The UK and Reform of the European Court of Human Rights

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The UK holds the Chairmanship of the Council of Europe until 14 May 2012. The UK Government supported proposals to reform the European Court of Human Rights contained in the Interlaken and Izmir Declarations, but submitted further proposals for reform in the draft Brighton Declaration on 23 February 2012. These proposals reflected among other things Government concerns about the intervention of the European Court in decisions that the UK courts had reached after a thorough examination of the issues and with respect to the European Convention on Human Rights.

The Prime Minister, David Cameron, wanted the Court to take more account of the principles of subsidiarity and the margin of appreciation in its decision-making, both to allow national authorities to reach conclusions based on their own particular circumstances, but also to reduce the ever-increasing workload of the Court. Some of the UK's initial proposals were controversial and some were subsequently amended, but there was evidence of support from other Council of Europe Member States. A number of NGOs and human rights organisations, including Amnesty International and JUSTICE, were opposed to certain proposed reforms, arguing against any dilution of the European Court's authority to consider cases.

The High Level Conference meeting at Brighton on 19 and 20 April 2012 adopted a Declaration containing proposed reforms to the Court mechanisms and somewhat weakened texts on the margin of appreciation and subsidiarity. The Declaration must be agreed unanimously by all 47 CoE States as a decision to amend the European Convention by means of an amending protocol.

Earlier Notes that consider reform of the European Court of Human Rights are:

- Standard Note 5936 The European Convention on Human Rights and the Court of Human Rights: issues and reforms 14 April 2011

- Standard Note 5949, The European Court of Human Rights: the election of judges, 4 May 2011

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1 Introduction

The Council of Europe (CoE) has emphasised that reform of the European Court of Human Rights is urgently needed:

> On 31 August 2011, some 160 200 cases were pending before the European Court of Human Rights. The explosive growth of litigation in the last ten years is due not only to the accession of new Council of Europe member states but also to a massive inflow of individual applications from both old and new member states. This situation poses a threat to the effective functioning of the Court. If it is to fulfil its essential functions, the processing of cases that are manifestly inadmissible or purely repetitive must be speeded up as a matter of urgency.[1]

Reform of the Court began in 2001 and Protocol 14 to the European Convention on Human Rights (the 'European Convention') was drawn up to tackle efficiency issues by "optimising the screening and processing of applications". It also created new judicial formations for simple cases, a new admissibility criterion (the existence of "significant disadvantage") and introduced one nine-year term of office for judges. Pending the entry into force of Protocol 14 an interim Protocol, 14*bis*, provided increased capacity for the Court to process applications quickly, which remained in force until the original Protocol entered into force on 1 June 2010. The general view is that the new structures have helped the Court to some extent, but that more needs to be done to tackle the Court's vast and growing backlog of cases.[2]

Under the Interlaken Declaration of February 2010 on reform of the European Court of Human Rights and the follow-up Izmir Declaration, agreed in April 2011, CoE Member States agreed to further reforms and were required to inform the CoE Committee of Ministers (CM)[3] by the end of 2011 of measures taken to implement the two Declarations.

2 UK fulfilment of Interlaken and Izmir Declarations

The UK Government submitted its Report in December 2011 (Cm 8254) in which it answered questions about its implementation of the Interlaken Action Plan and the Izmir Declaration. The Government explained that the domestic structures to implement and oversee the Interlaken Declaration at national level already existed within government, local authorities, public authorities and the courts, so new ones were unnecessary, except that it was establishing a Commission on a UK bill of rights[4] as part of the on-going human rights debate in the UK.

In evidence to the Joint Committee on Human Rights in November 2011, Lord Phillips of Worth Matravers thought the UK had a good record on implementing the European Convention: "I do not think this country is really open to very much criticism for failing to

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1 Council of Europe website

2 According to David Cameron, 25 January 2012, the backlog now stands at 152,800, of which two-thirds are estimated to be inadmissible under the court's rules.

3 The Committee of Ministers is composed of government ministers or their deputies from all CoE Member States.

4 The Commission was established by the Government on 18 March 2011 "to investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties". See http://www.justice.gov.uk/about/cbr

implement the Convention. There are one or two well-known cases in which it might be said that so far we have not had regard to our international obligations, but very few". However, it has been the "very few" that have given rise to criticism of the Convention and the Court in the UK.

According to the Government, the *Human Rights Act 1998* (HRA) covered many of the specific elements of the Interlaken Declaration Action Plan. For example, Section 6 HRA provides for increasing awareness of Convention standards, together with Ministry of Justice (MoJ) guidance and support materials for public authorities, together with the publications of the Equality and Human Rights Commission and its equivalents in Northern Ireland and Scotland. The HRA guide, the MoJ and various human rights bodies provided guidance for potential complainants under the Convention.

The report noted that the MoJ and the Foreign and Commonwealth Office (FCO) had improved the domestic means for ensuring the execution of Court judgments through "light touch coordination role for the implementation of adverse judgments", regular scrutiny by the Joint Committee on Human Rights (JCHR) and the yearly report on the Government's response to adverse Court judgments. HRA Section 2 requires a UK court determining a question linked to a Convention right to "take into account" any relevant European Court case-law and to interpret and develop domestic law to be compatible with the European Court's developing jurisprudence.[5]

The report emphasised that the MoJ, FCO, policy departments and the devolved administrations regularly discussed and monitored new cases, judgments and cross-cutting human rights issues. On ensuring an effective remedy the Government maintained that sections 3(i) and 6 HRA guarantee reliance on Convention rights before any UK court; Section 8 provides guiding principles on remedies, and Section 10 HRA covers remedial orders. Sections 3, 6, 10 and 129 HRA and JCHR scrutiny ensured the compatibility of bills, laws and administrative practice with the European Convention. Under Section 6 HRA individuals were entitled to a fair and public hearing, and although generally there was no provision for damages for breach of this Article, Section 9 HRA provided for damages for breach of Article 5 (right to liberty and security). The UK had, according to the report, improved its performance in the rapid execution of judgments through the timely payment of just satisfaction, with only eight outstanding cases to close (six relating to the same issue).

The Government said it had not seconded judges or senior lawyers to the European Court because of the career structure of the UK judiciary, "specifically the absence of a career judiciary". On the training of lawyers in European Convention jurisprudence, the report confirmed that law training must included human rights as a key element and law students must demonstrate a thorough understanding of the HRA and the Convention.

The Government explained that, as it believed in the principle of legal finality, there was no general provision in the UK for re-opening proceedings in the event of an adverse Court judgment, with the exception of reviewing possible miscarriages of justice in criminal proceedings and referring cases back to the appeal court. The UK sought to conclude friendly settlements (nine since May 2010) and had cooperated closely with the CM regarding the adoption and implementation of general measures for effective remedies.

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[5] The meaning of "take into account" has been the subject of debate among lawyers with regard to the UK courts' relationship with the jurisprudence of the European Court. See comments by Lord Judge and Lord Phillips, Joint Committee on Human Rights in November 2011.

The Government set out the UK selection procedures for European Court judges to ensure transparency and quality (post advertised in national press and online; selection based on CV and interview before senior MoJ and FCO officials, senior judges and law member from Judicial Appointments Commission, with three candidates short-listed for submission to Lord Chancellor and MoJ and FCO Secretaries).

Finally, the Government gave examples of its engagement with civil society on human rights matters and, with a view to its chairmanship of the CM, set out how it would continue to do so in 2012 to gauge public views on the Convention.

3 UK proposals for its chairmanship of the Committee of Ministers

The UK's six-monthly chairmanship of the Committee of Ministers (CM) started on 7 November 2011 and runs to 23 May 2012. The Government set out the priorities for its chairmanship in October 2011.[6] The UK aims to focus particularly on developing practical measures to reform the Court and strengthen implementation of the European Convention. The Government, while confirming that the Court was essential for protecting human rights across Europe, drew attention to the backlog of applications, which was "undermining the Court's efficiency and authority" and which Protocol 14 had not resolved. The UK intended to seek consensus in the following areas:

- **a set of efficiency measures**, which will enable the Court to focus quickly, efficiently and transparently on the most important cases that require its attention;
- **strengthening the implementation of the Convention at national level**, to ensure that national courts and authorities are able to assume their primary role in protecting human rights;
- measures to **strengthen subsidiarity** – new rules or procedures to help ensure that the Court plays a subsidiary role where member states are fulfilling their obligations under the Convention;
- improving the procedures for nominating suitably qualified **judges to the Court**, and ensuring that the Court's **case law is clear and consistent**.

Furthermore, the Government would seek an amendment to the Convention to implement the package of reforms, and would "aim to provide the Court with political support from the Committee of Ministers (CM) for the measures it is already taking to prioritise and better manage its workload, and to provide a wide margin of appreciation to member states' authorities in its judgments".

4 The principles of subsidiarity and the margin of appreciation

These principles have been at the centre of the Government's policy on the European Court.

4.1 Subsidiarity

The discussion around the principle of subsidiarity in the context of the European Convention is somewhat new, although it has been a principle of EU law-making since the *Treaty on European Union cam*e into force in 1993 that where possible, decisions should be made

6 CM/Inf(2011)41, 27 October 2011, "Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (7 November 2011 – 14 May 2012)"

nationally rather than at European level. It has been a tricky concept to implement in the EU context and is likely to cause considerable debate in the Council of Europe. In the EU the burden of proof regarding compliance with the subsidiarity principle has increasingly fallen on the European Commission as the 'guardian' of the EU Treaties. Who would be the arbiter in the Council of Europe? If it were the CM, there could be lengthy delays reaching an agreement on whether a complaint should be dealt with at national or European level. If it were the Court, this could counter the aim of applying the principle in order to reduce the workload of the Court. Sir Leigh Lewis KCB, Chair of the Commission on a Bill of Rights, suggested how the subsidiarity principle might be implemented using the EU model:

> Introducing subsidiarity reviews by analogy to the EU treaty; the Lisbon Treaty introduced into the procedures of the EU the possibility of review by the European Court of Justice of a proposal where a challenge to it on the ground of infringement of subsidiarity is made supported by 25% (or in other cases 33%) of the parliamentary voting strength of the EU Member States. The principle of one institution's judgment on subsidiarity being open to challenge by another might be adopted in the Council of Europe in various ways. One could be a power in the Committee of Ministers to resolve that a judgment should not be enforced on the ground that it infringed the principle of subsidiarity. This would arguably reflect the Izmir Declaration which states that:
>
> *The Conference 2. ... invites the Committee of Ministers to apply fully the principle of subsidiarity, by which the states Parties have in particular the choice of means to deploy in order to conform to their obligation under the Convention.*
>
> An alternative approach could be to leave the decision on subsidiarity with the Court but to build in new arrangements for the submission to the Court prior to a case's final consideration of formal memoranda contending that the proposed finding of violation is a matter on which democratic states should have a choice of means to comply with the Convention. A third approach could be acceptance of the jurisdiction of an external international body to determine a challenge that the Strasbourg Court had exceeded its competence by an infringement of the principle of subsidiarity. A counter-argument to such an approach is that the Court and the Committee of Ministers already give full effect to the principle of subsidiarity, and that the Court requires no direction or guidance from the political branches of international or national governments on how to interpret and apply Convention law. A further counter-argument is that, unlike the EU, there is within the institutions of the Council of Europe no directly elected body such as the European Parliament to which such a role might be given.[7]

The suggestion to consider the application of the principle in the context of the European Court of Human Rights was raised in a lecture by Lady Justice Arden (a judge of the UK Court of Appeal) in 2009. She observed that:

> Not every human rights case has to go to Strasbourg: the Convention requires contracting states to provide effective remedies in their own courts. The Strasbourg court recognises that it is not a fourth level of appeal from the decision of a trial judge. On the contrary, the mechanism for enforcement through the Strasbourg court is said to be subsidiary to that of the member state. The notion of subsidiarity is expressed in the doctrines of subsidiarity and the margin of appreciation, which I will need to discuss further. [...]

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[7] Letter to Nick Clegg and Kenneth Clarke on reform of the European Court of Human Rights, 28 July 2011

> Subsidiarity for this purpose is the principle that a central authority should have a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level. It inevitably follows from subsidiarity that it is recognised that there can be a diversity of solutions to a particular problem.
>
> Subsidiarity is consistent with democracy, and with the right of the individual to self-realisation reflected in art 8 of the Convention. This means that, so far as practical, decisions should be taken by the appropriate authorities in the areas most affected by those decisions. Examining the degree to which the supranational courts implement the principle of subsidiarity is therefore one way of testing my fourth benchmark for the supranational courts: respect for the role of national courts. Strasbourg jurisprudence and Luxembourg jurisprudence both have a principle called subsidiarity but they approach the concept differently and in each there is in my view room for expansion.
>
> Although the ultimate rationale for subsidiarity is the same in both Strasbourg jurisprudence and Luxembourg jurisprudence, it has been developed in different ways and therefore it has to be examined separately in relation to the Strasbourg court and the Luxembourg court.
>
> In Strasbourg jurisprudence, the doctrine of subsidiarity is well established. The Strasbourg court is not a "fourth instance". Its role is supervisory. In general domestic remedies must be exhausted before any application can be made.[...]
>
> My view is that subsidiarity, including margin of appreciation, is a concept which the Strasbourg court should develop in its jurisprudence. It should also build on the idea of subsidiarity in another direction. The Strasbourg court has a daunting burden of work. In 2008, the Strasbourg court issued 30,200 decisions but it received 50,000 applications, increasing its backlog of cases to 97,000. Some of these cases may be capable of being dismissed summarily as manifestly ill-founded. However, that would still leave a large residue. The only solution as I see it is to share the load with the national courts: however distasteful it may be to a human rights court, the Strasbourg court should, at least until matters improve, seek to focus on the more important cases and leave the cases which are less important to be dealt with by the national courts without further recourse to the Strasbourg court even if the litigant is dissatisfied with the result. There would have to be a clear definition of which cases were less important to contracting states in general, and the Strasbourg court would have to have a discretion, but the definition ought to exclude cases which raise issues in areas of law where there is already a clear and constant case law, and with which the national courts ought to be able to deal. The Strasbourg court might be able to use its "pilot judgment" procedure for this purpose. Excluding these cases would enable the Strasbourg court to focus on areas of its jurisprudence that most call for its special expertise.[8]

The Attorney General, Dominic Grieve, spoke about the need for subsidiarity in a speech in October 2011 entitled European Convention on Human Rights - current challenges:

> The United Kingdom agrees that this should be the guiding principle governing the relationship between our national courts and the European Court of Human Rights. Of course the United Kingdom should still be subject to the judgments of the Strasbourg Court but the Court should not normally need to intervene in

[8] Lady Justice Arden, Thomas More Lecture, Lincoln's Inn, November 2009,

> cases that have already been properly considered by the national courts applying the Convention.
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> One way of strengthening the principle of subsidiarity is for the Court to afford Member States a wide margin of appreciation where national parliaments have implemented Convention rights and where national courts have properly assessed the compatibility of that implementation with the Convention.[9]

The UK Government hosted a conference at Wilton Park called "2020 Vision for the European Court of Human Rights" on 17-19 November 2011, at which delegates from CoE Member States met judges and officials of the Court and Council of Europe, national parliamentarians and judges, and legal experts from civil society "to look beyond the immediate problems facing the European Court of Human Rights and begin to develop ideas for the Court's long-term future". The UK's concerns about the Court in the light of judgments on prisoner voting[10] and the deportation of Abu Qatada[11] were reflected in the Conference Report, which also noted public disquiet about the Court's rulings:

> In some states, including the UK, partly prompted by the backlog, public opinion is critical of the Court; it is not perceived as the 'guardian of human rights'. Politicians, and judges, may exacerbate the public disconnect further by incautious remarks about Court judgments or reference to Strasbourg's interference in the affairs of member states. This discredits the Court, despite its efforts to remain highly respectful of national jurisdictions. Politicians and other public figures might 'tread with conscience' when discussing human rights, especially in public announcements. Governments' legitimacy is not only based on democracy, but respect for fundamental rights.
>
> Primary responsibility for ensuring the rights the Convention guarantees rests with the state; the Court is intended to be a secondary measure. While governments have a fundamental role, the responsibility is also a shared one: with national courts, national parliaments and other national institutions. There is often insufficient political will, across the continent, to ensure adequate national implementation of the Convention. This is key to the future of the Convention system, and much more needs to be done by the parties responsible.

The Report commented on the issues of subsidiarity and the margin of appreciation:

> Some argue there is a need to 'rebalance' relations between the Court and national courts, because the Strasbourg Court has become too 'interventionist', and greater clarity is needed. This may have come about because of the increasing 'Constitutionalisation' of the Convention, which is much more of a national legal presence today than previously. If such is the case, national courts should be left some discretion. Additionally, the dynamic of the 'living instrument' approach has led to a reinforcement of human rights protection on the national level in many fields, resulting in innumerable civil, criminal and administrative complaints being considered from a human rights perspective. Some argue that this approach may now have reached its limits, and there is a need for the Court to consolidate its case-law rather than develop it further and further. The initial focus of the Convention as an instrument for human dignity is becoming clouded by the other elements with which it is associated. The

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9 Dominic Grieve QC, European Convention on Human Rights - current challenges, Lincoln's Inn, 24 October 2011

10 *Hirst 2* 6 October 2005

11 *Othman (Abu Qatada)* 17 January 2012

> primacy of the Convention in the national legal order is cogent when it relates specifically to fundamental human rights matters.
>
> There is some sympathy with the view that subsidiarity could be more clearly defined, but to try to legislate on it would be inherently difficult. The issue should not be politicised. The Court could take the lead in improving dialogue in this area with national authorities elaborating factors which need to be taken into account. Some propose a Court judgment could invariably include clear reference to subsidiarity considerations. Others suggest the difficulty for policy-makers lies in reconciling all the judgments in national and international jurisdictions, and to allow for sufficient political and policy space broader guidelines are needed. This should not, however, be seen to undermine the Court's powers, or as a means for national authorities to evade their responsibilities when faced with an unfavourable judgment.
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> Some suggest that if subsidiarity is to be rigorous applied, the Court should refrain from awarding just satisfaction. The Court should not be seen as a compensation claims tribunal. There are a range of views on whether this provision should be abolished, revisited or remain untouched. It is also suggested there could be a 'bounce-back' procedure, whereby the Court could send back to the national authority a well-founded case. Again, views on this are mixed. It could nevertheless be instrumental as a learning process at national level.

Sir Nicolas Bratza, President of the European Court of Human Rights since November 2011, addressed CoE Ministers' Deputies on 23 February 2012 on the Court's Preliminary Opinion on issues for discussion at Brighton. Focusing on the admissibility criteria proposed by the UK Government, he addressed the matter of subsidiarity

> Looking at what the United Kingdom is proposing - that is, a test based on the fact that the national courts have examined the Convention issues without manifestly erring in their application and interpretation of the Convention - it has to be said that we doubt whether it would be easy to apply. Moreover, as we point out in the preliminary opinion, this test reflects the Court's practice and how it sees the proper operation of the principle of subsidiarity as expressed in, for example, both the margin of appreciation and the fourth instance rule. That principle and these two distinct doctrines have often been confused in discussions about the Court's future. The Court has consistently stressed the value of these notions in its case-law. It understands the importance which Contracting Parties attach to them. *It is not however convinced that enshrining them in the Convention would serve any useful purpose*. This is particularly true of the margin of appreciation which by definition requires flexibility of application. Coming back to the obligation of States under the Convention, both Interlaken and Izmir refer to the idea of shared responsibility. It is clear that this entails ensuring that national courts are able to apply the Convention and in fact do so. Where an application has been duly examined under the Convention at national level, the Court will normally have no difficulty in finding that it is manifestly ill-founded using the existing criterion. [My emphasis][12]

When subsequently questioned about this issue by the Joint Committee on Human Rights on 13 March 2012, Sir Nicholas appeared to take a more nuanced approach to the question of subsidiarity, but expressed concern about the issue of the margin of appreciation, stating that:

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[12] Speaking note of Sir Nicolas Bratza for the Ministers Deputies, 23 February 2012

> I do not think we have a strong objection to writing it [the principle of subsidiarity] in. We feel it is not necessary, and I think we would need to see how it was actually expressed, because I think the word "subsidiarity" has been given a number of different meanings. For us, it is based on the premise that member states have fulfilled their primary obligation under Article 1 to secure the rights and freedoms of those within the jurisdiction, and their obligation, effectively, under Article 35 to provide an effective remedy where those rights have been violated.
>
> We would have more concern still about the suggestion that somehow the margin of appreciation should be legislated for as well. There I think there would be real doubts in attempting to legislate for something that, as is clear from our jurisprudence, varies very much depending on the nature of the particular article of the Convention invoked, the breach of that article, and whether it is for reasons of national security or for morals, in which case you give a wider margin, or in circumstances such as interference with political speech, where you would give a narrower margin. It would be extremely difficult to legislate for a margin of appreciation that would inevitably vary.

In 2011 Sir Nicholas Bratza had been critical of the UK Government's and press reaction to recent Court rulings. In an article in the *European Human Rights Law Review*[13] called "The relationship between the UK courts and Strasbourg", he looked at the extent to which the Court sought to impose uniform human rights standards on CoE Member States:

> The Court's judgments are replete with statements that customs, policies and practices vary considerably between Contracting States and that we should not attempt to impose uniformity or detailed and specific requirements on domestic authorities, which are best positioned to reach a decision as to what is required in the particular area.

However, he also thought the Court needed to be more aware of the consequences of its judgments on domestic law and practices; that when deciding the correct balance between competing Convention rights, and the Court should be "particularly cautious" about interfering where national courts have already attempted to apply the Convention in a way which is "reasonable and not arbitrary".

4.2 The margin of appreciation

The European Court of Human Rights has used the term "margin of appreciation" in hundreds of rulings and decisions to take account of the room of manoeuvre that national authorities may be allowed in fulfilling some of their main obligations under the European Convention.[14] The term was defined in the case of *Handyside v United Kingdom*[15] where the Court explained that "the machinery of protection established by the Convention is subsidiary to the national system safeguarding human rights." The Court observed that although national authorities enjoyed a "margin of appreciation", this went "hand in hand with [...] European supervision."

A practitioner text, *Human Rights Law and Practice*[16], notes that following a number of further cases, the Court has indicated that the attitude which it adopts towards the margin of appreciation will vary according to the context, and that "relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities

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13 EHRLR 2011, No. 5, pp. 505-512

14 See CoE Lisbon Network page on the margin of appreciation.

15 (1976) 1 EHRR 737

16 Lester, Pannick and Herberg (Eds) *Human Rights Law and Practice* (3rd Edition, LexisNexis, 2009)

concerned."[17] However, the principal is not written into the Convention itself and some Convention Articles cannot be subject to the margin of appreciation. For example, the Contracting States have no margin of appreciation in Article 3 cases (prohibition of torture).

Derogations from Convention obligations have been granted under Article 15 of the Convention "in time of war or other public emergency". A derogation, as distinct from the 'room for manoeuvre' of the margin of appreciation, is when deviation from the Convention rights may be permitted, but again not with regard to Article 3 (or from Article 2, right to life – "except in respect of deaths resulting from lawful acts of war", Article 4(1), prohibition of slavery and forced labour, or Article 7, no punishment without law). In *Lawless v Ireland* in 1961 the then Commission of Human Rights alluded to the margin of appreciation in dealing with the lawfulness of a derogation made in the context of terrorism in Northern Ireland, although the Court in its judgment did not refer to the principle, stating that an emergency was "reasonably deduced by the Irish Government from a combination of factors" (para. 28), which it enumerated [18]

In *Ireland v The United Kingdom* (1978) and *Brannigan and McBride* (1993), the Court held that

> It falls in the first place to each contracting state, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation.

In *Ireland v United Kingdom,* the Court emphasised the margin of appreciation to be granted to each Party and found that the extrajudicial deprivation of liberty was justified by the circumstances between August 1971 and March 1975, as they were perceived by the UK Government. [19] The Court stipulated, however:

> There must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified 'to the extent that is strictly required' as provided in Article 15.[20]

In *Brannigan and McBride v UK,* recalling *Lawless*, the Court added:

> Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected

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17 *Ibid*, para 3.18
18 *Lawless* judgment, 1 July 1961, Para. 28.
19 *Ireland v UK*, judgment, 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25.
20 *Ireland v UK* (1978) 2 EHRR 25:

> by the derogation, the circumstance leading to, and the duration of the emergency situation.[21]

As with principle of subsidiarity, opponents of the status quo have argued that the activities of the Strasbourg Court could be constrained by the operation of this doctrine. Most notably, Lord Hoffman, a former Law Lord, has argued that:

> The Strasbourg court has to a limited extent recognised the fact that while human rights are universal at the level of abstraction, they are national at the level of application. It has done so by the doctrine of the 'margin of appreciation', an unfortunate Gallicism by which Member States are allowed a certain latitude to differ in their application of the same abstract right. Clearly, that is a step in the right direction. But there is no consistency in the application of this doctrine and for reasons to which I shall return in a moment, I do not think that there is a proper understanding of the principle upon which it should be based. In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe. [...]
>
> The court treats the margin as a matter of concession to Member States on the ground that they are likely to know more about local conditions than the judges in Strasbourg. In other words, they assume that in principle they are competent to decide any question about the law of a Member State which is arguably touched by human rights but sometimes abstain from exercising this vast jurisdiction on the ground that it is something which the local judges are better equipped to do. What I think they should recognise is that we are concerned with a matter of constitutional competence, that is, whether they have the right to intervene in matters on which Member States of the Council of Europe have not surrendered their sovereign powers.[22]

These arguments were followed up by Dr Michael Pinto Duschinsky (a former member of the Government's independent Commission on a UK Bill of Rights), in a paper for policy exchange entitled 'Bringing Rights Back Home' and also by Lord Howard QC, a former Conservative Home Secretary, who argued for a: "radical expansion of the 'margin of appreciation'" in a speech at Policy Exchange in November 2011.[23]

4.3 Further reading on the margin of appreciation

- University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 52/2011 "The European Convention on Human Rights and the Margin of Appreciation", Paul Gallagher SC
- *European Law Journal* Vol. 17 Issue 1, January 2011, "Pluralism, Deference and the Margin of Appreciation Doctrine", Janneke Gerards
- *Refugee Survey Quarterly* (2010) 29 (4): 189-206. "The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection", Jens Vedsted-Hansen (abstract only)
- *Comparative Law Review* Vol. 2, No. 2, 2011, "The impact of supranational laws on the national sovereignty of member states with particular regard to the judicial

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[21] *Brannigan and McBride v UK*, judgment 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539, Para. 43.
[22] Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture, 19 March 2009
[23] Kingsland Memorial Lecture, Policy Exchange 2012

reaction of UK and Italy to the new aggressive approach of the European Court of Human Rights", Giuseppe Franco Ferrari and Oreste Pollicino

- *German Law Journal* No. 6 1 June 2006 "The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine", Ignacio de la Rasilla del Moral
- *Review of International Law and Politics* 18, 2006, "The Problem Relating to the Margin of Appreciation Doctrine under the European Convention on Human Rights" Cenap Cakmak
- *Oxford Journal of Legal Studies* 2006 26(4) pp 705-732, "Two Concepts of the Margin of Appreciation" George Letsas
- http://echrblog.blogspot.co.uk/2012/03/article-on-margin-of-appreciation-by.html

4.4 The relationship between the UK courts and the European Court

Lord Judge, the Lord Chief Justice, and Lord Phillips, President of the Supreme Court, gave evidence to the JCHR in November 2011. Dominic Raab recalled Lord Bingham's words in the case of R(Ullah) v Special Adjudicator on 17 June 2004 (para. 20), that it was the duty of national courts was to "keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less". Lord Judge did not think this was the last word on the relationship between UK law and the European Court, adding, "it is at the very least arguable that what Lord Bingham said in *Ullah* went too far. It is not finally binding on anybody, it is not finally binding on the Supreme Court and there will be occasions when it will fall to be considered".

In December 2011 Lord Irvine of Lairg said that British judges had shown too much deference to the Strasbourg court, and more than the HRA required or entitled them to show. He thought the "Ullah principle" had too often been "deployed as a convenient justification for dismissing the HRA claim without having to engage with, and explain the reasons for qualifying or dissenting from the judgments of the Strasbourg Court".[24] Lord Irvine emphasised that UK judges should not follow the "path of least resistance" offered by *Ullah*, but must "decide human rights cases for themselves". Lord Bingham's "no more, but certainly no less", was, in his view, their "Constitutional duty".

In a speech in January 2012 Lord Kerr expanded on the matter of keeping pace with Strasbourg jurisprudence, prefacing it with a consideration of the need for diversity of application and proportionality[25] in the European Court's interpretation of the Convention:

> ... while, of course, it is for Strasbourg to provide the authoritative interpretation of the Convention, does it necessarily follow that the content of Convention rights must invariably and solely be prescribed by the ECtHR? And, even if the content of the right must be as determined by Strasbourg, does that mean that there can be no variation in the manner in which it is vindicated or finds expression in a particular member state of the Council of Europe? One obvious potential for diversity of application is in the area of proportionality. What may be deemed proportionate in one country may not be in another, depending on the economic and social conditions of each.
>
> What does the statement that "the duty of the national courts is to keep pace with Strasbourg" mean? Does it mean that we should not lag behind or does it

[24] "A British Interpretation of Convention Rights", 14 December 2011, lecture to UCL Judicial Institute and Bingham Centre for the Rule of Law

[25] See CoE Lisbon Network page on the principle of proportionality.

> mean that we should not stride ahead or does it mean both? Let us suppose that it means both and move on. The next question is the truly crucial one. Where Strasbourg has not taken a pace which would allow us to fall into step beside them, must we remain stationary? [...]little by little, and case by case, his statement has been interpreted and developed and used as a justification and support for the proposition that, if Strasbourg has not spoken, it is not open to us to pronounce on a Convention right. [26]

Lord Kerr explained why he did not agree with the view that UK courts should not anticipate European Court rulings, but how that view was tenable.

4.5 David Cameron's speech on the Court

On 25 January 2012 the Prime Minister addressed the Parliamentary Assembly of the Council of Europe (PACE) in what he called a "once-in-a-generation chance ... to improve the way we enhance the cause of human rights, freedom and dignity". He defended Britain's "commitment to defending human rights", but said "the time is right to ask some serious questions about how the Court is working". While the UK was committed to safeguarding the right of individual petition, he thought there was a "risk of turning into a court of 'fourth instance'", giving "an extra bite of the cherry to anyone who is dissatisfied with a domestic ruling, even where that judgement is reasonable, well-founded, and in line with the Convention". He said that "not enough account is being taken of democratic decisions by national parliaments" and that the Court "should not see itself as an immigration tribunal", proceeding to outline the Government's views of the Abu Qatada case:

> Protecting a country from terrorism is one of the most important tasks for any government. Again, no one should argue that you defend our systems of rights and freedom by suspending those freedoms. But we do have a real problem when it comes to foreign national who threaten our security.
>
> In Britain we have gone through all reasonable national processes, including painstaking international agreements about how they should be treated and scrutiny by our own courts, and yet we are still unable to deport them. It is therefore not surprising that some people start asking questions about whether the current arrangements are really sensible. Of course, no decent country should deport people if they are going to be tortured. But the problem today is that you can end up with someone who has no right to live in your country, who you are convinced – and have good reason to be convinced – means to do your country harm. And yet there are circumstances in which you cannot try them, you cannot detain them and you cannot deport them. So having put in place every possible safeguard to ensure that ECHR rights are not violated, we still cannot fulfil our duty to our law-abiding citizens to protect them.

His concern, which he maintained was shared by many CoE Member States, was "not antipathy to human rights, but "anxiety that the concept of human rights is being distorted" which was having "a corrosive effect on people's support for human rights".

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[26] The Clifford Chance Lecture, "The UK Supreme Court: The modest underworker of Strasbourg", 25 January 2012

5 The draft Brighton Declaration

On 23 February 2012 Ministers' Deputies, at the High Level Conference on the Future of the European Court of Human Rights, adopted the draft Brighton Declaration. Unlike the previous Interlaken and Izmir drafts, the Brighton draft was not publicly circulated, but was leaked to the *Guardian* on 28 February 2012. It set out proposals for reforming the Court of Human Rights, and it was the basis for negotiations with other CoE Member States ahead of the high level conference on the future of the European Court of Human Rights in Brighton on 18-20 April 2012 (see below).

5.1 Summary of proposed reforms

- At national level, implementing measures on the following:
    - Establishing an independent National Human Rights Institution
    - Practical measures to ensure compliance with Convention
    - Systematic reporting to national parliaments of compatibility of draft legislation with Convention
    - Possibly introducing legal remedies for Convention violations
    - National courts/tribunals to take account of Convention principles in light of Court's case law, in proceedings and judgments
    - Litigants to be able to point to Court of Human Rights jurisprudence in national courts/tribunals
    - Public officials to be informed about Convention obligations and how to fulfil these obligations
    - Information and training on Convention to be provided in legal profession and training of judges
    - Information to be provided to potential applicants about the Convention.
    - States to be encouraged to translate significant Court judgments and guides on Court procedures etc into national languages, and to contribute to Human Rights Trust Fund
- The Council of Europe will suggest how it could provided better technical assistance to national authorities
- The "express inclusion" of the principles of subsidiarity and the margin of appreciation in the European Convention on Human Rights.
- There should be a "strong and open dialogue between the Court and national authorities", including with the Steering Committee for Human Rights, and consultation on proposals to amend the Rules of Court.
- The European Court should be given a new jurisdiction to give advisory opinions at the request of national supreme courts (similar to EU Court of Justice "preliminary rulings").

- Regarding Article 35 on Admissibility, options include:
    - Shorten time limit for application to 2, 3 or 4 months (from present 6);
    - Remove wording that "no case may be rejected on this ground which has not been duly considered by a domestic tribunal";
    - Applications will be inadmissible if they cover the same substance as a case already looked at in Convention terms by a national court, subject only to a "clear error or serious interpretative question" exception.
- Additional judges should be appointed to determine clearly inadmissible or repetitive applications; or to deal with applications pending before the Court.
- Improvements to procedures regarding making available decisions and judgments; just satisfaction and costs; making applications on-line.
- States Parties to implement and review new Guidelines on selection of judges.
- Remove "unless one of the parties to the case objects" from Article 30 on relinquishment of jurisdiction to the Grand Chamber, in order achieve consistency in Court's jurisprudence.
- Amend Article 23(2) to require judges to be no older than 65 at start of their term.
- To encourage States to execute Court judgments, these should be backed by financial sanctions.

The Declaration also invited the CM to establish a Commission to consider the future of the Convention and the Court, and to make recommendations on future challenges, the role of the Court, its mechanisms, the responsibilities of States Parties, the relationship between national authorities and CoE bodies and a process for change.

5.2 Reaction to the draft Declaration

- Lawyers for London, 28 February 2012, "Leaked proposals set out Britain's tough line towards Strasbourg"
- Soros, February 2012, Draft Brighton Declaration
- UK Human Rights blog, "Draft declaration on British ECHR reform plans leaked", Antoine Buyse, February 29, 2012 by 1 Crown Office Row
- Obiterj blog, 29 February 2012, "UK seeks to minimise the influence of Strasbourg"
- Telegraph, 29 February 2012, "ECHR needs major reform, leaked British plan argues"
- Guardian, 1 March 2012, "Tinkering with the powers of the human rights court could be dangerous"
- UK Constitutional Law Group, "Reforming the European Court of Human Rights: The Draft Brighton Declaration", 1 March 2012
- UK Constitutional Law Group, 5 March 2012, Mark Elliott: "The draft Brighton Declaration, the Human Rights Act, and the Bill of Rights debate"

- Amnesty International Joint NGO preliminary comments on the first draft of the Brighton Declaration on the Future of the European Court of Human Rights, 5 March 2012

- Amnesty International, response from AIRE Centre, Amnesty International, European Human Rights Advocacy Centre (EHRAC), Human Rights Watch, INTERIGHTS, International Commission of Jurists (ICJ), JUSTICE and REDRESS, 8 March 2012

5.3 Negotiating the final text

The draft Declaration underwent deletions and amendments before a final document was agreed by all CoE Member States. According to Dominic Grieve, "During the negotiations Member States were most divided over 'subsidiarity'. [...] Countries were in favour of reinforcing both doctrines, as was the UK, but were divided how to do this and not excessively fetter the court in the process".[27]

It was not only the Member States who were divided over subsidiarity. A group of eleven NGOs and human rights organisations, including Amnesty International, JUSTICE and Human Rights Watch, was unhappy about proposals on subsidiarity and the margin of appreciation, which they regarded as "principles of judicial interpretation" and therefore "ill-suited to codification":

> Other principles of interpretation, equally important in the application of the Convention rights by the Court, include the principle of proportionality, the principle of dynamic and evolutive interpretation; the doctrine of the Convention as a living instrument; the principle that rights must be practical and effective rather than theoretical and illusory; and the principle that the very essence of a right must never be impaired. These are the principles that the Court uses to apply the Convention standards to the many specific and complex circumstances that are brought before it. As principles of judicial interpretation, the margin of appreciation and the principle of subsidiarity are not appropriate for incorporation in the Convention, for several reasons, including:
>
> - Such incorporation trespasses to an unacceptable degree on the role and autonomy of the Court in interpreting the Convention. For the states parties to amend the Convention to elevate the status of certain principles of interpretation, and to define the nature and content of those principles, would undermine the interpretative role of the Court.
>
> - To single out the margin of appreciation, along with the principle of subsidiarity, in the Convention text, without reference to other, equally significant, principles of interpretation applied by the Court, misrepresents the role and status of those principles, suggesting that the Court should give them priority in its application of the Convention rights. Since the margin of appreciation is of its nature restrictive of the Convention rights, its elevation to the Convention has potentially far-reaching consequences in skewing the Court's jurisprudence, and undermining the Court's role in ensuring effective protection of the Convention rights.
>
> - The principle of margin of appreciation is particularly difficult to define. Attempts thus far have not accurately managed to embody the

[27] *Law Society Gazette* 20 April 2012

> complexity of the Court's jurisprudence. There is much subtle variation in how and when the margin applies. If the Convention were to include any definition of the nature or breadth of the margin of appreciation, or if it were to impose a wide margin of appreciation, this would significantly undermine the Court's capacity to apply the principle with sufficient care, restraint and flexibility to protect Convention rights.
>
> We take note of the Court's reluctance in having these principles codified in the Convention and we support the position of the President of the European Court that their express inclusion in the Convention is not necessary.[28]

A Joint NGO Statement of 13 April 2012 called on participants in the reform process "to do their utmost to ensure a sustainable Convention system with an independent and strong Court". They wanted the final Declaration to "properly focus[es] on the importance of effective integration of the Convention into national law, policy and practice, and to make sure that adverse measures [e.g. "codification of the margin of appreciation or subsidiarity in the Convention or amending the current admissibility requirements"] will not be included in the final Brighton Declaration and compromise its otherwise very promising content".

6 The Brighton Declaration

The UK hosted a High Level Conference on 18-20 April 2012 in Brighton, at which the Brighton Declaration was formally adopted.

6.1 Key reforms

The key reforms to be taken forward were:

- Convention Article 35(1): the time limit for applications to the Court will be reduced from six months to four months. A proposal to reduce the time-limit in the original draft Declaration was in the Court's Preliminary Opinion of 20 February 2012, which had suggested a reduction to two, three or four months.

  ***Comment**: Noreen O'Meara, Lecturer in Law, University of Surrey, said:*

  > *... critics of any change to Article 35(1) ECHR may argue that reducing the time-limit could lead to a greater number of knee-jerk applications, more poorly drafted/advised applications, or applications made without legal advice. This change may well risk prejudicing applicants with genuine claims from mounting well-reasoned applications. These risks may be real (and merit research) but unless a spike in applications or tangible evidence of such increased prejudice to applicants becomes apparent, it will be difficult to measure any impact of a reduced time-limit to apply.*[29]

- Convention Article 35(3)(b): the need for prior consideration by a domestic tribunal is removed with regard to inadmissible cases; applications where the complainant has not suffered any significant disadvantage will only be considered if respect for human rights requires it. The final Declaration also does not explicitly limit the right to

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[28] Joint NGO input to the ongoing negotiations on the draft Brighton Declaration on the Future of the European Court of Human Rights 20 March 2012. **Footnote 5**: Uncorrected transcript of oral evidence to the UK Parliament's Joint Committee on Human Rights, 13 March 2012, Q156 and Q159, available at http://www.parliament.uk/business/committees/committees-a-z/jointselect/ human-rights-committee/publications/human-rights-judgments---uncorrected-evidence---13-march-2012/.

[29] Constitutional Law Group blog, 20 April 2012

individual petition following an application by a national court of an advisory opinion, which the February text did.

An application should also be regarded as "manifestly ill-founded", if the complaint has been considered by a domestic court applying Convention rights, unless it raises a serious question regarding the interpretation or application of the Convention. The final text makes no mention of the draft Declaration's reference to national courts having "seriously erred" to allow admissibility for an application relating to a matter already considered at the domestic level.

***Comment**: Kate Stone, human rights barrister at Garden Court North Chambers, thought this point "nods to the concerns expressed by the UK government about the need to safeguard the principle of subsidiarity and the margin of appreciation which is afforded to states in the application of the Convention. The fact that no new admissibility criterion has been introduced suggests that the Council considers the existing criteria to be sufficient to uphold these principles".*[30]

Noreen O'Meara commented:

> *The Declaration's affirmation in para 15d that the Court should adopt "a strict and consistent approach" in rendering applications inadmissible under Article 35(3)(a) ECHR (inter alia) unless a "serious question concerning the interpretation or application of the Convention" is raised marks nothing new. The track changes on a subsequent pre-Brighton Draft suggest this point particularly exercised the drafters, but the end result seems to be nothing more than a gloss on the existing admissibility criteria, and one which will not trouble the Court—which rightly remains firmly in control. However, an amendment to Article 35(3)(b) ECHR (removing the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal") was agreed by the Conference. This would rectify what some regard as an anomaly with the "significant disadvantage" test introduced by Protocol 14 ECHR.*

O'Meara also noted "The irony of multiple references to greater transparency and clearer communication of court procedures, admissibility criteria and time-limits", which "may not be lost on Home Office lawyers awaiting the ECtHR's decision on Abu Qatada's referral request".[31] She continued:

> In calling for "stricter application" of the time limit in Article 35(1) ECHR and reiterating "the importance of the Court applying fully, consistently and foreseeably all the admissibility criteria including the rules governing the scope of its jurisdiction", para 15b of the Brighton Declaration alludes to the fractious debate on subsidiarity behind the drafting process. Yet in welcoming "the increased provision by the Court of information to applicants on its procedures and particularly on admissibility criteria" (para 15e) the Declaration identifies a significant issue. The Court must ensure that its procedural rules and criteria are clearly drafted and publicized; the Declaration's bid to reduce the time-limit for admissibility makes this all the more important.

- The Preamble to the Convention will, "for reasons of transparency and accessibility", include reference to the principles of subsidiarity and the margin of appreciation,

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30 "Reflections on The Brighton Declaration" 23 April 2012

31 For more on this see: Standard Note 4151 Deportation of individuals who may face a risk of torture (http://www.parliament.uk/briefing-papers/SN04151)

whereas the Draft Declaration had called for the "express inclusion" of the doctrines "in the Convention". Paragraph 3 of the Preamble will state:

> The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court

- Although earlier proposals for a new admissibility criterion were abandoned, paragraphs 15(a) and (b) contain proposals for amendments to the provisions on admissibility, and in paragraph 15(d) the Court is required to use its existing admissibility criteria in a way that clearly respects the principle of subsidiarity. The amending instrument, which is to be drawn up by the end of 2013, will take account of the new reference to subsidiarity and the margin of appreciation.

  ***Comment**: The draft Declaration had proposed that subsidiarity and the margin of appreciation be written into the Convention itself. Several human rights organisations, NGOs and the Court President, Sir Nicholas Bratza, were against this, maintaining that the Court has already developed them as tools of interpretation and that subsidiarity is implicit in Article 35, since applications are inadmissible unless all domestic remedies have been exhausted. Sir Nicholas said at the Conference:*

  > *[...] in the process of the preparation for the conference there has been much discussion on whether it is right and necessary to reinforce the notion of subsidiarity and the doctrine of margin of appreciation; whether some new form of admissibility criterion should be added to the arsenal of admissibility conditions that are already available to the Court and which allow it every year to reject as inadmissible the vast majority of the applications lodged with it; or again whether dialogue with national courts should be institutionalised through advisory opinions? As to subsidiarity, the Court has clearly recognised that the Convention system requires a shared responsibility which involves establishing a mutually respectful relationship between Strasbourg and national courts and paying due deference to democratic processes.*
  >
  > *However, the application of the principle is contingent on proper Convention implementation at domestic level and can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.*
  >
  > *The doctrine of margin of appreciation is a complex one about which there has been much debate. We do not dispute its importance as a valuable tool devised by the Court itself to assist it in defining the scope of its review. It is a variable notion which is not susceptible of precise definition. It is in part for this reason that we have difficulty in seeing the need for, or the wisdom of, attempting to legislate for it in the Convention, any more than for the many other tools of interpretation which have been developed by the Court in carrying out the judicial role entrusted to it.*
  >
  > *We welcome the fact that no proposal for a new admissibility criterion is now made in the Declaration and we are grateful for the efforts to take on board the Court's concerns in this respect. In this context may I repeat that it is indeed*

the Court's practice to reject a case as inadmissible where it finds that the complaint has been fully and properly examined in Convention terms by the domestic courts.

Dr Ed Bates, University of Southampton, considered the amendments to the Preamble and their possible effect:

> *In due course it will fall to the judges to consider what significance, if any, should be attached to the amended preamble. Opinions may well vary, not least of all as the Brighton Declaration was agreed by 47 States, so it is unrealistic to think that there was any single view as to why it was regarded as necessary to make this amendment.*
>
> *On the one hand, it could be argued that the amended preamble simply confirms the status quo on the margin of appreciation and subsidiarity, for, as the Declaration puts it, "reasons of transparency and accessibility". Judges taking that view will be able to argue that Brighton changes nothing; they would say the amendments made to the preamble are largely symbolic.*
>
> *Others may see it differently. In those cases when the application of a margin of appreciation is critical, it might be insisted that there was a broader significance to amending the preamble. It could be argued that at Brighton the States saw fit not just to simply remind the Court about the margin of appreciation via a statement in a Declaration, but to do so by actually amending the preamble, a step taken by the 47 States which was highly significant (they would argue). Consequently it might be argued that any debate about the scope of the margin of appreciation should be resolved in the State's favour.*[32]

- In paragraph 12(d) the Declaration proposed an optional protocol to enable the Court to issue advisory opinions on specific cases. The Court already has advisory jurisdiction under Convention Article 48 (with regard to the CM). The proposal would extend this to enable highest national courts to seek "advisory opinions" from the Court in a similar way to the European Court of Justice preliminary reference procedure. Paragraph 12(d) of the Declaration invites the CM to draft an optional protocol for an advisory opinion mechanism by the end of 2013. There was broad support for this among CoE Members, although there was disagreement as to whether such an opinion should be binding.

  ***Comment**: O'Meara thought "Critics would also be justified in being skeptical as to whether the Grand Chamber will have the capacity in the short-medium term to handle the greater workload which the advisory opinion mechanism would clearly generate".*

  Before the Brighton Conference the Court published a 'reflection paper on the proposal to extend the Court's advisory jurisdiction' in which it looked at "An institutionalised dialogue between domestic courts of last instance and the Court to reinforce their respective roles in human rights' protection". The Court acknowledged the potential advantage of an advisory opinion mechanism in deepening the dialogue between the Human Rights Court and national courts, which "may reinforce both the role of the Court and its case-law and that of the domestic courts in protecting human rights". The paper considered various views of such a mechanism:

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[32] UK Human Rights blog, Ed Bates "The Brighton Declaration and the "meddling court"", 22 April 2012

6. It has further been submitted by those in favour of an extension of the Court's advisory jurisdiction that the institutionalised dialogue established by an advisory opinion procedure could serve to avoid controversies between domestic courts and this Court. As it would be for the domestic courts of last instance to implement the Court's advisory opinions, such a procedure could diminish any national susceptibilities with regard to the Court's case-law.[8] This could promote the States' continuous support for guaranteeing an efficient Convention system.

7. Those in favour of extending the Court's jurisdiction to give advisory opinions stressed that the Court's authority could therefore be enhanced by that procedure. In their view, the Court notably did not appear to run a real risk of its authority being questioned by a domestic court not following its advisory opinion. It appeared rather unlikely that a domestic court asking for the Court's advice would subsequently not follow it.[9] Others considered, on the contrary, that there was a risk that domestic courts would not follow a non-binding advisory opinion. In any event, the Court should still have jurisdiction following an individual application in the same case, as the right to individual petition should not be restricted by a new advisory opinion procedure.

8 See also the report of the Norwegian and Dutch experts to the DH-S-GDR, cited in document DH-GDR(2010)019, pp. 10, 11 and the reference in footnote no. 4.
9 See also the view presented by the Norwegian and Dutch experts to the DH-S-GDR, cited in document DHGDR(2010)019, p. 11.

6.2 Reaction to the final Declaration

UK Government

At the opening of the Conference, the Justice Secretary, Ken Clarke, emphasised a need for "common sense" in reforming the Court:

> If we get this right, the prize is a great one. Not just a substantial package of measures, with common sense running through it like the letters through a stick of Brighton rock. But real progress in tackling the Court's backlog, while preserving the right of individual petition.
>
> A clear signal to our citizens that the ultimate goal is not for the Court to process ever more cases and deliver ever more judgments, but for the Convention rights to be protected and respected. And – importantly – an agreement that makes clear that the protection of human rights goes hand-in-hand with democracy and the role of national parliaments.[33]

Being 'sensible' was also Ken Clarke's verdict on the adoption of the Declaration. The commitment to non-intervention by the Court "where national courts have clearly applied the Convention properly", would, he said "strengthen the commitment of all the member states to the obligations of the Convention and will improve the ability of the Court to enforce these obligations sensibly".[34] Dominic Grieve said the Declaration made clear "that the primary responsibility for guaranteeing human rights rests with the government, parliament and courts of a country. It sets out clearly that the Court should not routinely overturn the decisions made by national authorities - and it should respect different solutions and different approaches between states as being legitimate".[35]

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33 Speech, 19 April 2012
34 Ministry of Justice press release, 20 April 2012
35 Ibid

Ken Clarke announced the adoption of the Brighton Declaration in a Written Ministerial Statement on 23 April 2012, summarising the reforms as follows:

> First, we have strengthened subsidiarity and the margin of appreciation by securing agreement to insert these key principles into the convention itself. The member states will amend the admissibility criteria of the convention. And we have sent an unequivocal message from all 47 states to the Court that it should from now on use the existing criteria to ensure that it consistently does not reconsider cases that have already been properly handled by national courts, unless they raise a serious question of interpretation or application of the convention.
>
> Secondly, we have agreed measures to improve the efficiency and effectiveness of the Court by cutting the time limit for making applications to the Court from six months to four; giving the Court tools to improve the efficiency with which it processes cases; and amending the convention so that the Court can routinely get rid of trivial cases.
>
> Thirdly, we have secured measures which will ensure that the Court and its judgments are of the highest possible quality by making sure that the main development of case law is only by the Grand Chamber, comprising the Court's most senior judges; improving procedures to ensure that the judges of the Court are experienced and well-qualified for the job; and making sure that the rules of office allow every judge to serve a full nine-year term on the Court.

The Justice Secretary expected the measures to result in fewer cases at the Court and to enable the Court to "focus more on the important cases and to do so more quickly".[36]

Other reaction

Sir Nicolas Bratza, whose views are outlined above, thought the Brighton Declaration would "not change the way we do our jobs".[37] Thorbjorn Jagland, the CoE Secretary General, thought the Declaration would make it easier for the European Court to "put aside" unsuitable applications.[38] Dr Michael Pinto-Duschinsky said the Brighton proposals would not resolve "the underlying issue, which is, where does the buck stop?"[39]

Amnesty International thought the Declaration "fails to address key challenges faced by the European Court of Human Rights even if it contains some positive measures".[40] Michael Bochenek, Director of Law and Policy at Amnesty International, said the amendments would "do little to alleviate the workload of the Court, while some of them instead undermine the independence of the Court and curtail individuals' access to justice".[41]

Stephen Bowen, Director of the British Institute of Human Rights, said "many of the proposals suggest a Government seeking to avoid international scrutiny rather than champion it. We urge delegations at Brighton to guard against negotiations being used by Member States to address grievances against particular rulings of the Court".[42]

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36 HC Deb 23 April 2012 cc33-4WS
37 *BBC News* 19 April 2012
38 Ibid
39 Ibid
40 News release 20 April 2012
41 Amnesty International press release 20 April 2012.
42 Press statement 13 April 2012

Noreen O'Meara thought the final draft had de-politicised the UK's earlier version:

> One lesson which can be drawn from the process of concluding the Brighton Declaration is that it was never going to magic away either the Court's docket or its essential, authoritative role in human rights adjudication. The hype (in some quarters, hostility) surrounding the negotiation process has not gone unnoticed at the Court. However, the revised set of proposals in the Brighton Declaration seems to have largely neutralised the more political features of earlier draft versions.
>
> A striking feature of the Declaration, which moves it away from the politicised aspects of the subsidiarity debate, is the prominence of concrete, pragmatic steps which should be taken to enforce the Convention at national level (Section A).

Angela Patrick, Director of human rights policy at JUSTICE, commented positively in *Public Service Europe* 23 April 2012, but could not speculate on the eventual impact of the reforms:

> Speculating over the impact of these amendments is difficult, if not impossible. The declaration sends a strong political message to the court. Take, for example, the inclusion of the admissibility criteria in the preamble of the convention. Either the court continues to apply its own principles of judicial interpretation as it always has, guiding the degree of discretion appropriate to states under some circumstances or moves to prioritise the principles of margin of appreciation and subsidiarity over all others. [...]Significant changes to the legal approach could undermine both the authority of the court and the credibility of the convention system in the long-term.
>
> Although changes to the deadline for application may have little effect where there is relatively easy access to legal information and modern means of communication, the impact on countries where claimants may rely upon assistance from civil society is less clear. This should be fully assessed. Reductions in the court's caseload should not arise from injustice in some of the most significant cases for some of its most vulnerable claimants. Proposals to improve national implementation have not survived unscathed. Valuable commitments to possible sanctions for states that ignore court judgments or who are repeat offenders; to a stronger, more defined role for national parliaments and to improved engagement with civil society have been lost or watered down. However, states facing up to their responsibilities to their citizens remains at the heart of the Brighton declaration. In the words of British minister Ken Clarke, the time has come for states to "pull their weight". Getting it right first time reduces the caseload of courts at home and in Strasbourg. The declaration commits states to more open acceptance of technical assistance and to discuss strengthening the enforcement of court judgments. It recognises a need for greater transparency and engagement with national parliaments. These commitments must be welcomed and built upon.

Mark Elliott, Senior Lecturer in Law at the University of Cambridge, looked at significant differences between the February draft and the final version of the Declaration. In addition to the subsidiarity and margin of appreciation principles being relegated to the Preamble ("It is highly unlikely ... that the revised Preamble will invest those notions with content that breathes new life into the more radical approach envisaged in the February draft"), Elliott pointed out that:

> ... the February draft's characterization of the margin of appreciation as "considerable" is nowhere to be found in the final version of the Declaration. And whereas the February draft said that the Strasbourg Court's role was to "ensure that [national authorities' decisions] are within the margin of appreciation", the final Draft holds that the Court's task is to determine whether such decisions "are compatible with the Convention, having due regard to the State's margin of appreciation". This implies a more marginal, albeit not unimportant, role for the margin of appreciation doctrine: in the final Draft, it is a factor to which the Court ought to have regard when deciding whether a breach of the Convention has occurred, rather than (as in the February draft) the key factor which frames the question ("Has the margin been exceeded?") lying at the core of the Court's adjudicative function.[43]

He concluded that although the UK Government's more radical proposals on the two principles would not be incorporated into the body of the Convention, "the possibility cannot be discounted of the (voluntary) adoption by the ECtHR of a more limited—more "deferential", in domestic parlance—approach". If this is the case, he continued:

> ... important questions remain about the nature of such deference: in particular, does it invite the ascription of weight, or respect, to the views of domestic courts or to those of national political institutions? If the former, then this might do little to appease State governments troubled by what they perceive to be excessively interventionist domestic courts—and little to diminish the existing capacity of sufficiently interventionist UK courts to uphold fundamental rights in the face of more sceptical political branches.

The Open Society Justice Initiative was disappointed that the Brighton Declaration proposed amending the European Convention to encourage greater deference by the Court to national governments, which would, it believed, "do little to stem the growing caseload".[44]

6.3 Implementing the reforms

The European Convention has been affected by 14 Protocols, several of which have amended the machinery supporting the operation of the Convention (e.g. Protocol 11 abolished the European Commission for Human Rights). Other protocols have expanded the rights that can be protected under the Convention. The Steering Committee for Human Rights (CDDH) is already looking at ways of improving the efficiency of the Court's procedures as part of the Interlaken reform process.

The Committee of Experts on a simplified procedure for amendment of certain provisions of the European Convention (DH-PS) is currently examining in depth proposals to simplify the Convention amendment procedure. These would be introduced by means of an amending protocol to the European Convention, and the timing is uncertain. There were three meetings on this in 2010-11[45] and the next meeting is in May 2012. The Declaration's General and Final Provisions notes the work done on this and "and calls for a swift and successful conclusion to this work that takes full account of the constitutional arrangements of the States Parties". A simplified procedure could be included in an amending protocol, in which case a simplified procedure could not be used to implement the Brighton Declaration itself, but could be used for future amendments to the Convention.

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43 "The Brighton Declaration: where now for the Human Rights Act and the Bill of Rights debate?" 25 April 2012

44 Open Society Justice Initiative, 20 April 2012

45 See Meeting report, October 2011; Meeting report + Addendum, March 2011; Meeting report, October 2010

The Declaration invites the CM (para. 35) to determine by the end of 2012 the process by which it will fulfil its further mandates under the Brighton, Izmir and Interlaken Conferences; the UK is invited to transmit the Declaration and Conference proceedings to the CM, the States Parties; and the CM, the Court and the CoE Secretary General are asked to give full effect to its provisions. Future CM Chairs are invited to "ensure the future impetus of the reform of the Court and the implementation of the Convention" (para. 39). It will thus be for the next CM chairmanship of Albania to carry forward the reform process and oversee the implementation of the Declaration.

Any amending protocol will require unanimous ratification by all 47 Member States in order to enter into force. The ECHR blog commented on 23 April: "A protocol 15 is in the making (and potentially 16, if the provisions on an advisory opinion opt-in will be put in a separate protocol). Let's hope that its fate will be to spend less time in the waiting room than Protocol 14 did".

7 Further reading

- Draft Brighton declaration on the future of the European Court of Human Rights, leaked draft of proposals for the reform of the European Court of Human Rights
- Brighton Declaration, 20 April 2012
- David Cameron's Speech on the European Court of Human Rights, 25 January 2012
- David Lidington's address to the CoE Parliamentary Assembly, 24 January 2012
- Open Society Justice Initiative Fact Sheets: Reform of the European Court of Human Rights, February 2012
- Open Society Justice Initiative, Joint Statement: Strengthening the Protection of Human Rights in Europe, March 2012, "Strengthening the protection of human rights in Europe: States must assume their fair share of responsibility".
- HR blogs:
    - The democratic legitimacy of human rights
    - European Court of Human Rights: is the admissions system transparent enough? – Ben Jones
    - Is Strasbourg obsessively interventionist? A view from the Court – Paul Harvey
    - Mr Cameron goes to Strasbourg
- "A British Interpretation of Convention Rights" Lord Irvine of Lairg, 14 December 2011
- Lord Kerr, Clifford Chance Lecture1, "The UK Supreme Court: The modest underworker of Strasbourg?" 25 January 2012

- Attorney General: "European Convention on Human Rights - current challenges" 24 October 2011, Dominic Grieve QC MP speaking at Lincoln's Inn
- Ministry of Justice, Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2010-11, September 2011
- Lord Walker's Thomas More Lecture on Article 8 of the European Convention on Human Rights, 9 November 2011
- Guardian, 27 October 2011, "Dominic Grieve takes on the European court of human rights"
- Guardian, 23 November 2011, "European judge slams UK 'xenophobia'"
- BBC News 7 February 2012, Profile of European Court,
- BBC News 29 February 2012, "UK presses for European human rights convention changes"
- Guardian, 24 January 2012, "Nick Clegg backs PM's drive to reform European court of human rights"
- Independent, 24 January 2012, "Nicolas Bratza: Britain should be defending European justice, not attacking it"
- Guardian, 25 January 2012, "Strasbourg is for all, Cameron warned"
- Mail online, 10 November 2011, "'They're trying to create a template for all aspects of life': Newest Supreme Court judge slams human rights rulings"
- Court's Preliminary Opinion of 20 February 2012
- HC Deb 7 February 2012 c 161
- HC Deb 13 March 2012 c 140
- Conservativehome, 21 February 2012, "Peter Bone MP: My Parliamentary Bill to temporarily withdraw from the ECHR so we can immediately deport Abu Qatada"
- House of Lords Library Note, for the debate on 19 May 2011 on the European Convention on Human Rights, 13 May 2011
- Arts and Humanities Research Council, "Parliaments and Human Rights: Redressing the democratic deficit", Murray Hunt, Hayley Hooper and Paul Yowell, April 2012
- Amnesty International, "Joint NGO input to the ongoing negotiations on the draft Brighton Declaration on the Future of the European Court of Human Rights" 20 March 2012. Other participants included INTERIGHTS and Open Society Justice
- INTERIGHTS + eight human rights organisations, statement regarding United Kingdom' priorities and objectives for its chairmanship of the Committee of Ministers, 4 November 2011

- INTERIGHTS + six human rights organisations, written comments as part of Council of Europe follow-up to Interlaken and Izmir Declarations on the future of the European Court of Human Rights, 10 January 2012.

- INTERIGHTS + six human rights organisations, written comments on first draft of the Brighton Declaration, 5 March 2012.

- INTERIGHTS + eight human rights organisations joint input to the ongoing negotiations on draft Brighton Declaration on the Future of the European Court of Human Rights, 20 March 2012.

- INTERIGHTS + ten human rights organisations joint statement on reform of European Court of Human Rights, 13 April 2012

- British Institute of Human Rights press release on the adoption of the Brighton Declaration, 20 April 2012

- Mark Elliot, UK Constitutional Law Group, The Brighton Declaration: where now for the Human Rights Act and the Bill of Rights debate?" 25 April 2012

- UK Human Rights blog, "The Brighton Declaration and the "meddling court"" Ed Bates, 22 April 2012

- ObiterJ blog, "The Brighton Declaration - a quick first glance", updated 23 April 2012

- *Law Society Gazette*, "Brighton: we never sought seismic change, says Grieve", Jonathan Rayner, 20 April 2012

- *The Guardian* 19 April 2012, "Draft Brighton declaration is a breath of fresh air"

- UK Human Rights blog, 20 April 2012, "Redressing the Democratic Deficit in Human Rights" Wessen Jazrawi