case, the scrutiny required to justify the restriction of the applicant’s rights is particularly heightened.

## II. As concerns the vulnerability of the applicant

We underscore the importance of examining whether the applicant, as a single mother living in poverty and dependent on State support, should be qualified as belonging to a vulnerable group in the sense of the Court’s case-law. In doing so, we urge the Court to take into account the fact that the ‘general’ policy measure at issue here – although its generality is questionable, as argued above – is extremely likely to target those inner-city residents who find themselves at the intersection of poverty and other sources of discrimination, such as gender or migration background (on the issue of intersectionality see *infra* III, 3).

As concerns the individual vulnerability of persons living in poverty, especially where poverty intersects with other sources of vulnerability, we submit that this can also be understood as a direct source of disempowerment and marginalization with the potential to affect many or all areas of life. In some sense,

<sup>9</sup> ECtHR, *Garib v. the Netherlands*, cited above, para. 57 (b).

<sup>10</sup> *Ibid.*, subparagraph c. See also paras. 47 and 48, 53.

<sup>11</sup> Cody Hochstenbach, Justus Uitermark and Wouter van Gent, *Evaluatie effecten Wet bijzondere maatregelen (“Rotterdamwet”) in Rotterdam*, Universiteit van Amsterdam, Amsterdam Institute for Social Science Research (AISSR), October 2015, available online, <http://aissr.uva.nl/news/content2/2015/12/evaluatie-rotterdamwet.html>.

<sup>12</sup> Eva Brems and Laurens Lavrysen, “Don’t Use a Sledgehammer to Crack a Nut’: Less Restrictive Means in the Case-law of the European Court of Human Rights’ 15 *Human Rights Law Review* (2015), 139-168.

<sup>13</sup> ECtHR, *Garib v. the Netherlands*, cited above, para. 42.

the lack of socio-economic resources is a prime example of the deprivation of the sources of resilience that can help individuals to counter their vulnerability.<sup>14</sup> As explored below, it is also associated with a range of pejorative preconceptions and stigmas, including assumed moral failings and associations with criminality.<sup>15</sup> In this vein, a group of Strasbourg judges recently remarked that while the Convention does not protect a “right not to be poor”, situations of extreme poverty may breach the civil and political rights enshrined in the Convention and may limit those affected in their ability to avail themselves of these rights.<sup>16</sup> As the present case demonstrates, taking into account the vulnerability that stems from poverty is not always about socio-economic entitlements. Rather, it can be about protecting vulnerable people from discrimination and stigma, including that arising from an experience of poverty.

Before further elaborating on this last point, we respectfully encourage the Court to take the vulnerability of the applicant into consideration and recall that a narrow margin of appreciation is granted to the State when measures affect the rights of members of vulnerable groups.<sup>17</sup> For example, in *Kiyutin v. Russia*, the Court found that the State’s margin of appreciation is narrowed where a difference in treatment affects vulnerable groups, defined as those that “have suffered from widespread stigma and exclusion” and have “a history of prejudice and stigmatization”<sup>18</sup>.

### **III. Using Article 14 ECHR to scrutinize disparate restrictions of the right to choose one’s residence**

We respectfully submit that the present case does not only concern an interference with the applicant’s freedom of movement and residence enshrined in Article 2 of Protocol No. 4.<sup>19</sup> This right alone is unable to capture the detrimental treatment experienced by destitute people whose housing permit has been refused because of their poverty or low income. In fact, the *Garib* case provides the Court with a unique opportunity to clarify the prohibition of discrimination on grounds of poverty or social condition as well as their intersection with other grounds. In a few cases, the Court has already dealt with the question of discrimination on grounds of wealth.<sup>20</sup> However, those cases did not address the specific situation of people being treated less favourably directly or indirectly because of their socio-economically underprivileged situation. Below, we firstly address the need to examine the present case from the standpoint of Article 2 of Protocol No. 4 in conjunction with Article 14 ECHR. Secondly, we argue that direct and indirect discrimination should both be strictly scrutinized by the Court. Finally, we invite the Court to examine the stereotypes and the intersections at play in the present case.

<sup>14</sup> On the idea of resilience, see *inter alia* Fineman Martha Albertson, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1-23, pp. 13-15; see also Peroni Lourdes and Timmer Alexandra, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 (4) *International Journal of Constitutional Law* 1056-1085, p. 1074.

<sup>15</sup> Compare on this Williams Wendy R., ‘Struggling with Poverty: Implications for Theory and Policy of Increasing Research on Social Class-Based Stigma’ 9 *Analyses of Social Issues and Public Policy*, 37-56.

<sup>16</sup> Laffranque Julia, Raimondi Guido, Bianku Ledi, Nußberger Angelika and Sicilianos Linos-Alexander (2013), ‘Implementing the European Convention on Human Rights in Times of Economic Crisis’ *Seminar Background Paper* (2013) <[http://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Seminar_background_paper_2013_ENG.pdf)>, p. 1.

<sup>17</sup> See e.g. ECtHR, *Alajos Kiss v. Hungary*, no. 38832/06, Judgment of 20 May 2010, para. 42.

<sup>18</sup> ECtHR, *Kiyutin v. Russia*, no. 2700/10, Reports 2011, paras. 42 and 64.

<sup>19</sup> According to well-established case-law, for the application of Article 14 ECHR “[i]t is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more of the Convention Articles.” See ECtHR, *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV, para. 40; ECtHR, *Muñoz Diaz v. Spain*, no. 49151/07, Reports 2009, para. 42.

<sup>20</sup> ECtHR, *Chabauty v. France* [GC], no. 57412/08, 4 October 2012; ECtHR, *Chassagnou and others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, Reports 1999-III.

## 1. Applicability and need to examine Article 14 ECHR jointly with Article 2 of Protocol 4

**On the applicability of Article 14:** the Chamber examined the applicant's complaint from the perspective of Article 2 of Protocol No. 4 alone. But this does not prevent the Grand Chamber from additionally examining the issue of compliance with Article 14 ECHR. The Grand Chamber is not bound by the arguments given by the parties to a case. Given that "the Court is master of the characterisation to be given in law to the facts of the case," and by virtue of the *jura novit curia* principle, the Court can consider and apply Articles or paragraphs not relied on by the parties.<sup>21</sup> Having recalled that the Grand Chamber may examine the present case under Article 14 ECHR jointly with Article 2 of Protocol No. 4, we turn to explain why the Court should do so.

**On the need to separately examine a possible violation of Article 14:** We respectfully invite the Court to assess the need for a separate Article 14 review in the light of the following considerations. First, as further explained below (*infra* 2), there are indications that the Inner City Problems Act adversely impacts a specific segment of the population, which is socially disadvantaged and stigmatized. These are persons living in poverty or who are socio-economically disadvantaged, such as people with a non-European background and single parents living on welfare, like the applicant. Second, rights restrictions which specifically affect people living in poverty should be carefully scrutinized. As argued below, this is so not just on account of their vulnerable position, but also because discrimination on poverty-related grounds is prohibited. Third, the applicant's experience suggests that, in practice, the contested regulation aggravates both the social hardship and the stigmatization of those who cannot meet the income criterion set by the Act. The prejudicial treatment of individuals belonging to a systematically disadvantaged group and the use of stereotypes, even when unintended, are both typical indications of discrimination. In many instances, however, neither 'traditional status grounds' in anti-discrimination law nor other civil, political or social rights are able to 'capture' the harm, prejudice and stigma that people living in poverty experience because of their precarious situation.<sup>22</sup> It is submitted that this goal can be accomplished by the prohibition of discrimination on the ground of poverty or 'social condition.'<sup>23</sup> Hence, we respectfully argue that an accurate normative analysis of the present case needs to examine a possible violation of Article 2 of Protocol No. 4 taken in conjunction with Article 14 ECHR.

## 2. Scrutinising direct and indirect discrimination

**Direct discrimination:** As a matter of fact, "status-based discrimination is frequently closely correlated with socio-economic disadvantage".<sup>24</sup> Put simply: poverty is not only a consequence but also a cause of

<sup>21</sup> ECtHR, see e.g., *Şerife Yiğit v. Turkey* [GC], no. 3976/05, 2 November 2010, para. 52; ECtHR, *Guerra and Others v. Italy* [GC], no. 14967/89, Reports 1998-I, para. 44.

<sup>22</sup> Wayne MacKay and Natasha Kim, 'Adding Social Condition to the Canadian Human Rights Act' (2009) 1, available at <[www.chrc-ccdp.ca/sites/default/files/sc\\_eng\\_1.pdf](http://www.chrc-ccdp.ca/sites/default/files/sc_eng_1.pdf)>; Diane Roman, 'La Discrimination Fondée Sur La Condition Sociale, Une Catégorie Manquante Du Droit Français' (2013) 1911 *Recueil Dalloz*; Ioannis Rodopoulos, 'L'absence de La Précarité Sociale Parmi Les Motifs de Discrimination Reconnus Par Le Droit Français: Un Frein Normatif À L'effectivité de La Lutte Contre Les Discriminations?' (2016) 9 *La Revue des droits de l'homme*, available at <<http://revdh.revues.org/2050>>; Sarah Ganty, 'Prohibition of Discrimination on Grounds of Social Condition: Making Socio-economically Disadvantaged People Visible', Working conference paper presented at the Law and Society Conference, New Orleans, 3 June 2016.

<sup>23</sup> Sarah Ganty and Maxime Vanderstraeten, 'Actualités de la lutte contre la discrimination dans les biens et services, en ce compris l'enseignement' in E. Bribosia, I. Rorive, S. Van Drooghenbroeck (coord.), *Droit de la non-discrimination: avancées et enjeux*, Bruxelles, Bruylant, 2016: 200-201.

<sup>24</sup> Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* pp. 214-15.

discrimination.<sup>25</sup> The former is demonstrated by the fact that victims of discrimination on “traditional” status grounds such as gender and race are overrepresented among the poor.<sup>26</sup> Nevertheless, people living in poverty also suffer from exclusion, stereotypes and prejudice because of their precarious situation itself. Here is where we see poverty working as a cause of discrimination.<sup>27</sup> Terms such as “povertyism” or “pauvrophobie” have been coined to refer to this problem.<sup>28</sup> In human rights law, violations on account of one’s socio-economic deprivation or perceived ‘markers’ of poverty can be directly scrutinised by the prohibition of discrimination, as pointed out by domestic and international bodies.<sup>29</sup> This is relevant for a gentrification measure that specifically refuses housing permits to persons relying on unemployment social benefits or to households with an income under 120 percent of the statutory minimum wage. Since such a measure restricts the rights of those persons on the basis of their poverty, we respectfully argue that this ground is prohibited by Article 14 ECHR, as it falls under “social origin” or “other status”. Distinctions on this basis merit close scrutiny. Considering that people living in poverty, including low-income persons, the unemployed and single parent households, are particularly vulnerable,<sup>30</sup> the discretion left to the State is “substantially narrower.”<sup>31</sup>

**Indirect discrimination:** the Court has acknowledged that indirect forms of discrimination are equally prohibited. These take place when a general policy or measure, though couched in neutral terms, has

<sup>25</sup> Human Rights Council United-Nations General Assembly, ‘Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona’ (2012), para. 18.

<sup>26</sup> Sandra Fredman, ‘The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty’ (2011) 3 *Stellenbosch Law Review* 566-590, p. 567.

<sup>27</sup> Human Rights Council United-Nations General Assembly, ‘Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona’ (2012), para. 18.

<sup>28</sup> Very recently, the NGO *ATD Quart Monde* warned the public opinion about this trend by speaking for the first time about “pauvrophobie.” See ‘Face à la pauvreté, ‘on sent un vent mauvais’’, *Le Monde*, 31 October 2016. See also Sheilagh Turkington, ‘A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism’ (1993) 9 *Journal of Law and Social Policy* 134-191, p. 134.

<sup>29</sup> See *inter alia*, UN Committee on Economic Social and Cultural Rights, General Comment No. 20, para. 35; IACtHR, Advisory Opinion OC-11/90 of 10 August 1990, paras. 22 and 31; European Committee of Social Rights, Conclusions 2013, General Introduction, January 2014, p. 11 (referring to the “non-discrimination clause (Article E), which obviously includes non-discrimination on grounds of poverty”). See also Sandra Fredman, ‘Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda’ (2010) 1 *Oxford Legal Studies Research Paper* no. 55/2010, 1-27, pp. 6-8; F. Pearl Eliadis, *Poverty and Exclusion: Normative Approaches to Policy Research* (Policy Research Initiative 2004), pp. 18-22. For some examples of national case-law concerning discrimination on grounds of social condition, see: Belgian Constitutional Court, Arrêt n° 160/2005 of 26 October 2005, para B6; Civ. Namur (Belgium), 5 May 2015, published on the website of the Interfederal Centre for Equal Opportunity, <[www.unia.be](http://www.unia.be)>; Irish High Court, *Redmond v. Minister for the Environment & Ors* [2004] IEHC 24 (13 February 2004); Northwest Territories Human Rights Adjudication Panel (Canada), *Mercer v. Northwest Territories and Nunavut (Workers’ Compensation Board)* (2007), CHRR Doc. 07-479 (N.W.T.H.R.A.P.). See also the *K and A* case before the European Court of Justice, where the ECJ developed very comprehensive scrutiny regarding the impact of integration tests for socio-economically disadvantaged migrants (ECJ, Judgment in *Minister van Buitenlandse Zaken v. K and A*, C-153/14, EU:C:2015:453, para. 58). Finally, a law that integrates the ground of “vulnerability because of one’s economic situation” into some anti-discrimination clauses was adopted in France in June 2016. Loi n°2016-832 of 24 June 2016 ‘visant à lutter contre la discrimination à raison de la précarité sociale’, *Journal officiel de la République française*, 25 juin 2016. See also the draft bill ‘visant à lutter contre la discrimination à raison de la précarité sociale’, *Sénat Fr.*, sess. ord. 2014-2015, no. 378. A more indirect consideration of discrimination on the grounds of socio-economic disadvantage can be found in ECtHR, *B.S. v. Spain*, no. 47159/08, 24 July 2012.

<sup>30</sup> See, e.g., European Committee of Social Rights, Conclusions 2015 concerning Latvia, January 2016, p. 57 (“the Committee has held that equal treatment must be assured to the different groups of vulnerable persons, particularly low-income persons, unemployed, single parent households...”); UN Guiding Principles on Extreme Poverty and Human Rights, 2012, adopted by the Human Rights Council by consensus on 27 September 2012, Resolution 21/11 (containing several principles that underline the vulnerability experienced by people living in poverty, while the preamble stresses the connection between poverty, vulnerable groups and discrimination).

<sup>31</sup> ECtHR, *Alajos Kiss v. Hungary*, cited above, para. 42.

disproportionately prejudicial effects on a given group.<sup>32</sup> It is submitted that the regulation contested in the present case is likely to produce indirect discrimination on grounds of gender and race.<sup>33</sup> In fact, studies indicate that the contested measure is likely to indirectly affect especially women and single mothers, since they are particularly at risk of poverty in comparison to men.<sup>34</sup> Moreover, according to Eurostat statistical findings, people with a migration background (non-EU) are also overrepresented among people at risk of poverty and social exclusion in the Netherlands.<sup>35</sup> Given that, in practice, people relying on unemployment social benefits or earning less than 120 percent of the statutory minimum wage are mostly women - particularly single mothers - and persons with non-European roots, the income criterion becomes a proxy for gender and race, as underlined by the dissenting Judges in the Chamber judgment.<sup>36</sup> As such, it is submitted that very weighty reasons should be advanced before the Court to justify the restriction set out by the contested regulation.<sup>37</sup>

### 3. Harmful stereotypes and intersectionality

**Harmful stereotypes:** We respectfully invite the Court to closely examine the harmful stereotypes about people living in poverty that could underlie the contested regulation or which could be reinforced by it. It is widely acknowledged that harmful gender stereotypes constitute a form of discrimination against women.<sup>38</sup> But these are not the only sort of harmful stereotypes that human rights law is committed to eradicating. Human rights bodies have also called upon States to tackle harmful stereotypes about people living in poverty.<sup>39</sup> In fact, these individuals are often portrayed as e.g. lazy, trouble-makers, dangerous, dishonest, criminals and anti-social. These stereotypes, like those regarding gender roles, encroach upon the prohibition of discrimination and serve to justify the rights violations experienced by people living in

<sup>32</sup> ECtHR, *D.H. and others v. the Czech Republic* [GC], no. 57325/00, Reports 2007-IV, para. 184.

<sup>33</sup> In this vein, see the joint dissenting opinion of Judges López Guerra and Keller to the Chamber judgment in the *Garib* case.

<sup>34</sup> Wim Van Lancker, 'Effects of Poverty on the living and working conditions of women and their children' in *Main Causes of Female Poverty, Compilation of In-depth Analyses* (European Parliament: Brussels 2015), pp. 8-13, available at <<http://www.europarl.europa.eu>>. According to this report, in the Netherlands, 11% of women live at risk of poverty, which means that their risk of poverty is approximately 3% higher than that of men. Moreover, the Netherlands combines "low poverty rates for families with children with a high share of single mothers being at risk of poverty." See also the remarks made by the Council of State, referred to by the applicant, at para. 20 of the Chamber judgment ("concerns about the implicit distinction based on income, which might lead to indirect distinctions on grounds of race, colour or national or ethnic origin"). See also para. 42 of the Chamber judgment (regarding the opinion of the Equal Treatment Commission).

<sup>35</sup> Eurostat, *Migration Integration Statistics: At Risk of Poverty and Social Exclusion*, data from December 2015, <<http://ec.europa.eu/eurostat/>>.

<sup>36</sup> Joint dissenting opinion of judges Lopez Guerra and Keller to the Chamber judgment in the *Garib* case, para 14.

<sup>37</sup> ECtHR, *Konstantin Markin v. Russia* [GC], no. 30078/06, Reports 2012 (extracts), para. 127; ECtHR, *Vrontou v. Cyprus*, no. 33631/06, 13 October 2015, para. 75; ECtHR, *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016, para. 96 (regarding gender and sex); ECtHR, *D.H. and others v. the Czech Republic* [GC], cited above, para. 196 (regarding race and ethnic origin). See also ECtHR, *Gaygusuz, v. Austria*, 16 September 1996, Reports 1996-IV, para. 42; ECtHR, *Bah v. the United Kingdom*, 27 September 2011, Reports 2011, para. 37.

<sup>38</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979, New York, in force since 3 September 1981, 189 States Parties [hereinafter CEDAW], Introduction and articles 2(f), 5(a), 10(c); CEDAW Committee, General Recommendation No. 28 of 16 December 2010 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (2010) CEDAW/C/GC/28, p. 9, para. 22.

<sup>39</sup> UN Guiding Principles on Extreme Poverty and Human Rights, 2012, Principle 21; UN Special Rapporteur on extreme poverty and human rights, report submitted by Magdalena Sepúlveda, A/66/265, 2011, para. 7; UN Committee on Economic Social and Cultural Rights, General Comment No. 20 on Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para. 35; UN Guiding Principles on Extreme Poverty and Human Rights, 2012, Principle 21; UN Special Rapporteur on extreme poverty and human rights, report submitted by Magdalena Sepúlveda, A/66/265, 2011, 2011, para. 7; IACtHR, *Servellón García et. al v. Honduras*, 21 September 2006, paras. 112 and 116.

poverty.<sup>40</sup> Moreover, different stereotypes often intersect or interact to assign characteristics to members of subgroups of people.<sup>41</sup> For example, young mothers living on welfare may be perceived as incarnating a combination of the harmful stereotypes accorded to both womanhood and poverty. And as a result of that, those women may face rights deprivations that other women and men living in poverty do not. To tackle the harm produced by compounded stereotypes, another legal tool is useful, namely the idea of intersectionality.

**Intersectionality:** We respectfully invite the Court to assess the present case from an intersectional perspective. Intersectionality is a concept increasingly used in human rights law<sup>42</sup> to capture compounded, instead of single-axis, forms of disadvantage and discrimination.<sup>43</sup> Instead of adding layers of discrimination, and regardless of the type of discrimination at stake (direct or indirect), intersectionality serves to identify the unique types of violations produced by the interplay of two or more grounds.<sup>44</sup> Importantly, the latter does not merely reflect the interaction between multiple identities, such as gender, class and ethnic origin. It also reflects the interplay between the systems of social hierarchies accorded to those identities.<sup>45</sup> As such, this approach is especially apt to tackle violations connected to institutional or structural biases, *de facto* discrimination and indirect discrimination experienced by the most disadvantaged. For example, the CEDAW Committee, deciding on a maternal death case, adopted the view that the victim “was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.”<sup>46</sup> Likewise, the Inter-American Court of Human Rights found that a ban on *in vitro* fertilization had a differentiated impact - amounting to indirect discrimination - on the victims “due to their situation of disability, gender stereotypes and financial situation.”<sup>47</sup> The Court also moved towards greater intersectionality awareness when considering the specific vulnerability of the applicant in the case of *B.S. v. Spain*.<sup>48</sup> We respectfully

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<sup>40</sup> In this vein, see Valeska David, ‘Caring, Rescuing or Punishing? Rewriting *R.M.S v. Spain* from an Integrated Approach to the Rights of Women and Children in Poverty’ in Eva Brems and Ellen Desmet, *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (Edward Elgar, forthcoming). See also Valeska David, ‘ECtHR condemns the punishment of women living in poverty and the ‘rescuing’ of their children’, *Strasbourg Observers* blog, 17 March 2012, <<https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/>>.

<sup>41</sup> Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press: Philadelphia 2010), pp. 29-31.

<sup>42</sup> The Convention on the Rights of Persons with Disabilities expressly recognises the intersectional discrimination experienced by these persons, including on grounds such as “social origin”, “property” and “other status”, Preamble (p) of the Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006.). See also, CEDAW, preamble; CEDAW Committee, General recommendation No. 27 on older women and protection of their human rights, para. 13; Committee on Economic Social and Cultural Rights, General Comment No. 20 on Non-discrimination in economic, social and cultural rights, paras. 17 and 27

<sup>43</sup> Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, (1989) *University of Chicago Legal Forum* 139-167.

<sup>44</sup> Johanna E. Bond, ‘International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations’, (2003) 52 *Emory Law Journal* 71-152, pp. 157-158; Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’, (1991) 43 *Stanford Law Review*, 1241-1299, pp. 1245-1251.

<sup>45</sup> By this we mean that a racialized or gendered position relates not only to an identity, but more crucially to the attendant disadvantage of those who occupy such a position and the relative privileges of those who do not. On intersectionality as dealing with the interplay between structures of inequality, see Catherine MacKinnon, ‘Intersectionality as Method: A Note’ (2013) 38 *Sign*, 1019-1030, pp. 1023-1024; Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law*, (2016) Report prepared for the European Commission, p. 31.

<sup>46</sup> Committee on the Elimination of Discrimination against Women (CEDAW), *Alyne da Silva Pimentel v Brazil*, Communication No. 17/2008, Views adopted on 25 July 2011, para. 7.7.

<sup>47</sup> IACtHR, *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, 28 November 2012, paras. 287-304, 314.

<sup>48</sup> In the *B.S.* case, the Court stated that “the domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute”, ECtHR, *B.S. v. Spain*, cited above, para. 62.



submit that an intersectional approach to the present case is helpful to evaluate the applicant's vulnerability, the disparate impact of the Inner City Problems Act and its possible endorsement of harmful compounded stereotypes.

#### **IV. Conclusion**

This third-party intervention respectfully invites the Grand Chamber to depart from the "general measures" line of reasoning used in the *Animal Defenders* case and instead apply a proportionality test. It is submitted that the present case should be examined not merely as a question of the reasonableness of State policy, but rather as a specific interference with the applicant's rights under Article 2 Protocol No. 4, taken alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). We respectfully argue that in examining the proportionality of the restriction of said rights, special consideration should be given to the applicant's situation of vulnerability as a single mother living on social welfare. The intervention invites the Grand Chamber to acknowledge the vulnerability of persons living in poverty, especially where poverty intersects with other sources of vulnerability. We furthermore underscore that the *Garib* case provides the Court with a unique opportunity to clarify the prohibition of discrimination on grounds of poverty or social condition as well as the intersection of poverty-related discrimination with other grounds. Until now, the Court has not addressed the specific situation of people being treated less favourably directly or indirectly because of their socio-economically underprivileged situation. We respectfully invite the Court to do so in the present case. For that purpose, this intervention argues that the Court should strictly scrutinise the existence of direct and indirect discrimination as well as the stereotypes and the intersections at play in the application of the measure contested in this case.

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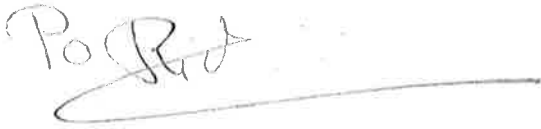
Dr. Laurens Lavrysen

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Prof. Emmanuelle Bribosia

A handwritten signature in black ink, appearing to read 'E. Bribosia', with a long horizontal stroke extending to the right.

Prof. Isabelle Rorive

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Sarah Ganty  
PhD Researcher

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December 2, 2016