Explanatory Memorandum on Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms

Title of Treaty

Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms

Command Paper number: 8951

Subject matter

The Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") was adopted by the Council of Europe in 1950, and came into force in 1953. It is commonly known as the European Convention on Human Rights.

Under the Convention, the High Contracting Parties undertake to secure certain rights and freedoms to everyone within their jurisdiction. The Convention also created the European Court of Human Rights ("the Court") to consider alleged breaches of those rights and freedoms by the High Contracting Parties.

The backlog of applications pending before the Court peaked at just over 160,000 in 2012. In light of this and continued questions about the proper role of the Court, the reform of the Court has been a priority of the Council of Europe. The current reform process was launched at a ministerial conference in Interlaken, Switzerland in February 2010, and reviewed at a further conference in Izmir, Turkey in April 2011.

The reform of the Court was also the highest priority of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe between November 2011 and May 2012. As part of this, the Government convened a ministerial conference at which was agreed, on 20 April 2012, the Brighton Declaration on the Future of the Court.[1] The Brighton Declaration represents political agreement to a comprehensive package of reforms, and includes commitment in principle to amend the Convention in five respects:

(i) to add a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble to the Convention, giving visibility to these key concepts that define the boundaries of the Court's role;

(ii) to change the rules on the age of judges of the Court, to ensure that all judges are able to serve the full nine-year term;

(iii) to remove the right of parties to a case before the Court to veto the relinquishment of jurisdiction in a case before a Chamber in favour of the Grand Chamber, a measure intended to improve the consistency of the Court's case law;

[1] Available at http://hub.coe.int/20120419-brighton-declaration/. The full proceedings of the Brighton Conference are available at http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Brightonproceedings/pdf.

(iv) to reduce the time limit for applications to the Court from six months to four months; and

(v) to tighten the admissibility criteria to make it easier for the Court to reject trivial applications.

Protocol 15 to the Convention gives legal effect to these parts of the Brighton Declaration. As an amending protocol, Protocol 15 will come into force and amend the relevant provisions of the Convention once it has been ratified by all 47 High Contracting Parties to the Convention. The draft of Protocol 15 was prepared at the Council of Europe, along with a non-binding Explanatory Report. The Committee of Ministers opened Protocol 15 for signature and ratification on 24 June 2013. The Permanent Representative of the United Kingdom to the Council of Europe signed Protocol 15 on behalf of the United Kingdom on the same day. As of 6 October 2014, Protocol 15 had been ratified by 10 States, and signed but not yet ratified by 29 others.[2]

Article 1: Amendment of the Preamble to the Convention

The Preamble to the Convention recalls general principles applicable to the Convention and may be used in the interpretation of the operative provisions of the Convention. Article 1 of Protocol 15 adds a new paragraph to the end of the Preamble to make express reference to the principle of subsidiarity and the doctrine of the margin of appreciation, two key concepts developed by the Court in its case law that define the boundaries of its role. The new paragraph recalls explicitly that it is the High Contracting Parties that hold the primary responsibility to implement the Convention. Paragraphs 8 and 9 of the Explanatory Report draw largely on the text of the Brighton Declaration to give a clear statement of the proper role of the Court and the operation of the doctrine of the margin of appreciation.

Article 2: Age rules for judges of the Court

Judges of the Court are elected for one non-renewable term of nine years. However, Article 23(2) of the Convention provides that "the terms of office of judges shall expire when they reach the age of 70". There is no requirement that a judge elected to the Court be able to serve a minimum period before reaching the age of 70, although Council of Europe guidelines suggest that they should be able to serve at least half of their term.[3] Nonetheless, a stable judiciary promotes the consistency of the Court, and the clarity and consistency of its judgments.[4] In the Brighton Declaration, the Conference therefore "conclude[d] that Article 23(2) of the Convention should be amended to replace the age limit for judges by a requirement that judges must be no older than 65 years of age at the date on which their term of office commences".[5]

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[2] The full chart of signatures and ratifications is available at http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CL=ENG.
[3] Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights (28 March 2012); available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2012)40.
[4] Brighton Declaration, note 1, at paragraphs 23 and 24.
[5] Brighton Declaration, note 1, at paragraph 25f.

In the process of drafting Protocol 15, a practical issue was identified with the implementation of this agreement, caused by the length of the process for electing a judge to the Court. Each High Contracting Party follows its own selection process to submit a list of three candidates, one of whom is elected to the Court by the Parliamentary Assembly of the Council of Europe, usually some six to nine months before their appointment is due to begin. It is often not possible to know for certain when the post is first advertised the date on which the successful candidate would begin their term of office. The amendment in Article 2 therefore ties the eligibility of candidates to the deadline by which the High Contracting Party has been asked by the Parliamentary Assembly to submit its list of three candidates, this date being the latest in the process that is known for certain at its outset.[6]

The current rule requiring retirement at the age of 70 will be removed from Article 23 of the Convention, which relates to the terms of office and dismissal of judges, and this new provision added to Article 21, which relates to the criteria for office.

Article 3: Removal of veto on relinquishment to the Grand Chamber

Article 30 of the Convention provides that:

> "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects."

The Court recently modified Rule 72 of its Rules of Court to require a Chamber to relinquish jurisdiction where it envisages departing from settled case law.[7] In response to this, Article 3 of Protocol 15 abolishes the right of a party to veto this relinquishment by deleting the words "unless one of the parties to the case objects" in Article 30. The Brighton Declaration also invited the Committee of Ministers "to consider whether any consequential changes are required", but no such changes were agreed in Protocol 15.[8]

Article 4: Time limit for applications to the Court

Under Article 35(1) of the Convention, an application must be made to the Court within six months of the date on which the final decision in the case was taken. In its written contribution before the Brighton Conference, the Court proposed that this deadline could be shorted, in light particularly of developments in modern communications technology.[9] Article 4 of Protocol 15 gives effect to this.

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[6] Even if the list is submitted late, the original deadline remains the point of reference.
[7] Available at http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/.
[8] Brighton Declaration, note 1, at paragraph 25d
[9] Available at http://www.coe.int/t/dgi/brighton-conference/Documents/Court-Preliminary-opinion_en.pdf.

Article 5: Tightening of the admissibility criteria

Under Article 35(3)(b) of the Convention:

> "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that... the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

This provision gives effect to the principle that the Court should not be concerned with trivial matters. However, since it was introduced by Protocol 14 to the Convention, this criterion has been used only a limited number of times. One perceived problem was that its use was prevented where a matter had not been considered by a domestic court, yet a matter too trivial for the Court could well also be too trivial for a domestic court. Article 5 of Protocol 15 therefore deletes the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".

Ministerial responsibility

The Secretary of State for Justice and the Secretary of State for Foreign and Commonwealth Affairs share policy responsibility for the Court and Convention.

Policy considerations

(i) General

Seen in light of the wider Brighton Declaration, Protocol 15 is a major step towards the objectives set out by the Prime Minister in his speech during the United Kingdom Chairmanship to the Parliamentary Assembly in Strasbourg, reflecting particularly his call to ensure that the Court does not function as a "court of fourth instance";[10] it therefore constitutes a meaningful contribution to the reform of the Court.

In particular, the amendment to the Preamble (Article 1 of Protocol 15) goes to the heart of current domestic and international debates about the role of the Court and its relationship with the High Contracting Parties to the Convention. It will be important that the Court follows the clear direction given by the High Contracting Parties in the Brighton Declaration as to the limits of its role, and reflects this in the cases that it admits and judgments that it gives.[11]

The Government is however clear that further reform is required both to address the continued backlog of applications pending before the Court, which remains around 80,000, and to address further the important questions about the balance between the obligations of the High Contracting Parties at national level and the role of the Court and the wider Convention system in the implementation of the Convention.

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[10] Speech of 25 January 2012, available at http://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights/.
[11] Notably paragraphs 12a and 15d.

The Brighton Declaration therefore called upon the Committee of Ministers "to consider the future of the Convention system, this consideration encompassing future challenges to the enjoyment of the rights and freedoms guaranteed by the Convention and the way in which the Court can best fulfil its twin role of acting as a safeguard for individuals whose rights and freedoms are not secured at the national level and authoritatively interpreting the Convention," specifying that this should include "consideration of more profound changes to how applications are resolved by the Convention system with the aim of reducing the number of cases that have to be addressed by the Court."[12]

This work is now being carried out by expert working groups at the Council of Europe, with a report setting out the full range of potential options to be presented to the Committee of Ministers by the end of 2015.

(ii) Financial

There are no costs arising from Protocol 15 for the United Kingdom. The Court itself may incur some negligible cost in updating its Rules, administration and information to reflect the changes made by Protocol 15; although the Court may equally save resources were it to receive fewer applications as a result of the change in Article 4 of Protocol 15, or to have to undertake fewer full examinations of applications as a result of the changes in Articles 3 and 5 of Protocol 15.

(iii) Reservations and Declarations

Protocol 15 does not make any provision for reservations: as confirmed by the Explanatory Report to Article 6, "by its very nature, this amending Protocol excludes the making of reservations". The Government does not foresee the United Kingdom's making any declaration upon ratification. As Protocol 15 amends the Convention, it is not necessary for the United Kingdom to make any declaration of territorial extent: it is understood that the United Kingdom's ratification is also on behalf of all Territories and Dependencies to which it has extended the application of the Convention.

Implementation

Protocol 15 will come into force on the first day of the next month after three months have passed from the date on which all High Contracting Parties have ratified it. Articles 1 and 5 of Protocol 15 will come into force immediately on this same date. Articles 2, 3 and 4 are subject to the transitional provisions set out in Article 8 of Protocol 15.

The changes regarding judges' ages in Article 2 will apply only to judges elected from lists of candidates submitted to the Parliamentary Assembly after Protocol 15 comes into force. The current rule in Article 23(2) will continue to apply in all other cases. Therefore, this will not extend the term of office of any judge currently on the Court.

The removal of the parties' veto on relinquishment of cases to the Grand Chamber in Article 3 will not apply to any cases in which a party has already objected to a proposal for relinquishment before Protocol 15 comes into force. The Brighton

[12] Brighton Declaration, note 1, at paragraphs 35c and 35e.

Declaration however also "encourages the States Parties to refrain from objecting to any proposal for relinquishment by a Chamber pending the entry into force of the amending instrument".[13]

The reduction in time limit in Article 4 will take effect six months after Protocol 15 comes into force, to allow additional time for information about the change to be disseminated, and will be applied to applications in which the final decision for the purposes of Article 35(1) – that is, the date as of which the time limit for making an application starts to run – is taken after the new time limit takes effect.

Protocol 15 does not require any changes to the law of the United Kingdom or that of any of its Territories and Dependencies. The Government does not expect to take any action to implement Protocol 15. The One-in, One-out Rule is not applicable to the process of concluding this Treaty.

Consultations

Although the United Kingdom's Treaty commitments are a reserved matter, cases before the Court can engage the interests of all three Devolved Administrations. They have therefore been consulted about the Government's intention that the United Kingdom ratifies Protocol 15, as have those Overseas Territories to which the Convention obligations have been extended. The Crown Dependencies have also been consulted and have indicated their agreement to the ratification of Protocol 15.

Before adopting Protocol 15, the Committee of Ministers formally consulted the Court and the Parliamentary Assembly of the Council of Europe, both of which gave a positive opinion on the draft.[14] During the negotiation of the Brighton Declaration and the drafting of Protocol 15, ministers and officials met regularly with non-governmental organisations (NGOs) based in both the United Kingdom and other members States of the Council of Europe, and the United Kingdom's National Human Rights Institutions (NHRIs). In addition, the Council of Europe permits certain international NGOs, such as Amnesty International and the International Commission of Jurists, along with the European Network of NHRIs, to participate fully in the work of its expert committees, including during the drafting of Protocol 15.

13/10/14

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[13] Brighton Declaration, note 1, paragraph 25d.
[14] The opinion of the Court is available at http://www.echr.coe.int/Document/2013_Protocol_15_Court_Opinion_ENG.pdf.