

Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights

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1 INTRODUCTION

THIS CHAPTER SEEKS to identify whether the jurisprudence of the European Court of Human Rights (ECtHR) may lead it to require both the State and private actors to effectively accommodate the needs of disabled people and to ensure that they are not subject to discrimination because of the environment which they inhabit. The following section examines four cases in which disabled litigants asked the ECtHR, implicitly or explicitly, to impose an obligation on the defending State to provide reasonable accommodation. All these cases invoked the right to respect for private life, guaranteed by Article 8 of the European Convention on Human Rights (ECHR). The third section considers the ECtHR's imposition of positive obligations on States and seeks to identify the precise nature of such obligations as well as their future potential for disabled people. In fact, the lessons from the existing case-law are rather disappointing. The leading case in this area remains *Botta v Italy*, decided in 1998, where the Court held that Article 8 could not be invoked in the absence of a 'direct and immediate link' between the measures sought and the 'private life' of the applicant. This link has been construed narrowly and appears to relate exclusively to the applicant's immediate surroundings or everyday activities. The fourth section therefore examines the possible strategies which might be used to circumvent the restrictions of the *Botta* line of cases so as to result in the recognition of an ECHR obligation to provide reasonable accommodations for disabled people. It will consider, in particular, whether Articles 3 or 14 (which prohibit inhuman or

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degrading treatment, and discrimination in the enjoyment of Convention rights) might be relied upon. Finally, in section 5, I will examine the impact of the Convention on the provision of reasonable accommodation in employment, which presents certain specific difficulties.

2 THE RIGHT TO RESPECT FOR PRIVATE LIFE AND THE REQUIREMENT OF ACCESSIBILITY

2.1 'Private Life'

The four ECHR cases, in which some form of accommodation for a disabled person was requested, all arose outside the context of employment. They invoked the right to respect for private life guaranteed by Article 8. Indeed, since the early 1990s, the notion of 'private life' which appears in Article 8 has been extended beyond the protection of information, and beyond the sphere of intimate relationships, to include a right to 'establish and develop relationships with other human beings and the outside world'.¹ This conception of private life is similar to the 'right to the free development of [one's] personality,' in Article 2 of the German Basic Law of 1949,² and also to the right to privacy, set out in the penumbra of the explicit clauses of the Bill of Rights appended to the US Federal Constitution and interpreted to include a right to make certain choices essential to one's existence.³

Indeed, it is such an extended notion of 'private life' that, in the case of *Pretty v UK*, Diane Pretty relied upon to claim the protection of an alleged right to make decisions about one's body and what happens to it. She argued that, because she was suffering from a neuro-degenerative disease leading to progressive muscle weakness affecting the voluntary muscles and would therefore be unable to commit suicide by herself, her right to private life conferred on her the right to be assisted in committing

¹ *Niemietz v Germany* (16 December 1992) Series A No 251-B, para 29.

² This provision states that:

Everybody has the right to the free development of his personality, as long as he does not violate the rights of others and does not contravene the constitutional order or moral laws

(trans in S Michalowski and L Woods, *German Constitutional Law: The protection of civil liberties* (Dartmouth, Ashgate, 1999), p 108). The German Federal Constitutional Court (*Bundesverfassungsgericht*) has derived a 'general freedom to act' from this provision (*allgemeine Handlungsfreiheit*), protecting

not only ... a limited area of personality development, but rather ... every form of human activity regardless of the importance of this behaviour for the development of personality (BverfGE 80, 153 (1989)).

³ Such choices may relate, eg, to childrearing and education (*Pierce v Society of Sisters* 268 US 510, 535 (1925); *Meyer v Nebraska* 262 US 390, 399 (1923)), marriage (*Loving v Virginia* 388 US 1, 12 (1967)), procreation (*Skinner v Oklahoma* 316 US 535, 541 (1942); *Roe v Wade* 410 US 113 (1973); *Planned Parenthood of Southern Pennsylvania v Casey* 505 US 833 (1992)) or contraception (*Eisenstadt v Baird* 405 US 438, 453-4 (1972)).

suicide. It was held that, despite the absence of any case-law guaranteeing a right to self-determination under Article 8, 'the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'⁴ *Pretty*, to which we shall return later, presented the Court with the new problem of determining whether the right to privacy could include a right to dispose of one's own body. Despite the high profile of that case, it constituted just one more development in the Article 8 case-law. Long before *Pretty*, Article 8 had been used to protect the physical and psychological integrity of the individual, as well as his/her social identity; thus guaranteeing 'autonomy' and the right to self-fulfilment, as opposed to a right to be simply 'let alone'. This approach to 'private life' has, for instance, led Judge Molinari to observe (in a case concerning the refusal of a disability allowance to the applicant on grounds of his nationality) that:⁵

In my opinion, this case goes to the heart of Article 8 of the Convention. The Court's interpretation of that provision has evolved concerning rights affecting the private and family sphere of human beings, which is the most intimate of spheres, and one in respect of which the Court must ensure that their dignity and their private and family life are protected by the States signatory to the Convention. The Court has held that these States must in the first place respect the private and family life of anyone within their jurisdiction, but also remove the obstacles and restrictions which hinder the free development of the personality, and assume broader and broader positive obligations.

In her view, the granting of allowances to disabled adults fell within the ambit of Article 8, justifying the application of Article 14 where it operated in a discriminatory fashion. It is this notion of 'private life' that has been invoked in a number of recent applications in attempts to require States to adopt measures which would contribute to the social and professional integration of disabled people by removing the artificial barriers which currently prevent them from freely developing their personality.

2.2 The Disability Cases

In the first and best-known case, *Botta v Italy*,⁶ the applicant complained that the bathing establishments at the seaside resort where he spent his vacations were not equipped with the facilities needed to enable disabled people to gain access to the beach and the sea. This was in breach of Italian law, which required a clause to be added to the relevant concession contracts obliging private beaches to facilitate access by disabled people, and made provision for compliance to be enforced by the competent local authorities. The Court, however, considered that Article 8 did not extend

⁴ *Pretty v UK* (29 April 2002) Application No 2346/02, para 61.

⁵ In her dissenting opinion in *Koua Poirrez v France* (30 September 2003) Application No 40892/98.

⁶ *Botta v Italy* (24 February 1998) *Reports and Decisions of the ECtHR* 1998-I, No 66 412.

to the right to gain access to the beach and the sea at a place distant from the normal place of residence during holidays, as:

there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.⁷

In the second case, also concerning Italy, the applicant, Mr Marzari, suffered from metabolic myopathy, leading to 'thermal disability.' Cold temperatures and changes in temperature caused him intense muscular pain, often forcing him to use a wheelchair. He complained that, in breach of Italian law, the local administrative authorities had failed to provide him with an apartment adequate to the needs arising from his impairment. However, the Court noted the willingness of the local authorities to carry out works on the apartment allocated to him and rejected the application as manifestly ill-founded. In its view, no positive obligation on local authorities to provide the applicant with a specific apartment could be inferred from Article 8. A suitable apartment had been offered to the applicant. He had refused it on the ground that it did not meet his needs, despite an assessment to the contrary by a Commission for the study of metabolic diseases.⁸

In a third case, *Zehnalová and Zehnal v the Czech Republic*, the applicants complained that in the town of Prerov where they were residing, a number of buildings providing services to the public (including the post office, the local tribunal, the police office, medical facilities and the local swimming pool) were not accessible to people with certain impairments because of inadequate enforcement of regulations which required the removal of architectural barriers.⁹ Despite the fact that the inaccessible buildings in question were far more closely linked to the everyday lives of the applicants than the inaccessible beaches had been to the life of Mr Botta, the Court ruled that they had failed to establish the necessary special link between the buildings and their private life. Relying on the test laid down in *Botta*, it explained that:

Considering the important number of buildings concerned, some doubt remains as to their everyday use by the applicant and as to the existence of a

⁷ *Ibid* para 35. On this case, see the notes by RA Lawson and A Hendriks in *NJCM-Bulletin* 1998, p 597.

⁸ *Marzari v Italy* (4 May 1999) Application No 36448/97.

⁹ Because it concerned the provision of public services, the case of *Zehnalová and Zehnal* (14 May 2002) Application No 38621/97 is closest to the well-known case of *Eldridge v British Columbia* [1997] 3 RCS 624, where the Canadian Supreme Court recognised that deaf persons should be provided a sign interpreter to facilitate their communication with the personnel of a public hospital: the absence of such an accommodation of their disability would constitute discrimination under the Equality Clause of Art 15(1) of the Canadian Charter of Rights and Freedoms.

direct and immediate link between the measures required from the State and the private life of the applicants.

As in *Botta* therefore, Article 8 was considered as inapplicable.¹⁰

Finally, in the most recent case of *Nikky Sentges v the Netherlands*, the applicant had a disease characterised by progressive muscle degeneration. As a result, he had to rely on assistance from other people for every act he wished to perform, including eating and drinking. A robotic arm would have greatly reduced his dependence on the constant presence of carers and would have enabled him to continue living at home for a longer period of time. The health insurance fund rejected his request for such a device, however, as it was not covered by any social insurance scheme. After failing to have this decision annulled by the national courts, Mr Sentges turned to the ECtHR where he argued that he was not free to establish and develop relationships with other human beings of his choice. He contended that 'private life' encompassed notions pertaining to his quality of life, including personal autonomy, self-determination and the right to establish and develop relationships with others. However, it was held that even if Article 8 were applicable, the Court must consider the fair balance to be struck between the competing interests of the individual concerned and the community as a whole, and must also have regard to the wide margin of appreciation granted to States in determining how to ensure compliance with the Convention. In light of the fact that this margin is particularly wide where the issues involve the allocation of limited State resources, the Court ruled that the Netherlands were within this range of acceptable responses.¹¹

2.3 An Interpretation

In all these cases the *Botta* test for determining the applicability of Article 8 was reaffirmed. According to this test the State will be under a positive obligation to ensure effective 'respect' for private life where two conditions are satisfied: First, there must be 'a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life',¹² which renders Article 8 applicable. Second, the efforts required from the public authorities should not be disproportionate, so that a fair balance is achieved between the competing interests of the individual and of the community as a whole. In other words, the State will be obliged to take measures to remove obstacles encountered by a disabled person,

¹⁰ *Zehnalová and Zehnal v the Czech Republic* (14 May 2002) Application No 38621/97. See the commentary by A Hendriks in *NJCM-Bulletin* 2003, p 321.

¹¹ *Sentges v the Netherlands* (8 July 2003) Application No 27677/02.

¹² *Botta v Italy* (24 February 1998), para 34.

where they relate to his/her immediate environment and constitute a permanent and important (rather than occasional or negligible) barrier to the development of his/her personality, unless doing so would impose a disproportionate burden upon it.

No such 'direct and immediate link' to private life was found in *Botta*, where a disabled person sought access to the beach and the sea at a place distant from his normal place of residence during his holidays; or in *Zehnalová and Zehnal*, where such a person claimed a right to access public facilities.¹³ On the other hand, such a 'direct and immediate link' was found to exist in *Marzari*, where access to housing was concerned, and in *Sentges*, where capacity to perform ordinary acts of daily life (such as switching a computer on, making telephone calls, eating or drinking) was concerned. In these two cases, Article 8 was held to be applicable, though not actually violated.

It has been rightly pointed out that what distinguishes the latter two situations from the former two is that, in *Marzari* and *Sentges*, the measures sought were personalised accommodation measures for the benefit of the particular individuals, as opposed to general measures for the benefit of an ill-defined community.¹⁴ It should be noted, however, that a finding of violation in *Marzari* or *Sentges* would have had consequences reaching far beyond those individual cases, obliging the Italian authorities, for instance, to rethink the accessibility of social housing for disabled people and the Dutch legislator to broaden the scope of the relevant social insurance scheme. In fact, the main reason why Article 8 was found applicable in *Marzari* and *Sentges* but not in *Botta* or *Zehnalová and Zehnal* lies in the 'direct and immediate link' to private life test set out in *Botta*. In *Marzari* and *Sentges*, the applicants were permanently affected in their everyday life by the alleged refusal to provide them with the accommodation they requested. According to the Court, this was precisely what the applicants in the other two cases failed to demonstrate.

3 THE JUDICIAL IMPOSITION OF POSITIVE OBLIGATIONS

3.1 Overview

These four leading ECHR cases illustrate the reluctance of the Court to impose far-reaching obligations on States to remove the architectural

¹³ In those cases, since Art 8 was held to be inapplicable, the non-discrimination clause of Art 14 could not be engaged. On the non-discrimination clause of Art 14 ECHR, see below.

¹⁴ See A Hendriks, on *Sentges v the Netherlands* (8 July 2003) (2004) 29 NJCM-Bulletin 57, at p 6: 'In de zaken *Botta* en *Zehnalová en Zehnal* had de klacht betrekking op (de niet-naleving) van algemene toegankelijkheidseisen, dat wil zeggen regels die zijn geformuleerd ten behoeve van een grotere niet-gedefinieerde groep mensen. ... Niet kan worden gesteld dat de aanpassingen die *Marzari* en *Sentges* wensten voor hele groepen mensen gepast is.'

or other barriers which impede the full social and professional integration of disabled people. How are these results to be explained? Are the particular facts of these cases to blame, or are there more structural explanations? I will consider three factors which may be operating, before looking at possible ways to circumvent them.

In my view the explanation for the relatively 'hands-off' approach of the Court is to be found at the institutional rather than substantive level. Its apparent timidity is to be attributed to various constraints operating upon it, rather than to an understanding of Article 8 as having no bearing upon the adjustment of infrastructure to facilitate use by disabled people.

3.2 The Specificity of the Obligation to Progressively Realise

The Court faces a number of specific constraints when considering the imposition of an obligation of progressive realisation on States. This form of human rights obligation requires States to adopt measures which, although they move the State in the desired direction, cannot immediately ensure that the right is fully realised in all its dimensions. In *Zehnalová and Zehnal* the Court noted that, despite the fact that many public buildings were inaccessible to the applicants, the authorities had not remained inactive and the situation in the town of Prerov had improved in recent years.¹⁵ In *Marzari*, the Court expressed the opinion that the authorities' refusal to provide relevant assistance to a disabled individual might raise an issue under Article 8 because of the impact of that refusal on the individual's private life. In that case it was the good faith of the authorities, their demonstrated willingness to find a solution to the applicant's housing problem, which led the Court to conclude that they had 'discharged their positive obligations in respect of the applicant's right to respect for his private life.'

Botta and *Zehnalová and Zehnal* exemplify the limits of the all-or-nothing approach, operating in the binary fashion which characterises the judicial function. This approach stands in contrast to that which might be expected, for instance, of a committee periodically reviewing the evolution of the situation in a particular State based on comparisons made over time. This latter mechanism (illustrated by the expert committees instituted by the UN human rights treaties) might appear better suited to the role of enforcing an obligation to adapt infrastructures for disabled people. Such

¹⁵ Although the Court belittles the influence this may have exercised on the finding of non-violation it arrived at, the role of this element, which demonstrates the good faith of the authorities, cannot be ignored. In its words:

La Cour observe en outre, sans cependant y attacher une importance déterminante, que les autorités nationales n'ont pas été inactives et que, de l'aveu même des requérants, la situation dans la ville s'est améliorée depuis quelques années.

an obligation may have to be implemented progressively, over a number of years.

3.3 The Problem of Polycentricity

Two further explanations for the cautious approach adopted by the Court in these cases can be identified: First, there is the difficulty created by what Lon Fuller has described as the resolution of polycentric problems by adjudication.¹⁶ Where an individual complaint presents the judge with a problem, the solution of which will have ripple effects elsewhere and perhaps worsen the situation of many others, how can the judge take this collective dimension into account? The alternatives would be either to deny the complaint or to adopt the role of social engineer, ordering and perhaps supervising large-scale changes to provide the necessary remedy.

O'Reilly and others v Ireland, which was ruled inadmissible by a Chamber of the ECtHR on 28 February 2002,¹⁷ provides a good illustration of the difficulty. It concerned the failure of a County Council to discharge its statutory duty to repair a road which constituted the sole access to the applicants' homes. The road had not been repaired since 1974 and, as a result, the applicants experienced a number of problems including those arising from the fact that a bus to collect a disabled resident, and also a school bus, were unable to use it.

The Court did not deny the hardship caused to the applicants by the County Council's breach of its statutory duty to repair the road. However, it accepted that the Council did not have sufficient resources to fulfil this obligation and was, therefore, obliged to choose and prioritise the roads to be repaired according to certain criteria.¹⁸ It was in response to this lack of funds that the Irish Supreme Court had refused to issue a mandamus order; the effective result of such an order would have been to 'ensure the repair of the roads in County Cavan in an arbitrary fashion by the elevation of certain roads to an unjustified priority in the road repair

¹⁶ See L Fuller, 'The forms and limits of adjudication' (1972) 92 *Harvard Law Review* 353; and 'Adjudication and the rule of law' (1960) 54 *Proceedings of the American Society of International Law* 1. The notion of 'polycentricity', as a characteristic of problems which should not be solved by adjudication, is borrowed from M Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (London, Routledge, 1951), pp 170 ff. See also, for a perspective similar to Fuller's, H Hart, 'The Supreme Court, 1958 term—foreword: the time chart of justices' (1959) 73 *Harvard Law Review* 84. For a discussion, see JWF Allison, 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1999) 54 *Cambridge Law Journal* 367.

¹⁷ *O'Reilly v Ireland* (28 February 2002) Application No 54725/00.

¹⁸ These criteria are summarised in the description of facts by the Court. They are:

the degree of deterioration of the road, the number of families availing of the road, the needs of industry and employment, the types of traffic using the road, the volume of traffic, whether there exist particular cases of social or medical needs, the potential for tourism development and representations from local elected representatives and from private individuals.

programme.' Indeed, the Supreme Court had pointed out that the effect of any mandamus order would be the repair only of the particular road complained of, leaving other roads in the County in a state of disrepair. This illustrates the 'arbitrariness' of having priorities decided upon by the order in which suits are filed, rather than on the basis of other, more objective, criteria.

Confronted with the particular circumstances of an applicant, but largely uninformed about the more global context of that situation; ill-equipped to arbitrate in the face of delicate budgetary choices to be made by the State authorities and furthermore lacking any democratic legitimacy to make such choices in their place, the reluctance of the ECtHR to take the course requested by the applicants in *O'Reilly* is understandable.¹⁹ It is confronted with the same dilemma whenever an individual alleges a violation but the State has insufficient resources to solve the problem for all those in similar circumstances. In *Sentges* the Court, mindful of this, observed that the margin of appreciation it will grant to the State

is even wider when ... the issues involve an assessment of the priorities in the context of the allocation of limited State resources In view of their familiarity with the demands made on the health care system as well as with the funds available to meet those demands, the national authorities are in a better position to carry out this assessment than an international court.²⁰

3.4 The 'Direct and Immediate Link' Test for the Identification of Positive Obligations

A third explanation for the outcomes of these cases may lie in the open-ended character of the notion of 'respect for private life,' and the scope of the positive obligations it could potentially impose on States. We know, perhaps, where the obligation begins; we hardly know where it ends. The introduction of the 'direct and immediate link' concept in *Botta* may be explained by the Court's desire to render the process by which it identifies the existence of positive obligations more objective. In earlier cases, in deciding whether such 'positive obligations' existed, the Court had regard to 'the fair balance that has to be struck between the general interest of the community and the interests of the individual.' In other words, the scope of the positive obligations imposed on States in the name of effective respect for private life was defined by a balancing of interests; the identification of the positive obligation being fused with the examination of

¹⁹ Indeed, the Court cites its previous case-law to the effect that the States are granted a wide margin of appreciation 'when the issues involve an assessment of the priorities as to the allocation of limited State resources' (see *Osman v UK* (28 October 1998) *Reports and Decisions of the ECtHR* 1998-VIII, s 116).

²⁰ *Sentges v the Netherlands* (8 July 2003) Application No 27677/02.

whether the State could offer objective and reasonable justifications for refusing further protection to the individual.²¹

In the terminology of *Botta*, on the other hand, Article 8 will be applicable only where the failure by the State to adopt certain measures amounts to an interference with the right to respect for private life. This represents an attempt to define the scope of positive obligations imposed on the State as if they were simply a category of negative obligations. Under the *Botta* test, indeed, the Court will require that the State discharge a positive obligation to take measures ensuring effective respect for private life where the lack of such measures *infringes upon the individual's right to private life by directly interfering with* his/her capacity to exercise his/her right to self-determination. It is significant that, when announcing this test, the Court referred to earlier cases in which Article 8 had been violated by the passivity of the State: passivity which had resulted in a woman being unable to seek judicial protection from her violent and alcoholic husband;²² a mentally disabled person being unable to invoke criminal proceedings against a sexual abuser;²³ a family being obliged to move from its residence to escape from the harmful effects of pollution caused by the activity of a waste-water treatment plant situated near the family home;²⁴ and the applicants being unable, in the absence of any information given by the authorities, to assess the risks they might be running by remaining in the vicinity of a factory producing toxic emissions.²⁵ In all these cases, the absence of appropriate measures by State authorities

²¹ See eg *Abdulaziz, Cabales and Balkandali v UK* (28 May 1985) Series A No 94, para 67 (stating that the extent of the obligations inherent in an effective 'respect' for family life will be defined 'with due regard to the needs and resources of the community and of individuals'); *Rees v UK* (17 October 1986) Series A No 106, para 44 (in answering the question whether respect for the private life of transsexuals entails the obligation of UK authorities to alter the register of births or to deliver birth certificates which differ in their contents from the birth register), where the Court stated:

[h]aving regard to the wide margin of appreciation to be afforded the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the positive obligations arising from Article 8 cannot be held to extend that far;

Gaskin v UK (7 July 1989) Series A no 160, para 42 stating that:

the Court, in determining whether or not such a positive obligation exists, will have regard to the 'fair balance that has to be struck between the general interest of the community and the interests of the individual',

B v France (25 March 1992) Series A no 232-C, para 44. See, for a critique of this criterion, F Sudre, 'Les 'obligations positives' dans la jurisprudence européenne des droits de l'homme', (1995) *Revue trimestrielle des droits de l'homme* 363.

²² *Airey v Ireland* (9 October 1979) Series A no 32.

²³ *X and Y v the Netherlands* (26 March 1985) Series A no 91 at para 30.

²⁴ *López Ostra v Spain* (9 December 1994) Series A No 303-C at para 58.

²⁵ *Guerra and Others v Italy* (19 February 1998) *Reports of Judgments and Decisions of the ECtHR* 1998-I at paras 57-60.

directly impacted upon the physical or psychological integrity of the individual. As a result of this passivity, the individual was deprived of the enjoyment of his private or family life, just as much as if the State had directly committed such interference of its own initiative.

It is true that the methodology used by the Court to identify whether or not the State has 'positive obligations' in a particular situation is by no means uniform.²⁶ It is also true that in *Sentges*, when determining whether a positive obligation existed, the Court had regard not only to the *Botta* concept of a 'direct and immediate link' to the private life of the individual but also engaged in the exercise of balancing all the interests involved. Nevertheless, it is possible to identify a clear judicial approach running through these decisions.

In sum, the introduction of the concept of the 'direct and immediate link' in *Botta* is a domestication of the notion of 'positive obligations.' Pushed to its limits, the theory of positive obligations could have led to the imposition of a requirement to undertake wide-scale restructuring of the environment wherever such restructuring could contribute, at a reasonable cost, to facilitating the self-fulfilment of disabled individuals. But the *Botta* jurisprudence restricts this potential. Whilst it may be justifiable to impose obligations on States to take measures to protect the physical and psychological integrity of the individual, where there is a direct impact on his/her functioning in daily life, it is not viewed as justifiable for a judge to use the notion of 'respect for private life' as a lever to impose on the public authorities a requirement to bring about far-reaching transformations of the environment.

4 OVERCOMING BOTTA

4.1 Overview

Advocates of disability rights therefore need to find ways to circumvent the limits imposed on Article 8 by the *Botta* line of cases. The main problem, as we have seen, resides in the identification of the precise scope of the positive obligations which may be imposed on the State in the name of the 'effective respect for private life'. The fear is that, once a positive obligation to provide reasonable accommodations for disabled people is affirmed, this obligation may be stretched so far that it will be simply impossible for the State authorities to meet this obligation. Therefore, what we require are techniques which will facilitate the identification of clear parameters for

²⁶ For a more detailed discussion, see O De Schutter, 'The protection of social rights by the European Court of Human Rights' in P Van der Auweraert, T De Pelsmaeker, J Sarkin and J Vande Lanotte (eds), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (Maklu, Antwerpen-Apeldoorn, 2002) at p 207, esp pp 225–32.

positive obligations to provide reasonable accommodations, which extend beyond the present concept of a 'direct and immediate link' with the private life of the individual, the restrictive effects of which have already been outlined. I will consider five potential routes to achieving this objective.

4.2 The Obligation to Ensure Compliance with Internal Law

A first possibility would be to require, as a minimum, that States act effectively against any violations of laws which they themselves have adopted, where this would ensure that the 'personal autonomy' of an individual is guaranteed. By enacting such laws the State has, in effect, chosen the extent to which it will seek to guarantee this capacity of the individual. In obliging the State to ensure that these laws are actively enforced, an international court would, therefore, neither be imposing its own particular views about what should be done in the local context, nor would it take the State by surprise or impose too heavy a burden upon it (since the State authorities could be expected to have made their own calculations before enacting the laws in question).²⁷ In *Hatton v UK* the ECtHR was asked to decide whether the implementation of a policy on night flights at Heathrow airport constituted a violation of the right to respect for the private lives of the local population disturbed by the noise. The Court insisted that:

in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime.²⁸

One of the reasons why the Court found that the night flights policy did not violate Article 8 was that it did not breach any provision of internal law.

To date, however, such arguments have failed in the context of disabled people's claims for accommodations. In *Botta*, as we have seen, the Court

²⁷ See eg the reasoning of the Irish High Court in *O'Reilly and others*, in which it agreed to make an order of mandamus against the competent County Council requiring it to repair the road leading to the domicile of the applicants as this was a statutory obligation imposed on the Council. According to the High Court:

This is not a case of telling the Government how it must spend money. It is a case of the [Government] having imposed a statutory duty on local authorities, being required to provide the means of carrying out that duty

(cited by the ECtHR in *O'Reilly and others v Ireland* (28 February 2002) Application No 54725/00).

²⁸ *Hatton and others v UK* (8 July 2003) Application No 36022/97 at para 120. The Court cites the cases of *López Ostra v Spain* (9 December 1994) Series A No 303-C at para 58, and *Guerra v Italy* (19 February 1998) *Reports of Judgments and Decisions of the ECtHR* 1998-I as examples of cases where the measure complained of was in violation of the internal law: in *López Ostra* 'the waste-treatment plant at issue was illegal in that it operated without the necessary licence and, in *Guerra*, the refusal to provide the requested information to the inhabitants was in violation of a statutory obligation of the State'.

ruled Article 8 inapplicable despite the fact that the Italian authorities had failed to enforce their law requiring private beaches to install facilities for disabled people. In *Zehnalová and Zehnal*, the applicants placed strong reliance on the argument that positive obligations could, at the very least, be imposed on State authorities to ensure compliance with internal legislation. By amending the Law on buildings in 1994, they argued, the Czech Republic had accepted an obligation to guarantee people with certain impairments access to public buildings. The State had, on their view, imposed obligations on third parties (eg those constructing the buildings) and must ensure that they complied with the law. This responsibility should be treated as a positive obligation falling within the scope of Article 8.

This argument, however, failed to convince the Court. Thus, whilst any active interference with Article 8 rights must be in conformity with the law (because it may be justified only if it is 'in accordance with the law'), the same does not apply in the context of a State's positive obligations. It seems that a failure to ensure compliance with national legislation will not necessarily violate a positive obligation stemming from Article 8.

4.3 The Obligation to Comply with Other International Undertakings

A second possibility would be to assess the scope of the positive obligations arising from Article 8 in the light of undertakings made by the relevant State under other instruments of international human rights law. Admittedly the ECtHR is not entrusted with the supervision of the other international obligations of the States which are party to the European Convention on Human Rights. In *Zehnalová and Zehnal* (where the applicants invoked Articles 12 and 13 of the European Social Charter), not only did the Court reaffirm this position, but it also seemed to recreate a distinction between categories of rights, depending on whether they were protected under the ECHR or under the Charter. In its words:

[t]he question is what are the limits of the applicability of Article 8 of the Convention and where the border lies which separates the rights guaranteed by the Convention on the one hand, and the social rights protected under the European Social Charter, on the other hand.

The impression this creates is misleading, however. As the decision in *Zehnalová and Zehnal* itself recognised, the European Social Charter may influence the interpretation of the ECHR, despite the fact that these instruments are endowed with different institutional enforcement machineries. The Court itself noted that:

like other international instruments, the European Social Charter (... elaborated, like the European Convention on Human Rights itself, in the

framework of the Council of Europe), may be a source of inspiration for the Court.²⁹

In *Botta*, the ECtHR was careful not to follow the argument of the European Commission on Human Rights that Article 8 was inapplicable because the rights claimed were 'social in character.' In the Commission's view:

the social nature of the right concerned required more flexible protection machinery, such as that set up under the European Social Charter.³⁰

The position of the Commission, therefore, was that the rights guaranteed by the European Social Charter should not be read into the ECHR because each of these instruments had their specific sphere of engagement: the latter guarantees rights which are immediately justiciable; the former contains programmatic rights to be progressively realised. This position, however, would have re-installed a watertight division between these two categories of rights; a division which, since *Airey*,³¹ the Court has systematically relaxed and in many cases overturned. It is worth emphasising that the ECtHR did not decide *Botta* on this basis. Its ruling does not rely on a division between civil and political rights and social and economic rights but is, rather, based on the Court's understanding of the term 'private life' and its requirements.

More significant still, where the Court has been asked to identify which positive obligations derive from Article 8 in other contexts, it has taken into account other relevant international obligations of the State concerned. It has used an estoppel-like argument: how could a State possibly argue that it would be unreasonable to expect it to adopt a particular measure, if the State has already undertaken to adopt that measure by agreeing to other international agreements? In general, the Court seeks to interpret the ECHR in the light of general public international law. It does so particularly where it needs to justify the meaning it attaches to notions which are, by definition, open and contextual, such as the positive obligations flowing from the duty to 'respect private life.' In *Ignaccolo-Zenide v Romania* and, more recently, in *Iglesias Gil v Spain*, the scope of the positive obligation of the State to adopt measures to ensure that children will be united with their parents in cases of parental kidnapping was defined with reference to the Hague Convention (to which the States concerned were parties).³²

²⁹ (14 May 2002) Application No 38621/97.

³⁰ *Botta v Italy* (24 February 1998) *Reports of Judgments and Decisions of the ECtHR* 1998-I, No 66 412 at para 28.

³¹ *Airey v Ireland* (9 October 1979) Series A no 32.

³² *Ignaccolo-Zenide v Romania* Application No 31679/96, CEDH, 2000-I at para 94; *Iglesias Gil and AUI v Spain* (29 April 2003) Application No 56673/00 at para 51:

S'agissant ... des obligations positives que l'article 8 de la Convention fait peser sur les Etats contractants en matière de réunion d'un parent à ses enfants, celles-ci doivent s'interpréter à la lumière de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants.

In this respect, the doctrine which the European Committee on Social Rights (ECSR) has derived from Article 15(3) of the revised European Social Charter is of particular relevance to *Botta*-like cases. The ECSR has stated that the revised version of this Article:

advances the change in disability policy that has occurred over the last decade away from welfare and segregation and towards inclusion and choice

and it has been interpreted by the Committee as requiring the adoption of positive measures to achieve the integration of disabled people in housing, transport, telecommunications, cultural and leisure facilities. Moreover, in the view of the Committee, Article 15(3):

requires the existence of anti-discrimination (or similar) legislation covering both the public and the private sphere in the fields such as housing, transport, telecommunications, cultural and leisure activities, as well as effective remedies for those who have been unlawfully treated.³³

4.4 The Obligation to Include Safeguards in the Decision-Making Process

A third line of development would be to focus on the issue of compliance with procedural norms, requiring States to weigh all relevant interests carefully when making decisions and, in particular, to analyse the impact of proposed measures on more vulnerable groups. In this regard it is no accident that, in *Marzari v Italy*, the Court was influenced by the fact that the State had set up a specific Commission for the study of metabolic diseases which had taken the view that the house offered to the applicant would have been adequate. This convinced the Court that the competent authorities had acted only after carefully weighing all the alternatives and collecting all relevant information regarding the possible impact on the fundamental rights at stake.

In cases relating to environmental issues, the Court's scrutiny has addressed two distinct issues: the first, material, involving an inquiry into the substantive merits of the measure; the second, procedural, focusing on the decision-making process. In *Buckley v UK* (which concerned the impact of land planning regulations on the nomadic lifestyle of the gypsy community) the Court said:

³³ Conclusion 2003-1 at p 170 (France—Art 15(3)); Conclusion 2003-1 at p 298 (Italy—Art 15(3)); Conclusion 2003-2 at p 508 (Slovenia—Art 15(3)); Conclusion 2003-2 at p 614 (Sweden—Art 15(3)). In its last control cycle, the Committee deferred its conclusion concerning the compliance of France with Art 15(3) of the Revised European Social Charter, pending receipt of the information requested on the existence of legislation protecting disabled people from discrimination in the domains cited (housing, telecommunications, transport, cultural and leisure activities). The conclusions of the Committee concerning compliance of Sweden with this provision of the Revised Charter were also deferred pending the receipt of further information. The Committee concluded that, as no such legislation exists in Italy or in Slovenia, the situation in these countries was not in conformity with Art 15(3).

Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one in issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed ... whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.³⁴

Similarly, in *Hatton*, the Court observed that it had to consider:

all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available.³⁵

Such a procedural check could also be applied to the adoption of regulations or policies which adversely affect disabled people. This would require public authorities, before adopting such measures, to seek information about the extent of such an impact, the available alternatives, and the means by which the impact could be reduced and kept to a minimum. This approach would be in line with the requirement of the ECSR (in relation to Article 15(3) of the ESC) that:

persons with disabilities and their representative organisations should be consulted in the design, and ongoing review of such positive action measures [seeking to improve the integration of persons with disabilities in the life of the community] and that an appropriate forum should exist to enable this to happen.³⁶

4.5 The Obligation Not to Discriminate

Fourth, we may seek to overcome the limits imposed by the *Botta* line of decisions by the combined effect of Article 8 and the non-discrimination requirement of Article 14 which, of course, may not be invoked independently. According to well-established case-law:

³⁴ See also eg *Beard v UK* (18 July 2001) Application No 24882/94 at para 103 (concerning the alleged violation of Art 8 ECHR resulting from the adoption of planning regulations ignoring the needs of the gypsy community):

the procedural safeguards available to the individual applicant will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, it must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.

³⁵ *Hatton and others v UK* (8 July 2003) at para 104, see n 28.

³⁶ Conclusion 2003-1 at p 168 (France—Art 15(3)); Conclusion 2003-1 at p 507 (Slovenia—Art 15(3)).

Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter.³⁷

Where Article 8 is not applicable, the Convention will therefore impose no requirement of non-discrimination. This was precisely the basis of the Court ruling in *Botta* as in *Zehnalová and Zehnal*.

However, the scope of Article 14 has sometimes been more broadly defined. Not only has it been held to be applicable where the alleged discrimination has its source in the exercise of a right protected by the Convention (eg in the exercise of the freedom to manifest one's religion³⁸ or to lead one's sexual life);³⁹ but it has also been held applicable where the relationship of the allegedly discriminatory measure, with the enjoyment of a right protected under the Convention, is comparatively indirect.

The case of *Petrovic* is perhaps most illustrative of this 'autonomisation' of Article 14.⁴⁰ The applicant, a father who was denied a parental leave allowance, alleged that the Austrian law which reserved such an allowance to mothers was discriminatory. The Court agreed that Article 14 was applicable, despite the fact that the refusal to grant the applicant a parental leave allowance did not amount to a failure to respect family life because Article 8 did not impose any positive obligation on States to provide the financial assistance in question. The Court reasoned that:

Nonetheless, this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children. The Court has said on many occasions that Article 14 comes into play whenever 'the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed'⁴¹ or the measures complained of are 'linked to the exercise of a right guaranteed'.⁴² By granting parental leave allowance, States are able to demonstrate their

³⁷ See *Abdulaziz, Cabales and Balkandali v UK* (28 May 1985) Series A No 94 at p 35, para 71, and *Inze v Austria* (28 October 1987) Series A No 126 at p 17, para 36.

³⁸ *Thlimmenos v Greece* (6 April 2000) Application No 34369/97 at para 42.

³⁹ *Fretté v France* (26 February 2002) Application No 36515/97.

⁴⁰ *Petrovic v Austria* (27 March 1998) *Reports of Judgments and Decisions of the ECtHR* 1998-II. The validity of *Petrovic* has been recently reaffirmed by a chamber of the Court (1st section), unanimous on this point (see para 4 of the dissenting opinion of Mr Grabenwarter (*ad hoc* judge) joining with the majority on this issue), in *Karner v Austria* (24 July 2003) Application No 40016/98 at para 32.

⁴¹ See the *National Union of Belgian Police v Belgium* (27 October 1975) Series A No 19 at p 20, s 45.

⁴² See *Schmidt and Dahlström v Sweden* (6 February 1976) Series A No 21 at p 17, s 39.

respect for family life within the meaning of Article 8. The allowance thus falls inside the scope of that provision. It follows that Article 14, taken together with Article 8, is applicable.

It requires little imagination to see what consequences this may have when combined with the very broad understanding of the notion of 'private life' discussed above. Certainly, a municipality or a State requiring all public buildings to be made accessible to persons with limited mobility, would thereby demonstrate their respect for private life within the meaning of Article 8. This is not to say that such measures would be required under Article 8 but, rather, that an authority which chose to take such measures would be brought within the scope of Article 8 and hence Article 14. Thus, if a State adopted legislation requiring that work stations should be adjusted so as to meet the needs of certain categories of disabled people but not others, Article 14 could be invoked in conjunction with Article 8, on the basis that this constituted a discriminatory implementation of Convention rights.

Were Article 14 to be given such an expanded scope, there would still be an issue as to whether it could be interpreted so that the requirement of non-discrimination included an obligation to accommodate disabled people. Certain new developments are encouraging in this regard. The case of *Thlimmenos* is particularly significant. It concerned a Jehovah's Witness who wished to become a chartered accountant, but was denied access to the profession because of a criminal conviction for refusing to serve in the armed forces for religious reasons. The Court famously stated that:

[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention [is violated not only when States *treat differently persons in analogous situations without providing an objective and reasonable justification*, but also] when States without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different*.⁴³

It found that the Greek authorities had discriminated against Mr Thlimmenos because they had failed:

to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants.⁴⁴

⁴³ *Thlimmenos v Greece* (6 April 2000) Application No 34369/97 at para 44.

⁴⁴ *Ibid* at para 48. The Court follows the opinion expressed by the European Commission of Human Rights in its report of 4 December 1998:

In the circumstances of the case, the Commission finds no objective and reasonable justification for the failure of the drafters of the rules governing access to the profession of chartered accountants to treat differently persons convicted for refusing to serve in the armed forces on religious grounds from persons convicted of other felonies. By failing to introduce such a distinction, ie by failing to introduce an exception to the rule barring from the profession of chartered accountants persons who have been convicted of felonies, the drafters of the rules violated the applicant's right not to be discriminated in the enjoyment of his right to manifest his religion (para 50).

Although the expression, as such, does not appear in the judgment, the language used by the Court is reminiscent of the notion of reasonable accommodation:

The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified It follows that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court finds that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime.

The importance of this case lies not only in its introduction of the concept of indirect discrimination into the case-law of the ECtHR, but also arguably in its contribution to the concept of reasonable accommodation. That is to say that a failure to take account of certain specific needs of an individual may now amount to discrimination; it may be unjustified to *refuse to create an exception to the general norm*, even where that norm is justifiable as reasonably related to a legitimate aim and proportionate to the fulfilment of that aim.

It is precisely because of this point that the prohibition against indirect discrimination and the obligation to provide effective accommodation must be recognised as distinct concepts: indirect discrimination occurs where an apparently neutral measure has a disproportionate impact or imposes a particular disadvantage on a certain category, and cannot be justified as a measure pursuing a legitimate aim by means both appropriate and necessary; the failure to provide effective accommodation is a failure to create an exception, where one would be required to take into account the specific situation of a category of persons, although the general rule is justified to the extent that it applies to the generality. In this sense, *Thlimmenos* is not a case about indirect discrimination, despite the fact that this is how it is usually presented (even, indeed, by the Court itself). It is, rather, a case about reasonable accommodation and its reasoning is, therefore, immediately useful to disability rights advocates.

4.6 The Obligation Not to Inflict Inhuman or Degrading Treatment or Punishment

In contrast with the Article 8 cases discussed above, the Court has been noticeably less reluctant to impose an obligation of reasonable accommodation

where a disabled person has been deprived of his/her liberty by the State and where, consequently, the State authorities bear a special responsibility for ensuring that s/he is not placed in an environment which creates additional disadvantage or which causes distress or physical or psychological damage. The leading case in this area is *Price v UK*. There, the applicant, who experienced phocomelia due to thalidomide, was committed to prison for seven days for contempt of court.⁴⁵ She was allegedly prohibited from taking with her the battery charger for her wheelchair because this was considered to be a luxury item. Before she was taken to prison, however, she spent a night in a cell at a police station. According to the description given in the judgment of the ECtHR:

This cell, which contained a wooden bed and a mattress, was not specially adapted for a disabled person. The applicant alleges that she was forced to sleep in her wheelchair since the bed was hard and would have caused pain in her hips, that the emergency buttons and light switches were out of her reach, and that she was unable to use the toilet since it was higher than her wheelchair and therefore inaccessible.⁴⁶

Despite the fact that their attention was drawn to this situation by a doctor who was called during the night, at the request of Ms Price, the responsible police officers did nothing to ensure that she was removed to a more suitable place of detention. When she was moved to the prison the next day, she was detained in the prison's health care centre, because of her limited mobility. Her cell had a wider door for wheelchair access, handles in the toilet recess and a hydraulic hospital bed. The nursing staff, however, expressed their concern upon her admission about the problems that were likely to be encountered during her detention, including reaching the bed and toilet, hygiene and fluid intake, and mobility (if the battery of her wheelchair ran down). Nevertheless, the transfer of Ms Price to an outside hospital, as was recommended by these medical staff, did not occur. The ECtHR found that this amounted to a violation of Article 3. Despite the absence of any 'positive intention to humiliate or debase the applicant',⁴⁷ the Court considered that:

to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.⁴⁸

⁴⁵ As a result of the rules on remission of sentences however, she was in fact detained for three nights and four days.

⁴⁶ *Price v UK* (10 July 2001) Application No 33394/96.

⁴⁷ Although the presence of such an intention is one of the factors the Court takes into account in considering whether a particular treatment is 'degrading' within the meaning of Art 3 ECHR, 'the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3' (*Price (ibid)* at para 24, citing *Peers v Greece* Application No 28524/95 paras 67–68 and 74, ECHR 2001–III).

⁴⁸ *Price (ibid)* at para 30.

It was the lack of any consideration of Ms Price's special needs, therefore, which led to the Court's finding that degrading treatment had taken place. As noted by Judge Greve in her separate concurring opinion, it is the failure to treat differently a person whose situation is significantly different that is degrading. Being a disabled person, in her view, made the applicant 'different' from other people so that treating her in the same way as them was both discriminatory and a violation of Article 3. Nowhere in the judgment does the Court allude to the fact that lack of resources could justify treatment which attains such a level of severity as to bring it within the scope of Article 3. This is significant because Ms Price had not attempted to bring an action in negligence against the Home Office precisely because, according to English case-law, the standard of care in a prison hospital is lower than would be required in an equivalent outside institution because of the shortage of resources.⁴⁹

The judgment in *Price* is, of course, explained by the specific responsibility of prison authorities to provide the requisite medical care for detained persons and, more generally, to ensure that the detention is compatible with the health of those persons.⁵⁰ The State does not owe the same responsibility to individuals in the 'free world'. In this context, moreover, there is no 'floodgates problem'; the obligations imposed on the public authorities are clearly circumscribed and will not extend indefinitely. Further, if the State truly cannot take appropriate measures to ensure that the detention does not constitute degrading treatment, the disabled detainees could be released. We therefore cannot be confident that the *Price* doctrine, according to which the denial of reasonable accommodation may amount to a form of degrading treatment, will be applied to disabled people not detained in institutions.

Indeed, this position has been adopted since *Price* by UK courts. In *Bernard v Enfield LBC*⁵¹, the applicant failed to convince the court that Article 3 had been violated. She had been obliged to live for twenty months in a house not equipped to meet her needs, which had resulted in severe inconvenience and a lack of independence, which of course also had a negative impact on other family members and on family life in general. Although the court concluded that the situation amounted to a violation of the right to respect for family life, *Price* was regarded as not applicable because, in the words of Sullivan J, 'the cases concerned with prisoners' rights [...] must be treated with great caution outside the prison gates.' Anna Lawson has explained this result thus:⁵²

⁴⁹ See *Knight and others v Home Office and another* [1990] 3 All ER 237, cited in *Price* at para 19.

⁵⁰ See eg *McGlinchey and others v UK* (29 April 2003) Application No 50390/99 at para 57.

⁵¹ [2002] England and Wales High Court 449.

⁵² A Lawson, 'The Human Rights Act 1998 and disabled people: a right to be human?' in C Harvey (ed), *Human Rights in the Community* (Oxford, Hart Publishing, 2005).

The crucial factor may be that prisoners, unlike tenants, are subjected against their will to regimes controlled in every detail by others. On this basis, *Price* would apply equally to other institutions in which disabled people might be confined, such as psychiatric wards. Outside the institutional context, however, it would seem to be extremely difficult to establish a breach of Article 3 without proof of a positive intention to humiliate or debase.

5 REASONABLE ACCOMMODATION IN EMPLOYMENT

The future will reveal the extent to which *Thlimmenos* will be developed into a general obligation to accommodate the specific needs of members of religious groups and whether, from there, it will be extended to the claims of disabled people. Hitherto, the institutions set up to oversee the ECHR have been somewhat reluctant to require exceptions to rules of general applicability, even where those rules impose a particular disadvantage on the adherents to a particular faith.⁵³ In the well-known case of *Ahmad v UK*, a muslim schoolteacher was refused permission to be absent on Friday afternoons to attend mosque. He had to leave his job and accept a part-time position compatible with the requirements of his faith. The European Commission of Human Rights found that this did not amount to a violation of Article 9, as Mr Ahmad had freely accepted the obligations of his teaching position when he took up the job offer and had not requested any adjustment to his schedules during the first six years of employment.⁵⁴ According to this ruling, which stands in sharp contrast with the attitude of the Canadian Supreme Court to a very similar issue a few years later,⁵⁵ the freedom of an employee to manifest his/her religion does not impose any requirement to adjust the

⁵³ See generally C Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford, OUP, 2001) ch 9; and St Stavros, 'Freedom of religion and claims for exemption from generally applicable, neutral laws' (1997) 6 *European Human Rights Review* 607.

⁵⁴ *Ahmad v UK* (12 March 1981) DR 22 p 27.

⁵⁵ See *Ontarian Commission of Human Rights v Simpson-Sears Ltd* [1985] 2 Supreme Court Reports 536. In this case, Ms O'Malley, whose religion strictly obliged her to rest between sunset on Friday and sunset on Saturday, complained that her employer wished to see her work on Friday evenings and on Saturdays. The Court concluded that this constituted a form of discrimination, as the employer had neither sought to accommodate her religious practice by proposing other working hours, nor proved that any such accommodation would result in undue hardship for the undertaking. See also *Commission Scolaire Régionale de Chambly v Bergevin* [1994] 2 Supreme Court Reports 525 (a collective agreement not providing for a holiday on the day of the Yom Kippur produces a disparate impact on teachers of Jewish faith, and is thus discriminatory unless effective accommodation is provided by the employer, where this does not impose an unreasonable burden on the employer).

organisation of work on an employer.⁵⁶ This view has been affirmed in subsequent cases, all relating to the conflict between religious obligations and work schedules.⁵⁷ It is based on the proposition that, ultimately, leaving a job may be the price of exercising religious freedom. In other words, the imposition of professional constraints which are incompatible with the religion of an employee are acceptable because the employment has been voluntarily chosen by that employee at the beginning of the employment relationship and may be voluntarily ended by the employee if s/he attaches more value to her freedom of religion.

This approach has been reaffirmed by the Court even after the *Thlimmenos* decision,⁵⁸ thus raising a doubt as to the precise message to be drawn from that case. It may be that the Court will decide that the ECHR will require effective accommodation only where the person concerned has not implicitly consented to the restriction on his or her religious practices by, eg, entering into an employment contract containing the restrictive requirement.⁵⁹

⁵⁶ See generally JT Gunn, 'Adjudicating rights of conscience under the European Convention on Human Rights' in JD Van der Vijver and J Witte (eds), *Religious Human Rights in Global Perspective* (The Hague/Boston/London, Martinus Nijhoff, 1996) at p 305; or G Quinn, 'Scope and limits of conscientious objection: conscientious objection in labour relations' in *Freedom of Conscience*, Proceedings of the Leiden Seminar, 12–14 November 1992 (Strasbourg, Council of Europe, 1993) at p 112; B Tahzib, *Freedom of Religion or Belief—Ensuring Effective International Legal Protection* (The Hague/Boston/London, Martinus Nijhoff, 1998) at p 326; P Frumer, *La renonciation aux droits et libertés. La Convention européenne des droits de l'homme à l'épreuve de la volonté individuelle* (Bruxelles, Bruylant, 2001) at pp 383–94.

⁵⁷ European Commission of Human Rights, *Konttinen v Finland* (2 December 1996) DR 87–B, at p 68; European Commission of Human Rights, *Stedman v UK* (9 April 1997) DR 89–B at p 104.

⁵⁸ See above, n 43.

⁵⁹ Indeed, in *Pichon and Sajous v France* Application No 49853/99, the Court, in an inadmissibility decision of 2 October 2001, agreed with the French authorities that the conviction of two pharmacologists for having refused to sell contraceptives to three women was compatible with Art 9 ECHR, despite the fact that they based their refusal on their religious convictions:

The Court notes that in the present case, the applicants, who are pharmacologists, have argued on the basis of their religious beliefs to refuse to sell, in their pharmacy, contraceptive pills. The Court considers that, as the sale of this product is legal, may only be sold upon medical prescription and exclusively in pharmacies, the applicants should not be allowed to impose their religious views on others to justify a refusal to sell this product, as these convictions may be manifested in many ways outside the professional sphere.

The outcome of *Pichon and Sajous*, however, can be explained by the fact that the exercise of religious freedom would have led to denying to women, who were prescribed the use of contraceptives by their physician, a medical product they required. This may be compared with a case (this time outside the professional sphere) where parents complained that they were denied the possibility of not sending their children to school on Saturdays, despite the fact that their religious belief imposed total rest on that day of the week. The Court considered the application manifestly ill-founded, as such an exemption would enter into conflict with the right of the child to education: see *Martins Casimiro and Cerveira Ferreira v Luxembourg* (27 April 1999) Application No 44888/98. It should be emphasised however that the Court does not seem to share the view of the national jurisdictions that any authorisation granted to parents not to send their child to school on Saturdays would result in such a disorganisation of the school system that it would ultimately threaten the rights of the other schoolchildren.

Despite these ambiguities, the following observations can be made about the presence (or absence) in the ECHR of an obligation on States to ensure that employers effectively accommodate the needs of their disabled employees unless doing so would constitute an undue burden.

First, it can be argued that the absence of national legislation requiring employers to adapt the working environment to the needs of an otherwise competent disabled person, presents such a direct and immediate link to the 'private life' of the individual concerned that Article 8 would apply. Such a case would be closer to *Marzari* or *Sentges* than to *Botta* or *Zehnalová and Zehnal*. In the past, the Court has recognised that, if respect for private life comprises a right to establish and develop relationships with others, there is no reason in principle why activities of a professional or business nature should not be included. Indeed, according to the Court:

it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.⁶⁰

Assuming, then, that a refusal of the State to oblige employers to provide some form of accommodation for a disabled person falls under the scope of Article 8, will such a refusal be justifiable? The aims which might be invoked to justify such a restriction can be easily identified. Accommodations will be seen as costly; a point which should be balanced against the potential benefits of such adjustments, both to the employer (where it leads to the recruitment of the best candidate or where it increases the productivity of the worker),⁶¹ and to society more generally. The ECtHR has accepted that the 'economic well-being of the country' and the 'rights of others' (both legitimate objectives under Article 8(2)) may justify restrictions on the rights of individuals where undue burdens would otherwise be imposed.⁶²

Quite where this balance will be struck is a matter of speculation at present. It is clear from previous ECtHR decisions that it will not adopt the approach of the Irish Supreme Court, which ruled that the requirement to make reasonable accommodations violated the property rights of employers.⁶³

⁶⁰ *Niemietz v Germany* (16 December 1992) Series A No 251-B, para 29.

⁶¹ See, for the argument that a statutory duty to provide reasonable accommodation may promote efficiency on the labour market by reducing the risks entailed by the incomplete information of the employer and the asymmetry between the employer and the candidate employee as to the qualities of the latter: JH Verkerke, 'Is the ADA efficient?' (2003) 50 *University of California Law Review* 903. A recent attempt to a systematic analysis of the relationship between reasonable accommodation of persons with disabilities and efficiency requirements is by MA Stein, 'The law and economics of disability accommodations' (2003) 53 *Duke Law Journal* 79.

⁶² *Hatton and others v UK* (8 July 2003) para 121, see n 28.

⁶³ See further, C Gooding and C Casserley, 'Open for all? Disability discrimination laws in Europe relating to goods and services' ch 8 below. See also *Mellacher and others v Austria* (18 December 1989) Series A No 169, s 56 (concerning the compatibility with the right to property of Art 1 Protocol No 1 ECHR of legislation on rent control, even in the circumstance where the measure adopted by the Austrian legislature affected the further execution of previously concluded contracts).

However, whether a refusal to provide reasonable accommodation will be judged to strike a fair balance between all the interests involved, is a question to which only highly contextualised answers can be given. It could be argued, on the basis of the existing case-law, that this balance is upset wherever laws or practices of general applicability are imposed without the flexibility necessary to take into account the circumstances of people who are adversely affected because of particular personal characteristics. Indeed, the Court has on some occasions moved towards a requirement of proportionality, which would imply that any laws or practices of general applicability should allow for exceptions in specific situations where their application would lead to excessive hardship.⁶⁴ The requirement of proportionality would thus apply not only to the rule itself, but also to the absence of any provision for exceptions to the rule.

There are some traces of such a two-tiered understanding of proportionality in the case-law. In *Gaskin v UK*, the Court held that a requirement that access to personal records should be dependent on the consent of the persons who contributed the information was in principle compatible with Article 8. Nevertheless, the absence of any procedure for an independent consideration of the particular circumstances of each situation was held not to comply with the requirement that the restriction on the right of access to personal data must be 'necessary in a democratic society.' The Court observed that, while such a system could be regarded as compatible with Article 8 obligations, taking into account the State's margin of appreciation:

under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent.⁶⁵

No such procedure being available to the applicant, the Court found a violation of Article 8. This example is not isolated. In *Immobiliare Saffi v Italy*, the Court held that although:

in principle, a system of temporary suspension or staggering of the enforcement of court orders followed by the reinstatement of the landlord in his property is not in itself open to criticism, having regard in particular to the margin of appreciation permitted under the second paragraph of Article 1 [of Protocol 1 ECHR]. However, such a system carries with it the risk of imposing on landlords an excessive burden in terms of their ability to dispose

⁶⁴ See S Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme* (Brussels, Bruylant-Publ des FUSL) 2001, No 281–84.

⁶⁵ *Gaskin v UK* (7 July 1989) Series A No 160, para 95.

of their property and must accordingly provide certain procedural safeguards so as to ensure that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable.

It observed that 'the Italian system suffered from a degree of inflexibility.' Indeed, no court had jurisdiction to rule on the impact which the delays caused by this system might have in a particular case so that the applicant company was deprived of any means by which to compel the government to 'take into account any particular difficulties they might encounter as a result of the delay in the eviction'. This led the Court to conclude that there had been a violation of Article 1 of Protocol 1.

It is only fair to say that case-law is not settled on this point. It is possible to identify cases that point in different directions. The case-law relating to freedom of conscience in the work environment has already been referred to, and the principle evident in those cases (that where the individual in question has made a choice, he or she cannot then require the adjustment of general conditions even where this imposes considerable hardship) can also be found in other contexts. In *Hatton*, only a very small segment of the population neighbouring Heathrow airport (representing 2–3 per cent of that population) suffered from the noise produced by aeroplanes flying at night. The Court commented that it considered it reasonable, in determining the:

impact of a general policy on individuals in a particular area, to take into account the individuals' ability to leave the area. Where a limited number of people in an area ... are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure.⁶⁶

The implication is that, where a general policy is justified with respect to the generality of situations to which it applies, it will not need to be justified in its application to each individual case, at least where the individuals concerned could have chosen not to be affected by that policy.

This stands in sharp contrast to the contextualised requirement of proportionality identified in *Gaskin* or in *Immobiliare Saffi*, as well as to the notion that effective accommodation should be provided to take into account specific individual situations, at least where this does not result in the imposition of disproportionate burdens. These contrasting answers to the question of proportionality make it very difficult to anticipate whether the ECtHR will impose an obligation to provide reasonable accommodation in future employment cases beyond the scenario exemplified by *Thlimmenos*, where the exercise of religious freedom led to a prohibition on entering certain professions.

⁶⁶ *Hatton and others v UK* (8 July 2003) see n 28, para 127.

6 CONCLUSION

The concept of 'private life' has been interpreted broadly in the case-law of the ECtHR. In some cases this has led it to impose far-reaching positive obligations on the State parties to the Convention. Moreover, in *Thlimmenos*, the Court has demonstrated its willingness to move beyond a formal understanding of the requirement of non-discrimination. Despite these encouraging developments, however, the ECtHR has not yet affirmed an obligation to provide disabled people with effective accommodations, either in the sphere of employment or in other domains, which could contribute to their social integration. Nevertheless there are signs that the Court is moving towards such an affirmation. Three final remarks may be made about the conditions in which this development is occurring.

First, the current case-law of the ECtHR distinguishes between situations where the denial of effective accommodation for disabled people presents a direct and immediate link to their private and family life and other situations where, in the absence of such a link, Article 8 will be considered inapplicable. Although the sphere of employment would appear to fall within the former group of situations, the *Botta* line of cases confronts us with an implicit view that certain activities in life (eg travelling, going on vacation, having the choice of which chemist to visit) are less worthy of protection, because they are less essential to the fulfilment of one's personality. Perhaps we should question this hierarchy. Perhaps we should challenge both the practicability of such a distinction—as if housing or employment, for instance, can be distinguished from public transportation or access to services of general interest—and, especially, the underlying idea that it would be compatible with the requirement of autonomy to oblige a person to restrict him/herself to his or her immediate surroundings and deny him/her the opportunity of moving beyond them.

The centrality of employment to one's self-fulfilment may also be questioned, particularly if (as in the Council Directive 2000/78/EC) it results in an exclusive focus on employment as the sphere in which an obligation to make reasonable accommodation may be imposed. In fact, the professional sphere and other spheres are not easily separable. Citing the 1993 Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (the purpose of which is to ensure that all disabled people 'may exercise the same rights and obligations as others'), the UN Committee on Economic, Social and Cultural Rights insists, in its General Comment no 5 of 1994, that disabled people, 'whether in rural or urban areas, ... have equal opportunities for productive and gainful employment in the labour market.' Equal access to employment requires, however, that the artificial barriers to integration are removed, not only in the workplace, not only in the working environment, but also in the general environment; as the Committee emphasises:

it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are ... cited as the reason why persons with disabilities cannot be employed.⁶⁷

Second, we have seen that even post-*Thlimmenos*, uncertainties remain around the question whether the duty to provide reasonable accommodation (which may, in certain cases, take the form of an exception to a general rule) will become part of the requirement of non-discrimination as formulated in the ECHR, and will benefit disabled people seeking access to employment or to remain employed, but facing architectural or other barriers. *Marzari* and *Sentges* show that the closer the link between the measures requested from the State and the everyday activities of the individual, the easier it will be to invoke the applicability of Article 8. Moreover, while the Court was hesitant about the large-scale consequences (including budgetary consequences) which a finding of violation in cases such as *Botta* or *Zehnalová and Zehnal* would have implied, such consequences are not to be feared where reasonable accommodation in work and employment is concerned. The scope of what an accommodation requires in order to be effective is well-defined in such cases: it must create the conditions which will make it possible for a competent individual with an impairment to perform the essential functions of the job. And whether such an effective accommodation must be provided will depend on whether it is reasonable; such a duty will not exist where it imposes an undue, or unreasonable, burden on the employer.

Finally, the ambiguity inherent in the relationship between the prohibition of indirect discrimination, on the one hand, and the obligation to provide effective accommodation, on the other, should be noted. Although the obligation to provide reasonable accommodation is a specific consequence of the general prohibition of indirect discrimination, it should not take priority over that prohibition or be seen as a substitute. A number of indicia show that a duty of reasonable accommodation could be read into the Convention. At the same time, it would be inadvisable to present this, without further reflection, as the preferred (or exclusive) solution to the exclusion of disabled people from the social or professional sphere. The duty of reasonable accommodation should be seen, rather, as subsidiary to the prohibition of indirect discrimination. Where a regulation or practice produces an adverse impact on disabled people, putting them at a particular disadvantage, it first has to be asked whether it may be objectively justified by the pursuance of a legitimate aim by the appropriate and least restrictive means. Only if the answer to this first question is in the affirmative must we then ask the further question: whether an effective accommodation would make it possible for the disabled person not to be excluded,

⁶⁷ General Comment No 5 (11th session, 1994). *Report of the Committee on Economic, Social and Cultural Rights*, UN Doc E/1995/22, pp 99–109. The quotation is from para 22.