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A new UK judge for the European Court of Human Rights

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Summary

A new UK judge for the [European Court of Human Rights](#) in Strasbourg will be elected by the Parliamentary Assembly of the [Council of Europe](#) in June 2016, from a panel of three lawyers nominated by the UK. The successful candidate will replace the current UK judge there, who is due to retire in September 2016.

Unlike when appointing a domestic judge, parliamentarians have a role in several parts of this process, including the final vote.

The Court's 47 judges – one for each Member State of the Council of Europe – are each elected for a single term of nine years. The judges sit in panels to decide cases alleging a breach of rights under the European Convention on Human Rights. The Court cannot strike out domestic legislation that conflicts with the Convention, but it can require Member State governments to bring forward changes to legislation. It can also award compensation.

The appointment process for a judge of the Court has two parts, with parliamentarians from across Europe interviewing candidates recommended by the Member State and making the final decision:

- 1 First the Member State concerned selects three suitably qualified candidates – at least one man and one woman – through its own national procedures. According to the Convention, the candidates must all be 'of high moral character' and must either be qualified to be a senior judge or be 'jurisconsults of recognised competence', but judicial experience is not specified. A [Council of Europe Advisory Panel of legal experts](#) will advise whether the proposed candidates meet these criteria.
- 2 Then these three candidates are interviewed by a committee of European parliamentarians: the Council of Europe Parliamentary Assembly's [Committee on the Election of Judges to the European Court of Human Rights](#). The Committee includes one member of the House of Lords and one member of the House of Commons. Once the Committee has recommended a panel of three, the whole Parliamentary Assembly – which includes 18 UK representatives – will vote on which one should be appointed.

The UK Government has chosen to have the Judicial Appointments Commission run the national selection process. A panel of judges and legal experts sifted the applications and interviewed eight candidates. The panel recommended three candidates to the Lord Chancellor, Michael Gove, who formally nominated the three (none of whom is a judge):

- Tim Eicke QC, a London-based barrister specialising in human rights, civil liberties and EU law
- Murray Hunt, legal advisor to the Parliamentary Joint Committee on Human Rights, as well as a barrister and visiting professor in human rights at Oxford University
- Jessica Simor QC, a London-based barrister with extensive experience in both the European Court of Human Rights and the Court of Justice of the EU

The three candidates have informally met members of the UK delegation to the Parliamentary Assembly of the Council of Europe. They are due to be interviewed by the Committee on the Election of Judges in Strasbourg on 19 June 2016, with the final plenary vote expected later that week.

The Council of Europe and the UK have long been concerned about the method of appointment of European Court judges and their quality.

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Recent forms to the appointment process include the creation of the Advisory Panel of Legal Experts, and the requirement that the members of the Committee on the Election of Judges must have legal knowledge or experience.

The UK's national selection process has been criticised for giving the Government too much power, and there have been some calls for greater parliamentary involvement at that stage.

The UK Government wants to change the relationship between the UK and the Court. Judicial activism in interpreting the Convention as a 'living instrument' has sometimes been criticised as taking the Convention beyond the intentions of the Member States, although others argue that these interpretations follow changing attitudes in the Member States. There are signs that the Court is becoming more deferential to Member States, even though Protocol 15 to the Convention – which would add express references to the principle of 'subsidiarity' and the doctrine of the 'margin of appreciation' to the Preamble of the Convention – is not yet in force. The UK was largely responsible for producing Protocol 15. The UK Government also plans to publish proposals for a UK Bill of Rights which are likely to include measures on the relationship between the UK and the Court.

1. Introduction

The UK's seat on the European Court of Human Rights in Strasbourg is due to be filled by a new judge by September 2016.

1.1 How important are the judges?

The judges decide cases brought to the Court by individuals (or sometimes by States) alleging that their rights under the European Convention on Human Rights have been breached by a Council of Europe Member State. All domestic remedies must have been exhausted first.

For judgments they sit in panels of three or more, but individual judges can decide on whether an application is admissible or not (the vast majority are not admissible).¹

The Court is not a 'supreme court': it cannot overrule national domestic courts, rehear cases, or quash, vary or revise their decisions. Nor can it strike out domestic legislation that conflicts with the Convention.

However, a judgment against a Member State binds that State under international law:

Article 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

...

The Court can require Member State governments to bring forward changes to legislation (though it cannot order parliaments to pass legislation). It can also award compensation.

The Court and the Convention are not part of the EU.

1.2 What is the vacancy for?

This vacancy has arisen because the UK's current judge, Paul Mahoney, will turn 70 in September – the compulsory age for retiring from the Court. He was elected in 2012 and his term of office will end on 6 September 2016.

The Court's 47 judges – one for each Member State of the Council of Europe – sit in their individual capacity and do not represent any State. They are each elected for a single term of nine years as full-time professional judges, resident in Strasbourg.²

¹ In 2015, there were 43,135 applications declared inadmissible or struck out, compared with 2,441 cases where a final judgment was delivered ([ECHR – Analysis of Statistics 2015](#)).

² Article 23

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The current gross monthly salary is €16,614 (about £12,660), and is not subject to income tax.³ This compares with a gross monthly salary for High Court judges in England and Wales of £14,980 (subject to tax).⁴

³ Judicial Appointments Commission, [Judge of the European Court of Human Rights - Information Pack](#)

⁴ [Ministry of Justice Judicial Salaries from 1 April 2016](#)

2. A two-stage process

2.1 Overview

Judges at the European Court of Human Rights must meet broad criteria for office, but do not need to have been judges.

Each time a vacancy arises, the Member State concerned selects a panel of three nominees according to its own procedures.

Then a Committee of the Council of Europe Parliamentary Assembly interviews the candidates before the whole Assembly votes:

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.⁵

2.2 Criteria for office

Broad criteria for being a judge of the European Court of Human Rights set out in Article 21 of the European Convention:

The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

Most notably, the judges do not have to have any judicial experience.

[Guidelines](#) from the Council of Europe's Committee of Ministers give some more detail, for instance on language skills and legal knowledge:

1. Candidates shall be of high moral character.
2. Candidates shall possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
3. Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe (English or French) and should also possess at least a passive knowledge of the other, so as to be able to play a full part in the work of the Court.
4. Candidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable.
5. If elected, candidates should in general be able to hold office for at least half of the nine-year term before reaching 70 years of age.
6. Candidates should undertake not to engage, if elected and for the duration of their term of office, in any activity incompatible with their independence or impartiality or with the demands of a full-time office.
7. If a candidate is elected, this should not foreseeably result in a frequent and/or long-lasting need to appoint an ad hoc judge.
8. Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates

⁵ Article 22 of the [European Convention on Human Rights](#)

on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.

However, phrases like 'Practical legal experience is also desirable' do not suggest as high a bar as one might expect.

2.3 Member States select three candidates

When there is a vacancy, the first stage is for the Member State concerned to nominate three candidates, with the advice of a Council of Europe Advisory Panel.

Nominations

Each Member State decides how to select its three candidates.

But the Council of Europe Parliamentary Assembly requires the process to reflect the principles of democratic procedure, transparency and non-discrimination. It has set out standards which include the following:

- the list should include candidates of both sexes (unless there are exceptional circumstances); and
- the call for candidatures should be public and open.⁶

The Council of Europe's Committee of Ministers has set out more detail in its 2012 [Guidelines](#) on selecting candidates,⁷ for instance:

- the procedure for eliciting applications should be established in advance and made public;
- the body responsible for recommending candidates should have sufficient technical knowledge, command respect and confidence, and be free from undue influence;
- all serious applicants should be interviewed (if there are too many, a shortlist for interviews should be drawn up by the recommending body);
- there should be an assessment of applicants' linguistic abilities, preferably during the interview.

There is still considerable latitude and variation across the 47 Member States in how the candidates are chosen.

Council of Europe Advisory Panel

Once the Member State has a list of three possible nominees, it must send their CVs to a Council of Europe [Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights](#).⁸

⁶ See for example its Recommendation 1429 (1999); Order 558 (1999); Resolution 1366 (2004); Recommendation 1649 (2004); Resolution 1426 (2005); Resolution 1627 (2008); Resolution 1646 (2009); Resolution 1841 (2011).

⁷ [Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights](#) adopted on 28 March 2012, as amended by [Resolution CM/Res\(2014\)44](#) with effect from 26 November 2014. The [Explanatory memorandum](#) gives examples of good practice.

⁸ The Advisory Panel was established by Committee of Ministers [Resolution CM/Res\(2010\)26](#) on the establishment of an Advisory Panel of Experts on

The Advisory Panel's role is to advise whether their proposed candidates meet the Convention's criteria for selection. It can hold confidential discussions with the Member State, and it gives the Parliamentary Assembly its opinion on the candidates, again confidentially.

The seven members of this Advisory Panel are appointed by the Council of Europe Committee of Ministers after consulting the President of the European Court of Human Rights. They must be senior national judges, former judges of international courts (including the European Court of Human Rights) or other lawyers 'of recognised competence'. The current members are:

- Mr John Murray – Chairperson (former judge of the Supreme Court of Ireland)
- Ms Nina Vajic – Vice-chairperson (former judge of the European Court of Human Rights)
- Mr Matti Pellonpää (Justice at the Supreme Administrative Court of Finland)
- Mr Jean-Paul Costa (former President of the European Court of Human Rights)
- Mr Christoph Grabenwarter (judge at the Constitutional Court, Austria)
- Ms Lene Pagter Kristensen (Justice of the Supreme Court of Denmark)
- Ms Maria Gintowt-Jankowicz (Judge of the Constitutional Tribunal, Poland)

2.4 The Council of Europe Parliamentary Assembly interviews and votes

The Member State then submits its list of three candidates to the Parliamentary Assembly of the Council of Europe. Parliamentarians on its Committee on the Election of Judges interview the three candidates and rank them, before the whole Assembly – including 18 UK parliamentarians – vote on which should be the new judge.

Interviews by the Committee on the Election of Judges

The candidates are first interviewed by the Parliamentary Assembly's [Committee on the Election of Judges to the European Court of Human Rights](#).

The Committee scrutinises the three candidates' CVs (in a standardised form)⁹ and interviews each of them in person. It considers whether all three candidates are qualified to do the job, and whether they would contribute to the 'harmonious composition of the Court, taking into

Candidates for Election as Judge to the European Court of Human Rights, 10 November 2010, as amended by [Resolution CM/Res\(2014\)44](#) 26 November 2014

⁹ A model CV is appended to [Resolution 1646 \(2009\)](#)

account, for example, their professional backgrounds and a gender balance'.¹⁰

If the Committee accepts the list, it will rank the candidates or simply [recommend one as the most qualified](#). In case of equal merit, it will give preference to a candidate of the sex under-represented at the Court.¹¹

If it rejects the list, it will ask the Member State to submit a fresh list. Recently the Committee has twice [rejected](#) the lists proposed by Slovakia and Azerbaijan respectively.

The Committee meets in private, and any votes on candidates are by simple majority in a secret ballot. Only members who have attended in full the interview procedure for a post of judge may vote.¹²

It has [22 members](#), who must have 'appropriate knowledge or practical experience in the legal field' in order to be able to evaluate the qualifications and skills of candidates.¹³ Twenty are appointed by the five political groups in the Assembly. The other two are the Chairperson of the Assembly's Committee on Legal Affairs and Human Rights (currently Alain Destexhe, a Belgian Senator) and the Chairperson of the Committee on Equality and Non-Discrimination (currently an Italian MP, Elena Centemero).

The two UK members of the Committee currently are:

- Lord Anderson of Swansea (Donald Anderson), a Labour life peer who was formerly MP for Swansea East, and a barrister and diplomat
- Suella Fernandes, the Conservative MP for Fareham who studied law at Cambridge and the Sorbonne before qualifying as an attorney in New York

This Committee was established in 2015. Previously a sub-committee of the Assembly's Committee on Legal Affairs and Human Rights conducted the interviews.

Final vote in the Parliamentary Assembly

The final stage is for the full Parliamentary Assembly of the Council of Europe to vote on the three candidates approved by the Committee. It holds a secret ballot during a plenary session, based on the recommendations of the Committee on the Election of Judges.

If a candidate obtains an absolute majority of votes cast, they are elected to the Court. If no candidate obtains an absolute majority, a second ballot is held, and the candidate who has obtained the most votes is declared elected.

¹⁰ [Procedure for electing judges to the European Court of Human Rights](#), Information document prepared by the Secretariat to the Committee on the Election of Judges to the European Court of Human Rights, AS/Cdh/Inf (2016) 01 rev 3, 29 April 2016, para 12

¹¹ Resolution 1366 (2004), as modified, paragraph 5.vi

¹² Terms of reference of the Committee on the Election of Judges to the European Court of Human Rights (Appendix 1 to [Resolution 2002 \(2014\)](#))

¹³ Terms of reference of the Committee on the Election of Judges to the European Court of Human Rights (Appendix 1 to [Resolution 2002 \(2014\)](#))

The Parliamentary Assembly is made up of 324 parliamentarians from the national parliaments of the 47 Council of Europe Member States. The UK has 18 seats on the Assembly;¹⁴ these MPs thus have more power to select European Court judges than to choose domestic judges.

¹⁴ 18 representatives and 18 substitutes. See [UK delegation to the Parliamentary Assembly of the Council of Europe](#), House of Commons Briefing Paper 7378, 16 November 2015

3. UK candidates 2016

3.1 National selection process

The Lord Chancellor is responsible for submitting the UK's shortlist of three candidates for election as judge of the European Court of Human Rights. The Government chose to have an open competition and interviews by a panel of legal experts first.

Administered by the Judicial Appointments Commission

The 2016 selection process was administered by the Judicial Appointments Commission of England and Wales (JAC), working with the Northern Irish Judicial Appointments Commission (NIJAC) and the Judicial Appointments Board for Scotland (JABS). It was conducted in parallel with a recruitment exercise for the High Court in England and Wales; candidates who passed both would be allowed to defer their High Court deployment until their term in Strasbourg was complete.

The position was [advertised](#) in November 2015. Candidates were expected to meet the Parliamentary Assembly's requirements, ie:

- **Either:** have the 'qualifications required for appointment to high judicial office' in the UK. This is not as onerous as it looks: even the highest judicial office in the UK (justice of the UK Supreme Court) is open to anybody who has been a barrister or solicitor (or the Scottish equivalents) for 15 years.
- **Or:** be 'jurisconsults of recognised competence'. The exact meaning of the word 'jurisconsult' is obscure, but 'presumably it brings some legal academics into the pool of persons technically eligible'.¹⁵

The UK also imposed the following criteria:

... the UK expects that candidates should have a proven and consistently high level of expertise, with at least seven years' experience in the areas of law in which they have been engaged. Candidates will normally be expected to have experience in criminal or civil fields, with demonstrable knowledge of the UK's national legal systems, public international law, public law, Strasbourg law and human rights.

Working as a Judge in the ECtHR will require an aptitude for working as part of a team in an international environment in which several legal systems are represented. The nominee will also need to possess the interpersonal and communication skills necessary to exert his or her influence within the Court.¹⁶

More [selection criteria](#) were included with the advertisement, for instance 'sound judgement' and 'a thorough understanding of the

¹⁵ Anthony Speaight QC, '[A proposal for Parliamentary input into the selection of the next British judge at Strasbourg](#)', Policy Exchange, 12 October 2011

¹⁶ See '[Election of judges to the European Court of Human Rights: List and curricula vitae of candidates submitted by the Government of the United Kingdom](#)', Communication to the Secretary General of the Parliamentary Assembly, Doc 14050, 28 April 2016, p4

political context and wider impact of ECtHR judgments on Member States’.

Panel of legal experts interviewed candidates

In February 2016 a selection panel sifted the applications, and interviewed eight candidates. These eight were also tested for French language competence by the Institut Français.

The panel gave the Lord Chancellor a detailed report on all eight candidates, but was asked to recommend only candidates they assessed as suitable to take up the office of UK Judge at the Strasbourg Court. It unanimously recommended three candidates: Tim Eicke QC, Murray Hunt, and Jessica Simor QC (see below).

The panel was able to consult the senior judiciary of England and Wales, Scotland and Northern Ireland, senior lay figures and senior officials, before sift and interviews, and ministers were consulted on longlisted candidates before interviews.

The members of the selection panel were:

- Dame Rosalyn Higgins, the former President of the International Court of Justice (chair)
- Lord Dyson, the Master of the Rolls
- Lord Reed, a Justice of the Supreme Court and former judge in the Court of Session (Scotland)
- Richard Heaton, Permanent Secretary of the Ministry of Justice
- Professor Graham Gee, a legal academic
- Baroness O’Neill of Bengarve, then chair of the Equality and Human Rights Commission
- Iain Macleod, the Foreign and Commonwealth Office Legal Adviser.

Lord Chancellor’s shortlist of three

The interview panel this time recommended three candidates to the Lord Chancellor, ‘to further make sure that the selection process is merit based’.¹⁷ In previous years, the Lord Chancellor has received a ‘longlist’, and been able to consult again before deciding (on unpublished grounds) on the shortlist of three candidates.

The Advisory Panel of Experts concluded that all three candidates met the criteria in Article 21(1) of the European Convention on Human Rights.

On 4 April 2016 the Lord Chancellor sent the UK’s [list of three nominees](#) and their CVs to the Parliamentary Assembly.

3.2 Council of Europe election process

Some of the UK parliamentarians on the Council of Europe Parliamentary Assembly have already met the three candidates. Formal

¹⁷ [List and curricula vitae of candidates submitted by the Government of the United Kingdom](#), Council of Europe Parliamentary Assembly Doc 14050, 28 April 2016, p3

interviews by the Assembly's Committee on the Election of Judges are expected on 19 June, followed by a vote in plenary later that week.

Informal meeting with UK parliamentarians

Members of the [UK Delegation to the Parliamentary Assembly](#) met the three shortlisted candidates briefly and informally on 12 May.

Although the Delegation is not invited formally to interview candidates or comment on their merits, its Members wanted to meet each candidate before the plenary vote in Strasbourg. All of the UK's 18 representatives in the Parliamentary Assembly (or the substitutes) will be entitled to vote on the candidates.¹⁸

Strasbourg interviews and votes

The Parliamentary Assembly's Committee on the Election of Judges to the European Court of Human Rights is due to interview the three candidates in Strasbourg on 19 June 2016.

The election itself is expected during the Assembly's plenary part-session, 20-24 June 2016.

3.3 The three candidates

All [three candidates](#) are established barristers with considerable human rights experience, both in practice and as authors, but no judicial experience. Two are QCs and one brings parliamentary and academic expertise. They are all based in England, and in their late forties/early fifties.

Tim Eicke QC

German-born Tim Eicke (born 1966) is a barrister with degrees in German, Scots and English law who specialises in human rights, EU and public international law. He has represented applicants, governments and interveners at the European Court of Human Rights and has appeared many times at the UK Supreme Court. He has been on the panel of counsel for the Equalities and Human Rights Commission and the Attorney-General's 'A' panel of counsel. He edits European Human Rights Reports. He participated as independent expert in discussion on reform of the Court that resulted in Protocol 14 to the Convention, and has provided human rights training to judges England and other Convention countries.

Murray Hunt

As legal adviser to the UK Parliament's Joint Committee on Human Rights, Murray Hunt (born 1965) advises and drafts reports on the human rights compatibility of all Government Bills and the government's implementation of human rights judgments and treaties. He is also a barrister who has advised and appeared as Counsel in human rights cases in both the ECtHR and UK higher courts for a wide range of clients including individual claimants, NGOs and local

¹⁸ See '[Election of judges to the European Court of Human Rights: List and curricula vitae of candidates submitted by the Government of the United Kingdom](#)', Communication to the Secretary General of the Parliamentary Assembly, Doc 14050, 28 April 2016, p5

authorities. He has held various academic posts, and is currently visiting professor in human rights law at Oxford University where he focuses on the role of parliaments in relation to the rule of law and human rights. He has stated that if elected, he would be '[a judicial champion of increasing parliamentary involvement](#)' in the effective protection of human rights'.

Jessica Simor QC

Jessica Simor (born 1968) is a barrister with extensive experience in human rights and public law. She has acted for public and private clients in many cases at the European Court of Human Rights, following periods as a lawyer at the European Commission in Brussels, the European Commission on Human Rights in Strasbourg (which is now absorbed into the Court) and as legal adviser to the Human Rights Ombudsman in Sarajevo. She was on the Attorney General's 'A' panel of counsel, and is now on the UNHCR (UN refugee agency) panel of counsel. She wrote *Human Rights Practice* and is currently editor, and trained British judges on human rights. She is writing a report on global labour standards in the retail garment sector.

4. Criticism and reforms

There have long been concerns in both the Council of Europe and the UK about how European Court judges are appointed and about their judgments.¹⁹

4.1 Method of appointment

The Council of Europe's Committee of Ministers and Parliamentary Assembly identified several weaknesses in the selection process for judges, and included this topic in the 'Interlaken process' established in 2010 to reform the Court. They have made a number of changes,²⁰ including creating the Expert Panel to advise Member States on national candidates for the position of judge at the Court before the panel of three candidates is sent to the Parliamentary Assembly for scrutiny (although this panel – unlike the equivalent panel for the Court of Justice of the EU²¹ – does not interview the candidates, and only rarely meets the Member States). Another reform is the requirement that the members of the Committee on the Election of Judges must have legal knowledge or experience.

But as the Slovenian academic Dr. Jernej Letnar Čerňič notes in the German legal blog *Verfassungsblog*, the criteria for judges of the European Court are 'quite open to subjective interpretation', even with the more detailed guidelines from the Council of Europe. And he suggests that the process 'does not fully exclude the possibility of day-to-day politics interfering with the national selection process'. He gives the example of the President of Slovenia in 2014 refusing to send a list of three candidates approved by the Judicial Council of the Republic of Slovenia to the Slovenian National Assembly to vote on.²²

Some legal commentators have reportedly criticised the power of the UK Government to select the UK's three judicial candidates:

John Wadham, human rights lawyer and former director of Liberty, said: "It will be interesting to see whether the government chooses someone on the basis of their expertise, their politics or the extent to which they are a Eurosceptic."

Lord Lester QC, a member of the government's deadlocked bill of rights commission, said: "The appointment procedure is regressive. It gives [Gove] far too much power.

"To have a Brexit minister being able to select the three candidates is very bad. Ministers can't help being judges in their

¹⁹ See Michal Bobek, ed, *Selecting Europe's Judges: A Critical Review of the Appointment Procedures*, 2015. For background, see [The European Court of Human Rights: the election of judges](#), Commons Library Briefing Paper 5949, 4 May 2011

²⁰ See Assembly documents [Resolution 1082](#) (1996); [Recommendation 1295](#) (1996); [Resolution 1200](#) (1999); [Resolution 1646](#) (2009); [Resolution 2002](#) (2014)

²¹ Under Article 255 TFEU, introduced by the Treaty of Lisbon – see Lord Mance, '[The nomination of judges to the Court of Justice of the European Union and the European Court of Human Rights](#)', Newsletter n° 23/2013 of the Network of the Presidents of the Supreme Judicial Courts of the European Union

²² Dr. Jernej Letnar Čerňič, [Pitfalls of the National Selection Processes of Judges to the ECtHR](#), *Verfassungsblog*, 25 September 2014

own cause: he's unlikely to choose a candidate who is strong on human rights."²³

The Government defended the process:

A Ministry of Justice spokesperson said: "It is totally wrong to suggest that there is anything inappropriate about this process or the involvement of the [justice secretary] who has specific constitutional responsibilities for the judiciary.

"In fact the independent selection panel was chaired by a British former president of the international court of justice and included senior officials and members of the judiciary, as well as the Equalities and Human Rights Commission chair, to ensure the UK's next judge is of the highest calibre."²⁴

Anthony Speaight QC has argued that the next UK judge in Strasbourg should already have a high judicial position, for example being a current Court of Appeal or High Court judge.²⁵

He has also called for greater parliamentary involvement in the national selection procedure for judges for the European Court. Public confirmation hearings before a parliamentary committee, such as are held by the US Congress of nominees to the US Supreme Court, would, he suggested, have several drawbacks. Instead he argued for an all-party panel of parliamentarians – perhaps taken from the UK delegation to the Council of Europe Parliamentary Assembly, and/or the Joint Committee on Human Rights – to undertake the sift and interviews before making confidential recommendations to the Foreign Secretary and Secretary of State for Justice for a final decision on nominations.²⁶

Adam Wagner suggested on his UK Human Rights blog that the informal meeting with MPs on the UK's delegation to the Parliamentary Assembly should be held in public, and broadcast online, to 'improve democratic accountability'.²⁷

Joshua Rozenberg, by contrast, has criticised the process as too political. Commenting on the previous election of the UK's judge in 2012, he implied it was not based on merit:

Writing about the candidates in March, I picked Emerson as the clear front-runner. Why did I get it wrong?

It is because I was viewing the appointment as if it was being made here in the UK, where we have unelected judges chosen on merit. I rather overlooked the fact that this appointment is decided by politicians and that politicians tend to vote on political grounds.²⁸

²³ ['Gove "has too much power" over human rights judge selection'](#), *Guardian*, 1 April 2016

²⁴ ['Gove "has too much power" over human rights judge selection'](#), *Guardian*, 1 April 2016

²⁵ ['Gove "has too much power" over human rights judge selection'](#), *Guardian*, 1 April 2016

²⁶ Anthony Speaight QC, ['A proposal for Parliamentary input into the selection of the next British judge at Strasbourg'](#), Policy Exchange, 12 October 2011

²⁷ Adam Wagner, ['Why no public appointment hearings for UK's new European Court of Human Rights judge?''](#), UK Human Rights blog, 23 May 2012

²⁸ Joshua Rozenberg, ['Paul Mahoney: politics trumps merit'](#), *Guardian*, 27 June 2016

This echoes the debates around whether there should be more parliamentary involvement in senior UK judicial appointments.²⁹

4.2 Judgments

Judicial activism in interpreting the Convention as a ‘living instrument’³⁰ has sometimes been criticised as taking the Convention beyond the intentions of the Member States. On the other hand, the Court has said that its changing interpretation of the Convention follows changing attitudes in Member States – for example towards same-sex couples.³¹

The most obvious example of UK criticism of European Court judgments is the prisoner voting cases.

The Court’s ruling in the [Hirst 2 case](#) in 2005, and its rejection in early April 2011 of the UK Government’s attempt to overturn the ruling in another prisoner voting case, *Greens and MT*, led to increased UK criticism of the Court, its members, and the effects of the European Convention on Human Rights on domestic laws.³²

A direct result was the UK’s efforts to bring about the series of reforms set out in Protocol 15 to the Convention (although this Protocol is not yet in force). The most significant change would be the introduction of an express reference to the principle of ‘subsidiarity’ and the doctrine of ‘the margin of appreciation’ in the preamble to the Convention. Both are well-established principles of interpretation in the case-law of the Court:

- **Subsidiarity** means that the national authorities (governments, parliaments and courts) have the primary responsibility for securing Convention rights for everyone within their jurisdiction, and for providing an effective remedy when those rights are violated.
- The **margin of appreciation** is the degree of latitude that States have in deciding from a range of possible ways of giving effect to Convention rights.³³

Even though Protocol 15 is not yet in force, there are some signs that the Court is already taking a more cautious turn, affording more deference to Member States in how they interpret and apply Convention rights.³⁴

²⁹ See for example Alexander Horne, ‘[Is there a case for greater legislative involvement in the judicial appointments process?](#)’, UK Constitutional Law Association blog, 27 March 2014

³⁰ See the case of *Tyrer v UK*, Application no. 5856/72, judgment of 25 April 1978

³¹ See *Schalk and Kopf v Austria*, (Application no. 30141/04, judgment of 24 June 2010, paras 93-95

³² See [Prisoners' voting rights \(2005 to May 2015\)](#), Commons Library Briefing Paper 1764, 11 February 2015, and [Prisoners' voting rights: developments since May 2015](#), Commons Library Briefing Paper 7461, 15 February 2016

³³ Joint Committee on Human Rights, [Protocol 15 to the European Convention on Human Rights](#), HL Paper 71, HC 837 of 2014-15, 2 December 2014. The [UK ratified Protocol 15 on 10 April 2015](#), but it will not come into force until all 47 Council of Europe Member States have ratified.

³⁴ See for example Joint Committee on Human Rights, [Protocol 15 to the European Convention on Human Rights](#), HL Paper 71, HC 837 of 2014-15, 2 December 2014;

Nevertheless, the UK Government will be bringing forward proposals in the current parliamentary session for a UK Bill of Rights to 'better protect against abuse of the system and misuse of human rights laws' and 'restore common sense to their application'.³⁵ These may include measures on the relationship between the UK and the European Court of Human Rights.³⁶

Judge Robert Spano, '[The European Court of Human Rights: anti-democratic or guardian of fundamental values?](#)', UK Human Rights blog, 19 November 2014

³⁵ Cabinet Office / Prime Minister, [Queen's Speech 2016: background briefing notes](#), p48

³⁶ See [A British Bill of Rights?](#), Commons Library Briefing Paper 7193, 18 May 2016

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