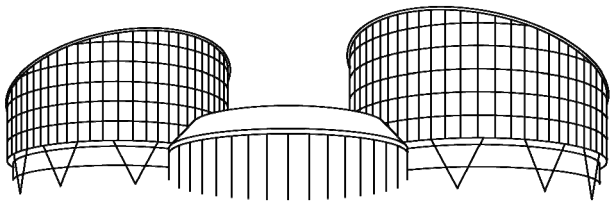

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

20.02.2012

Preliminary opinion of the Court

in preparation for the Brighton Conference

(Adopted by the Plenary Court on 20 February 2012)

Introduction: the background and underlying principles

1. The Brighton Ministerial Conference announced by the United Kingdom Chairmanship of the Council of Europe will be the third high-level Conference devoted to the Court and the Convention system in just over two years. This process began at Interlaken in 2010 and was continued at Izmir in 2011. It follows on from the discussions leading up to the adoption of Protocol No. 14 in 2004 and the Report of the Group of Wise Persons submitted to the Committee of Ministers in 2006.

2. The starting point for these initiatives is a reaffirmation by the member States of the Council of Europe of their commitment to the system of human rights protection set up by the Convention and to the Court. This commitment entails making every effort to secure the Convention rights and freedoms at national level and accepting that these efforts are subject to judicial scrutiny at European level. It further pre-supposes that the Court as the judicial body entrusted with exercising this control is properly resourced and composed of independent and highly qualified judges. The independence of the judiciary as a prerequisite for the rule of law applies to the Court as it does to national jurisdictions.

3. In reaffirming their commitment to this system, States have also confirmed their attachment to the right of individual petition as lying at the heart of the Convention system. It is the individual complaint which triggers the Convention review and enables the Court to identify shortcomings at national level. At the same time the role of national courts as actors in the Convention system and as the primary guarantors of the rights and freedoms protected is fully acknowledged and must be enhanced. The importance of dialogue between national courts and the Strasbourg Court is underlined.

4. A key element in the process initiated at Interlaken has been increased recognition that responsibility for the effective operation of the Convention has to be shared. The Court should not in principle, and cannot in practice, bear the full burden of the work generated by implementation of the Convention.

5. A central theme is the need to ensure that the Court is in a position to deal in good time with the cases which have been submitted to it. Yet there remains a mismatch between the Court's workload and its capacity.

6. Three main components of the case-load may be identified: the massive inflow of inadmissible applications; the large number of repetitive cases; and the accumulation of potentially well-founded non-repetitive cases,

What steps has the Court taken?

Pre-Interlaken

7. Even before Interlaken the Court had taken a number of steps designed to enhance the effectiveness of the Convention system. Thus it developed the pilot judgment procedure in response to the proliferation of structural and systemic violations capable of generating large numbers of applications from different countries.[1] It also adopted a prioritisation policy under which it aims to concentrate its resources, and particularly those of the Registry, on the cases whose adjudication will have the most impact in securing the goals of the Convention, as well as those raising the most serious allegations of human rights violations.[2]

Protocol No. 14

8. Following on from Interlaken and the subsequent entry into force of Protocol No. 14 the Court has in particular sought to achieve the maximum effect for the Single Judge mechanism, under which a Single judge assisted by a Registry rapporteur carries out the filtering function. The results obtained using this new procedure and following restructuring of the Registry have been striking, with an increase in just one year of over 30% of applications disposed of in this way. These results have made it possible to envisage a situation in which, as far as filtering is concerned, there is both a balance between new cases and decided cases and a progressive elimination of the current backlog. As the Court has already indicated, reaching this point is conditional upon additional resources for the Registry, which could take the form of temporary secondments from Contracting States.

9. As regards the other innovations of Protocol No. 14, the new competence of three-judge committees under Article 28 § 1 (b) has begun to produce its effects. Committees are progressively taking the place of Chambers in deciding repetitive cases. The Court had already greatly streamlined its procedure for dealing with these straightforward cases, but it is conscious that more effective and speedy processing of repetitive cases is not a long-term response to this phenomenon. On the contrary, the more efficient the Court becomes in dealing with these cases, the more such cases it will attract, without necessarily addressing the root causes.

10. The significant disadvantage admissibility criterion provided for in Article 35 § 3 (b) of the Convention has yet to achieve the impact foreseen by the drafters of the Protocol. The Court has so far applied this provision in some thirty cases. This criterion may be used more

1. See *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V, 22.6.04; *Broniowski v. Poland* (friendly settlement) [GC], no. 31443/96, ECHR 2005-IX, 28.9.05.
2. http://www.echr.coe.int/NR/rdonlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf

frequently in the future when the case-law has developed and when it becomes available to Single Judges as from 1 June 2012.

Follow-up to Interlaken and Izmir

(a) Friendly settlements and unilateral declarations

11. In response to recommendations made at Interlaken and Izmir the Court has further developed its practice with regard to friendly settlements and unilateral declarations with the result that the number of applications disposed of in this way has increased substantially. 2010 saw a 94% rise in these decisions and 2011 a further 25%.

(b) Rule 39 interim measures

12. A particular concern expressed in the context of the Izmir Conference was the increased inflow of requests for interim measures under Rule 39 of the Rules of Court. In 2011 the Court reorganised its internal set-up for dealing with these urgent requests and changed its procedures at both the judicial and administrative level. It also revised its practice direction, and, through its President, made a public statement on the situation.[3] These measures have produced their effects quickly, returning this aspect of proceedings to a more normal rhythm.

(c) Consistency and coherence

13. The Court has already taken account of the emphasis placed by the two high-level conferences on the need for a high degree of consistency in the interpretation and application of the Convention from case to case.

14. On this issue, while it is well established that there is no formal doctrine of precedent in the Strasbourg jurisprudence, the Court has long recognised that "it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases".[4]

15. The Convention mechanism for avoiding inconsistency in the case-law is the Grand Chamber. Along with this formal means, the Court has other arrangements in place to detect and resolve potential problems of inconsistency. Following the Interlaken Conference, the Court's Jurisconsult described these in a note that was forwarded to all Government Agents.[5]

16. The Court has continued to reflect on improvements. Regarding the relinquishment of jurisdiction by Chambers to the Grand Chamber (Article 30), the Court is considering an amendment to the Rules of Court (Rule 72) making it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law. In light of the importance of the objective pursued and the States' express attachment to consistency in the case-law, it is to be hoped that they refrain from opposing such relinquishment.

3. http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf
4. See, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I
5. Clarity and consistency of case-law, note by the Jurisconsult, 8.7.2010, #3197955.

(d) Information

17. Responding directly to Interlaken and Izmir the Court has also made a considerable effort to increase the information available on its procedure and particularly on admissibility conditions. Thus the Court has published a detailed admissibility guide now available in 14 languages, notably thanks to contributions from different States.[6] At the end of last year it put an admissibility checklist on its internet site, with a progressive sequence of questions aimed at helping potential applicants understand the reason why their application might be declared inadmissible.[7] A short admissibility video has been produced which aims to get across the message in a simple graphic way that around 90% of applications fail to meet the admissibility conditions and what those conditions are.[8]

18. In conclusion under this head the Court has responded promptly and effectively to the concerns raised in Interlaken and Izmir and has pursued the avenues of reform assigned to it. It continues to reflect on further measures to rationalise and streamline its procedures and working methods and the fruit of this reflection will provide input to Brighton conference.

New steps being taken or considered by the Court

19. Analysis of the Court's caseload establishes the different categories of cases, each of which calls for a different response. These categories are identified under the Court's prioritisation policy, which States encouraged the Court to pursue at both Interlaken and Izmir. More broadly they can be divided into priority cases (categories I –III), non-priority but non-repetitive cases (category IV), repetitive cases (category V) and inadmissible cases (categories VI and VII).

Inadmissible cases

20. The measures taken to streamline filtering under the Single Judge procedure have been mentioned above. Further steps are being envisaged, including for example a stricter application of the six-month rule (Article 35 § 1) and extension of working methods developed under this procedure throughout the Registry and for all countries. In the context of any future reform it may be stressed that, whatever system is adopted, the careful sifting of incoming applications will always be necessary and this will, as indicated above, have resource implications linked to the volume of incoming cases (see paragraph 8 above).

Repetitive cases

21. In early 2012 there are almost 34,000 non-priority, repetitive cases on the Court's docket. 10,800 such cases were registered in 2011. As things stand, the Court is not in a position to deal with these cases within a reasonable time. They are cases which commonly reflect a failure of the execution process to secure the adoption of effective general measures. These are cases in which the root cause has by definition already been identified in a previous leading or pilot judgment and the decisive legal issue determined. The Court envisages a practice whereby in relation to clearly repetitive cases the Registry would simply refer a list of cases directly to the Government to be settled in an appropriate way. In the absence of any

6. http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide/
7. http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Checklist/
8. http://www.youtube.com/watch?v=mcbDDhs5ZVA&list=UUeKYK7AiOqPyJMk5-cSjseQ&index=1&feature=plcp.

justified objections from the Government, failure to provide redress within a fixed period of time would lead to a "default judgment" awarding compensation to the applicant.

Non repetitive, non-priority cases

22. The accumulation of substantial non-repetitive cases (currently some 19,000 with 4,600 new applications in 2011) which do not fall within the first three categories of cases is a particularly grave problem in so far as they may raise serious issues concerning for instance fair trial, respect for private life or freedom of expression and association. Moreover the exercise of these rights may also be linked to the disclosure of serious violation of the core rights covered by the top three priority categories.

23. At the same time many of these cases can be dealt with on the basis of the Court's well-established case-law within the meaning Article 28 § 1 (b) and therefore under a summary Committee procedure. The Court envisages a broader interpretation of this notion which has hitherto been applied exclusively in the context of repetitive cases. Such an approach is entirely in conformity with the object and purpose of Protocol No 14. Again the Court sees this approach against the background of the States' shared responsibility for the system and the corresponding need to take account of the Court's well-established case-law, beyond the particular respondent State concerned. Where a case falls to be determined in this way because it is in reality manifestly well-founded, respondent States could be expected to offer friendly settlements or, where appropriate, unilateral declarations under a simplified or "light" communication process with minimum Registry and judicial input.

Priority cases

24. If repetitive cases are resolved outside the Court and a summary procedure is used for a far larger proportion of non-repetitive cases, the Court will have more time and resources to devote to cases falling within the top three priority categories. There were almost 6,000 of these at the beginning of 2012. In 2011 1,500 of these applications were received. The Court will further intensify its efforts in relation to these cases in 2012 and thereafter. Such cases are not necessarily the exclusive reserve of Chambers. A high-priority application may be determined on the basis of well-established case-law or be of a repetitive nature, or both, and so be suitable for committee adjudication, while not losing its priority status. An example of this would be a chronic problem relating to prison conditions such as exists in certain countries.

Issues for the Brighton conference

Aim

25. The main thrust of the reform process is to ensure that the Court's case-load is of a manageable size and consists of cases raising important Convention issues. The Court can subscribe to this general aim subject to two conditions: firstly that the right to individual petition is preserved and secondly that effective mechanisms (international or national) are put in place to accommodate well-founded cases which the Court is not able to deal with.

Domestic implementation

26. It is common ground that the long-term effectiveness, indeed survival, of the Convention system depends on better implementation at national level. The Court is confident that these

issues will be taken up by the Brighton conference and looks forward to innovative ideas in this respect. In particular it stresses the importance of the effective implementation by the States of pilot judgments and of giving serious consideration to the implications of judgments against other States. From the Court's point of view it will continue its efforts to ensure better dissemination of the case-law, including in national languages. The Court has set up a judicial training institute after having received financial support from the Human Rights Trust Fund. The programme will start to operate in April this year.

Dialogue with national courts

27. An important aspect of domestic implementation is reinforced dialogue between Strasbourg and national courts. In pursuit of this dialogue the Court has regular working meetings with national superior courts. There is also scope for judicial dialogue through judgments. One recent example is the Grand Chamber's judgment in the case of *Al-Khawaja and Tahery v. the United Kingdom*.[9] The Supreme Court of the United Kingdom had conveyed to Strasbourg its misgivings over what it perceived as an inflexible application of the Court's case-law on the fairness of relying on hearsay evidence, with no proper regard to the specific features of the country's rules of criminal procedure. This view was considered carefully by the Court, and responded to at length in the Grand Chamber's judgment.

28. Whether there should be a new procedure for dialogue between national courts and the European Court in the form of an advisory opinion jurisdiction is now under consideration as part of the broader reflection on future reforms. The Court takes the view that this question merits further reflection. A reflection paper prepared by the Court on this subject will be issued subsequently.

Judges' independence and status

29. The presence of highly qualified and independent Judges on the Court is of crucial importance both to ensure the quality of its judgments and to guarantee that they carry sufficient weight. To achieve this, continuing reflection on national selection processes is to be welcomed as is the operation of the new advisory panel. The status of Judges must be such as to attract appropriately qualified candidates. This should include consideration of the conditions under which Judges will return to their home countries at the end of their term of office. It may also be appropriate to reconsider the current age-limit for Judges, which is less important now that terms of office are non-renewable. The existing system may prevent experienced Judges from completing a full term of office or indeed exclude their candidature altogether.

Access to the Court

30. On the issue of access to the Court, it is worth reiterating the Court's opposition to such obstacles as fees and compulsory legal representation on both principled and practical grounds.

31. With regard to the possibility of introducing a new admissibility criterion, the Court considers that in the context of long-term reform discussions a review of the existing admissibility conditions might well be justified. However, the Court is not convinced that

9. *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, 15.12.11.

adjusting or adding admissibility criteria (as opposed to excluding cases from examination on other grounds) will have any significant impact on the Court's case-load.

32. As regards the specific proposal for a criterion based on the extent to which complaints are duly considered by national courts[10], the Court takes the view that this principle governs in practice the Court's examination of complaints, both in relation to the exhaustion rule and the question whether an application is "manifestly ill-founded". In so far as such a criterion would aim to ease the Court's workload, it is probable that assessment of whether proper or due consideration had occurred or whether the national courts had manifestly erred would in any event require systematic and thorough examination.

"Sunset clause"[11]

33. The Court is clear in its opposition to the so-called sunset clause, whereby applications which were not communicated before expiry of a fixed period would be extinguished. The arbitrary effect of such a provision sits ill with the rule of law. Beyond that it would in all likelihood have the unintended consequence of far more applications being communicated, possibly unnecessarily.

Selecting cases for adjudication

34. The Court does not rule out the possibility that if case-load continues to increase it will in the future become necessary to envisage introducing new limits on the numbers of cases to be examined. The "sunset clause" is one approach, which as noted above, the Court deems unacceptable. "Pick and choose" is another. If it were necessary to adopt such an approach, the Court would prefer to use the already existing criterion of "well-established case-law".[12] Under this test, where there is well-established case-law, the Court would only take up the case for a full Chamber decision on its merits if respect for human rights within the meaning of Article 37 of the Convention required it to do so. Admissible cases not satisfying this test would have to be dealt with outside the Court either under another international process or by being remitted to a national mechanism.

Repetitive cases

35. Despite their routine character these cases raise issues which go to the effective operation of the rule of law and failure to resolve the underlying problems undermines the Council of Europe's mission of furthering democracy and the rule of law. The Brighton Conference should therefore seek to identify solutions to this phenomenon which relieve the Court of the burden of processing and adjudicating them and which address the underlying issues. The Court believes that the examination of such large numbers of repetitive complaints is not compatible with the functioning of an international court. The Court considers that Council of Europe member States should make more collective and individual efforts to target the

10. Joint Swiss-United Kingdom proposal set out in a note of 21 October 2011 submitted to the DH-GDR (CDDH). "An application would be inadmissible if it were substantially the same as a matter that had already been examined by a domestic tribunal applying the rights guaranteed by the Convention and Protocols thereto. An exception would be made where the national tribunal had manifestly erred in its interpretation or application of the Convention rights. A further exception would apply where the application raises a serious question affecting interpretation of application of the convention or the Protocols thereto."

11. Also referred to in the note of 21 October 2011.

12. See in this respect paragraph 24 above.

structural and endemic situations which generate repetitive cases. Council of Europe resources and expertise could be better harnessed to assist States resolve these often longstanding and deeply-rooted problems. The aim must be to identify and correct the legislative and administrative causes of these situations and to establish national mechanisms to afford redress for those affected by them.

Execution

36. A key area is that of execution of judgments, whose effectiveness has a direct bearing on the Court's case-load as well as on the rights and freedoms of all those affected by an existing source of violation. Particularly in relation to structural and endemic violations generating repetitive cases, the current process must be strengthened and Council of Europe activities and resources should be harnessed to target such situations. The Court would stress in particular the need to ensure prompt and comprehensive general measures following the adoption of a pilot judgment.

Six-month time-limit

37. The Court is already envisaging a stricter application of the six-month time-limit, but for the purposes of future Convention amendment, the time has perhaps come to consider whether this period, which was entirely reasonable 50 years ago, remains the appropriate length in today's digital society with swift communication tools. Having regard to equivalent time-limits in national proceedings, it may be possible to reduce this time-limit considerably.

Relinquishment

38. As noted above, the Court wishes to give compulsory effect in its Rules of Court to the possibility for a Chamber to relinquish jurisdiction under Article 30 where it envisages departing from settled case-law. For this measure to be effective, States would have to renounce the right to oppose relinquishment to the Grand Chamber. Consequently thought should be given to removing this right from the Convention.

Ad hoc Judges

39. The Court accepts that the Protocol 14 system for selecting *ad hoc* Judges is an improvement in terms of objective independence. However, if States were required to choose an *ad hoc* Judge from among the elected sitting Judges, this would both resolve the problems of legitimacy and independence and increase efficiency while reducing costs.

EU accession

40. Following the submission of a draft accession treaty to the Committee of Ministers in October 2011, the process now seems to be stalled. After some thirty years of discussion all that appears to be lacking is the political will to overcome the last obstacles. The Court would therefore urge the Member States to seize the opportunity provided by the Brighton Conference to take forward the process to completion in compliance with the Lisbon treaty.

Conclusions

41. It has long been recognised that the problems facing the Court require a range of different measures involving all the actors and stakeholders in the Convention system.

42. The Court is conscious of its own responsibility in this respect. As indicated above (see paragraphs 8 and 20), it will continue to develop its filtering function so as to ensure that inadmissible cases are disposed of efficiently and other categories of cases are identified rapidly. At the same time it will concentrate resources on priority cases in accordance with its prioritisation policy.

43. As regards the responsibility of States, in addition to the general obligation of more effective Convention implementation at national level which has been highlighted in the Interlaken and Izmir Declarations, special efforts should be taken to resolve structural situations that generate large numbers of cases. In particular, as well as eliminating underlying causes, it is necessary to establish mechanisms whereby persons affected can obtain redress in the country concerned. The objective should be to provide national remedies for those affected and to relieve the Court of the burden of dealing with such cases - a burden that is not in keeping with the proper function of an international human rights court of last resort.

44. The Committee of Ministers has also a crucial role to play in assisting States to resolve structural situations. In particular it should be further stressed that judgments identifying such situations do not fall into the same category as ordinary judgments. There is need for an even more proactive approach to the execution of such judgments.

45. The Court considers that solutions should also be found at Brighton for the problems of non-priority, non-repetitive cases in addition to those already being considered by the Court, notably broader interpretation of well-established case-law and its application beyond the respondent State (see paragraph 23). Thought should be given to increasing the Court's capacity to deal in particular with cases which, while not attracting the top priority status, raise important issues.

46. With regard to resources, the Court takes the view that once it is clear what engagements the member States are prepared to undertake to resolve the phenomenon of repetitive cases, it would be appropriate to conduct a detailed study of staffing needs.

47. The EU accession agreement should be adopted as soon as possible and the current impasse brought to an end.

48. As far as Convention amendment and long term reform prospects are concerned, the Court does not rule out a review of admissibility conditions or examination of further measures to restrict the number of cases coming before it in the light of the results of measures already programmed in the follow-up to Interlaken. Nor is it opposed in principle to the introduction of an advisory opinion jurisdiction which it believes should be the subject of continued reflection.

49. The present opinion is intended as the Court's preliminary input into the Brighton process. The Court reserves the right to submit further observations in the light of the evolution of the Conference declaration and of other contributions which may be made.