Given that our government professes concern about fiscal restraint, this is an odd result. That it costs far more to keep people homeless than it does to provide housing is old news; moreover, it is news of which the government is well aware.

But even in the face of powerful government opposition our coalition has made a choice. Enough timidity! We're fighting for the right to adequate housing in Canada, a struggle rooted in justice, not charity.

"The CLJF is supported by the Law Foundation of Ontario but the findings of this research do not necessarily reflect the views of the Foundation"

For more information on the challenge:

http://www.acto.ca/en/cases/right-to-housing.html

http://righttohousing.wordpress.com/

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The right to emergency accommodation, a breach in the dam of fundamental rights ?

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In recognising that the right to emergency accommodation is a fundamental freedom, administrative courts delineate its boundaries, drawing a distinction between the right holders liable to cite the state as negligent in court when this right is ignored and the others, those who are unable to claim this right.

For a long time, access to emergency accommodation, for those living in extreme hardship, was unconditional. Then, gradually, during the first decade of the new millennium, the idea of subjecting this access to certain conditions was raised, as two forms of pressure came to bear on the shoulders of the authorities concerned.

The first source of pressure prompting this change was the fact that the legal status of migrants was growing ever more complex. This led to an increase in the number of people allowed to remain on French soil but unable either to work or to seek assistance from the usual solidarity mechanisms. As a result, these individuals had no other option but to turn to the 'unconditional emergency mechanisms' for support. The number of temporary residence permits granted increased, authorising stays of between 3 months and 1 year. At the same time, it became more difficult to obtain either permanent leave to remain or French nationality, the concept of natural entitlement dissolved and that of state discretion took its place. The successive waves of new EU citizens entitled to move freely within the Union's borders found their right to work in France restricted for periods of up to seven years in length.

The second factor behind the change was the entry into force, of the Dalo[1] Law, on March 5th 2007. This law made it possible for individuals to take the state to court and claim the right to emergency accommodation. The text stated that temporary accommodation structures were a valid resource with which the state could fulfil its obligation to house those individuals deemed priority cases by Mediation Committees. In order to create the space necessary for the state to do so, those who entered these structures ultimately need to be able to leave.

Logic would therefore dictate that in a smoothly functioning system, those who entered temporary state accommodation would be eligible for support allowing them to leave. Eligible, namely, for social housing, the access to which is currently subject to ever more stringent conditions of residence.

1 Droit au Logement Opposable – the enforceable right to housing

Following a literal interpretation of the Dalo Law, France's administrative courts concluded that no condition of residence could affect the right of an individual to claim emergency accommodation from the state in court. However, in a judgement issued on March 7th 2011, Lyon's Administrative Court enshrined a logic of contagion in accommodation eligibility criteria, making the right to take the State in order to receive housing conditional upon the possession of a valid residence permit.

On February 10th 2012, a ruling issued by the Council of State declared : '*it is incumbent upon state authorities to ensure that the right of any homeless person in a situation of medical, psychological or social distress to emergency accommodation as recognised by law is enjoyed in practice*' and stated that *'blatant negligence in performing this task can constitute (…) a serious and manifestly illegal violation of a fundamental freedom, should this negligence have serious consequences for the person concerned.'*

This statement from the administrative judge placed the right to emergency accommodation among the ranks of the fundamental freedoms to be enjoyed in France. Given that this right must be recognised and guaranteed by the authorities, it prompts decisions on the part of the administration which are then validated by a judge. Given that the right to emergency accommodation is a fundamental right, in emergency situations, cases in which the state is challenged on account of its failure to provide such housing can be fast-tracked through the courts. These courts have the means to force the authorities into action.

With this statement, the right to emergency accommodation, previously something of an afterthought in the field of social rights, became a positive right - the state is now bound to take positive action in order to ensure it is enforced.

The Council of State has spoken: the very survival of the individuals concerned depends upon the enjoyment of this right - at the very least their dignity is at stake. It is impossible to compromise on the right to life and to live in dignity – a right of every human being. Nevertheless, through two of its rulings on the constitutional and fundamental right of asylum – 'Nzuzi' and 'Panokheel' in 2010 - the Council of State stipulates that there are conditions which must be fulfilled before an individual's homelessness can be deemed a failure of the state: the rulings state that the consequences of this homelessness must be particularly serious, in view of the age, health and family situation of the claimant.

When a case is brought before the emergency judge, the judge will examine its particulars and decide whether the claimant's situation of distress is liable to make the state responsible and thus oblige the state to house him.

In spring 2012, the end of the 'Winter Plan' which seeks to ensure all homeless people are accommodated during the winter months, saw a reduction in the capacity of emergency accommodation structures. This reduction culminated, as it always has done, in evictions (in the absence of a dispute settlement procedure, violent evictions became common practice in the housing sector…) and in the suspension of housing access services in order to facilitate the closure of a number of centres which opened on a sporadic basis.

Almost immediately, several petitions for injunctions or interim suspension orders were filed by individuals who were either homeless or at risk of homelessness. These were individuals who had called upon emergency social services for support, but who had found these services unable to grant their request.

In simple terms, in order for a claimant to argue successfully in court that the state had failed to fulfil its responsibility to provide accommodation, it was originally sufficient to compare the claimant's careful steps to find accommodation with the state's efforts to meet its obligation to house the individual in question. The majority of claimants saw their claims upheld. Others saw their cases thrown out of court, namely when they had received offers of assistance whose terms they had failed to obey, or when it was deemed that that they had played too large a part in causing their own homelessness.

In spring 2013, against a backdrop of new cuts to emergency housing services, along with a new, hard-line policy on makeshift housing (squats, shantytowns), a new wave of petitions for interim suspension orders and injunctions flooded into the administrative courts.

From that point on, the decisions taken by the courts and the justifications provided became more complex, riddled with inconsistencies and the legal texts of reference on which they were based were grossly over-simplified.

The administrative courts rejected claims when the claimant in question was a single man either in rude

health or deemed insufficiently sick, holding the view that the fact that these men were on the street, with no possible way out of the situation despite having turned to the emergency social services for support, did not in itself constitute a situation of distress serious enough to declare the state negligent.

At the same time, families with children saw the legitimacy of their claim acknowledged:

> *'The details of the case make it clear that, given the family situation of this couple, the state's negligence of its obligation to provide emergency accommodation to homeless persons is blatant and constitutes a serious and manifestly illegal violation of one of the fundamental freedoms of the claimants. As a result, there are grounds on which to order the Prefect of the Rhône department to offer the couple and their children emergency accommodation, within four days of receiving this notification.' (Lyon Administrative Court, 4 April 2013, n°1302164).*

The state was also deemed negligent in the case of a sick woman living alone.

> *'The examination of this case reveals that this woman has been diagnosed with Cushing Syndrome; that the consequences of this illness include significant weight gain, extreme fatigue, pain and the aggravation of her diabetes. Consequently, as far as the circumstances of the case are concerned, despite the fact that this lady benefited from state-funded accommodation until 31 May 2013 and a further week of accommodation paid for by a housing charity, her severe medical situation means that she must be housed as a matter of urgency.' (Lyon Administrative Court, 5 August 2013, n°1305450).*

The distinction drawn between families and those living alone, between the healthy and the sick, subsequently became more complex still.

Confronted with cases regarding the fundamental freedom of the right to emergency accommodation, judges were prompted to determine whether or not a complainant's presence on French soil was legitimate, despite the fact that such decisions fall under the scope of other legal procedures.

In order to establish whether or not the state's negligence constituted a grave violation of the fundamental right to emergency accommodation, the situation of distress of a given individual began to be examined in the light of his administrative status as a foreign national where the right to live in France was concerned. Consequently, homeless families saw their claims thrown out of court, on the grounds that they were unable to demonstrate that it was impossible for them to return to their country of origin and remedy their distress.

> *'The new medical certificate, dated 6 May 2013 and produced by the claimants, confirms the seriousness of their daughter's handicap but nevertheless, fails to contradict the opinion issued by the regional health agency. Furthermore, the claimants, who were housed until May 13 2013, have not taken any steps to comply with the decision obliging them to leave the country. Consequently, there are no grounds on which the claimants can maintain that the Prefect of Lyon is guilty of a serious and manifestly illegal violation of their fundamental freedoms.' (Lyon Administrative Court, 7 June 2013, n°1303654).*

> *'The claimants are not without connections in Romania where the gentleman was working in the construction sector and have failed to prove that they are unable to return to their country of origin. At the same time, they do not contest the fact that they are residing illegally on French soil and doing so entirely at the expense of the emergency social service. Pending the definitive resolution of their case, the family may benefit from itinerant social support (…)' Lyon Administrative Court, 5 August 2013, n°1305451*

Through a judgement issued on September 18 2013, the Council of State enshrined in French law the principle of excluding foreigners residing illegally on French soil from the right to claim the fundamental right to emergency state accommodation in court. The right of a homeless foreign national in a situation of medical, psychological or social distress to live in dignity is now dependent on his possession of the right to reside on French soil, unless he can demonstrate that the situation of distress is such that it prevents a return to his country of origin.

> *'It is incumbent upon the judge at a court of interlocutory proceedings to assess in each case the efforts made by the authorities in view of both the resources at their disposal and the age, health and family circumstances of the party concerned. Regarding foreign nationals whose application for asylum has been definitively rejected and who are obliged to leave national territory having exhausted all possible channels of appeal, these individuals cannot legitimately claim the right to emergency accommodation unless their particular circumstances are such that whilst they reside on French soil for the period strictly necessary for the preparation of their departure, a situation of distress serious enough to prevent this departure arises.' (Council of State, 18 September 2013, n°372229).*

Consequently, through case by case analysis, the decisions taken by the courts establish various categories of people entitled to take the state to court and claim the right to emergency accommodation. According to these decisions, those living alone are excluded from these categories, unless suffering from a particular illness, along with families not in possession of a residence permit. The dividing line between families and persons living alone, between the sick and the healthy, between nationals and foreign nationals and between those with leave to remain and those without is not enshrined in any legal text and is nevertheless decisive in verdicts issued by the courts.

It is highly likely that it will be a long time yet before we know how the Court of Justice of the European Union (EUCJ) will interpret the decisions taken by French administrative courts. There is no doubt that these decisions could prompt requests for the EUCJ to issue preliminary rulings in an attempt to deal with areas of tension between domestic law and the law of the European Union. However, judges in French administrative courts have thus far shown no desire to seek such clarification.

It is highly likely that it will be a long time yet before we can read the opinion of the European Court of Human Rights on these distinctions drawn between categories of individuals, established by practice rather than law, as part of the exercising of a fundamental freedom. This fundamental freedom is attached to the status of being a human individual, insofar as it forms part of the right to life, family life and private life and must be enjoyed without discrimination on the grounds of nationality, health and family situation…

Examining individual situations on a case by case basis rather than issuing one-size-fits-all rulings was one of the major pieces of legal protection acquired in the 19th century and it is important that this principle be protected. However, this principle is abused the moment it begins to function as a pretext with which to sort the wheat from the chaff through the establishment of sub-categories which facilitate the erosion of State responsibility where the guaranteeing of a fundamental freedom is concerned.

The difficulties inherent in managing these cases cannot alone be sufficient to restrict the universality of access to services on which the enjoyment of fundamental rights depends. This is due to the fact that at stake in this debate is one of the most powerful pillars upon which the legitimacy of the Republican system is built: human rights. It is this very concept of imprescriptible universality which forms the core of our political and institutional identity.

The challenge facing us today is therefore that of establishing a public policy which will allow the state to shoulder its obligations regarding the fundamental right to emergency accommodation, whatever the means or the end. The right to reside in France or the family situation of any given individual should not influence, even indirectly, their access to the right of emergency accommodation, in view of the fact that this is recognised as a fundamental freedom.

We are in no way obliged to await rulings from High Courts in order to stoke the flames of a substantive debate. The judiciary has a role to play in the strategic function of the law where the development of policy is concerned, but this is a role which it must play alongside others. In the face of such a complex situation, it is most likely not in the courts that this tension will be resolved, but rather within public debate - a debate which all defenders of fundamental rights and freedoms are responsible for keeping alive. To use that famous phrase which came from the lips of Cicero 2000 years ago, where the source of law is concerned, it is a matter of understanding the extent to which Society will take it upon itself 'to protect a human being for no other reason than that he is a human being.'