



# European Human Rights Advocacy Centre

## Protocol 15 to the European Convention on Human Rights – Implications

Protocol 15 provides for five amendments to the European Convention on Human Rights (the Convention). A number of these, discussed below, represent a significant and controversial development, reflecting the current political climate and other pressures on the European Court of Human Rights (the Court).

Protocol 15 was opened for signature on 24 June 2013. It will not enter into force until three months after it has been signed and ratified by all forty seven member states. In the first week it was open for signature, it was signed by twenty of the member states of the Council of Europe.

It is the result of a process that began at the Interlaken conference in February 2010 and was followed by the high-level conference on the future of the Court in Brighton in April 2012. On 26 April 2013, the Parliamentary Assembly of the Council of Europe (PACE) adopted Opinion No. 283 (2013) on the draft Protocol 15, which resulted in 5 key changes to the text of the Convention:

1. The addition of a reference to the doctrine of the “margin of appreciation” and the principle of subsidiarity in the Preamble of the Convention (Art. 1 of the draft P-15);
2. A change to the upper age limits for judges at the Court (Art. 2 of the draft P-15);
3. The removal of the right of parties to object to relinquishment of a case by the Chambers to the jurisdiction of the Grand Chamber (Art. 3 of the draft P-15);
4. A shortening of the time limit for submitting application to the Court from six months to four months following the date of a final domestic decision (Art. 4 of the draft P-15);
5. The amendment of the admissibility criteria as related to ‘significant disadvantage’ under Article 35 of the Convention (Art. 5 of the draft P-15).

Each of these changes is considered in more detail below:

### 1. Amendment in Preamble of the Convention

Since 1958, the European Commission on Human Rights<sup>1</sup> and later the Court have recognised that state parties to the Convention should be allowed a certain amount of discretion when implementing certain of their obligations under the Convention within their own jurisdictions. The purpose of this doctrine, known as the “margin of appreciation”, is to recognise the diverse cultural and legal traditions of the various state parties to the Convention. It is a concept which is intrinsically linked with that of subsidiarity of the Convention system, which acknowledges that domestic authorities have primary responsibility for guaranteeing and protecting human rights at a national level.

Article 1 of the newly drafted Protocol 15, for the first time, inserts these well established principles into the text of the Convention, at the end of the Preamble, with the following text:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention

EHRAC together with other NGO’s has expressed concerns about this amendment on the basis that it incorporates principles of judicial interpretation into the text of the Convention which are more appropriately, accurately and flexibly expressed within the Court’s jurisprudence. For example, the doctrine of margin of appreciation does not apply at all in respect of some rights or aspects of rights

<sup>1</sup> *Greece v UK*, app. No. 176/56, report of EC (Plenary) of 26 September 1958, page 326

protected under the Convention, such as the right to freedom from torture and other ill-treatment. Furthermore, at a time when the Court and the Convention are under political attack in certain jurisdictions, it is of concern that the decision was made to single out the doctrine of the margin of appreciation and the principle of subsidiarity for inclusion within the preamble without any reference being made to other equally significant principles of interpretation, such as the principle of proportionality or the doctrine of the Convention as a living instrument. For further discussion on this point see the [joint NGO statement of 24 June 2013](#).

## **2. Changes to the upper age limits for judges (Changes in the Articles 21 and 23 of the Convention)**

Judicial candidates for the Court are elected from a list of three candidates nominated by member states. Changes made by Protocol 15 to Article 21 of the Convention require that candidates put forward for selection must be less than 65 years of age at the date by which the list of three candidates is requested by PACE.

The second change to the office term for a Strasbourg judge removes the requirement that a judge's term of office expires when they reach the age of 70 by deleting paragraph 2 of the current Article 23 of the Convention.

Both these changes are aimed at enabling elected judges to serve a full nine-year term of office, thereby reinforcing the consistency of the membership of the Court. It has been argued that the 70 year age limit applied under paragraph 2 of Article 23 of the Convention limits certain experienced judges from completing their term of office<sup>2</sup> and in light of the fact that judges' terms of office are no longer renewable, it was no longer considered essential to impose an age limit.

However, this change will not be enforced retrospectively, and the current maximum age for judges will remain in force for those judges whose names appear in those lists of candidates submitted before Protocol 15 enters into force.<sup>3</sup> In practical terms, this means for instance that the recently elected British Judge Paul Mahoney will be obliged to retire in 2016.

## **3. Parties' consent no longer required for the relinquishment of jurisdiction by a Chamber to the Grand Chamber (Change in Article 30)**

Article 30 of the Convention provides that where certain criteria are met, a Chamber may relinquish jurisdiction of any case which is before it to the Grand Chamber. These criteria are that either the case raises a serious question affecting the interpretation of the Convention/Protocols or that resolution of a question before it might have a result inconsistent with a judgment previously delivered by the Court.

Protocol 15 removes the right of parties to object to this relinquishment by a Chamber and is aimed at accelerating proceedings before the Court in cases which raise serious questions affecting the interpretation of the Convention/Protocols or a potential departure from existing case-law. In such cases, it would be expected that the Chamber would consult the parties on its intentions, and it would be preferable for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.<sup>4</sup>

This amendment will not apply to cases in which one of the parties has already objected before the Protocol entered into force, or to the Chamber's proposal of relinquishment in favour of the Grand Chamber.<sup>5</sup>

## **4. Time limit for submitting applications (Change in paragraph 1 of Article 35)**

This amendment will result in a time limit of four rather than six months for lodging an application with the Court following the date of a final domestic decision.

<sup>2</sup> See the Explanatory Report on the draft of the Protocol 15, paragraph 12 at: <http://www.conventions.coe.int/Treaty/EN/Reports/Html/Prot15ECHR.htm>

<sup>3</sup> See paragraph 1 of Article 8 of the draft Protocol 15 at: <http://conventions.coe.int/Treaty/en/Treaties/Html/Prot15ECHR.htm>

<sup>4</sup> See the Explanatory Report on the draft Protocol 15, paragraphs 17-19 at: <http://www.conventions.coe.int/Treaty/EN/Reports/Html/Prot15ECHR.htm>

<sup>5</sup> See paragraph 2 of Article 8 of the draft Protocol 15 at: <http://conventions.coe.int/Treaty/en/Treaties/Html/Prot15ECHR.htm>

This amendment will not be enforced retrospectively and will also not apply to applications where the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the amended rule entering into force.

EHRAC, together with other NGO's, has expressed regret that member states decided in favour of a reduction in the time limit for individual applications made to the Court. A curtailed time period for applying to the Court is likely to have a disproportionate impact upon applicants in jurisdictions where some of the most gross violations of human rights occur. For instance, some applicants may experience difficulties in finding adequate legal representation (due to an absence of lawyers experienced in ECHR work or the climate of fear and intimidation). Others may be disadvantaged due to geographic remoteness, financial or technological limitations. For further discussion see the [joint NGO statement of 24 June 2013](#).

#### **5. Admissibility criteria: significant disadvantage (Change in paragraph 3 of the Article 35)**

The current Article 35(3)(b) provides that the Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the applicant has not suffered a significant disadvantage **unless (i)** respect for human rights as defined in the Convention and in the Protocols thereto requires an examination of the application on the merits **and (ii)** provided that no case may be rejected on such grounds which has not been duly considered by a domestic tribunal.

Protocol 15 removes the second limb of the Article 35 test set out above, namely "provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal". In practical terms this means that the application of the criterion of lack of "significant disadvantage" will be limited only by the first requirement of "respect for human rights".

EHRAC and other NGO's are of the view that the removal of this safeguard aimed at preventing a denial of justice is unfortunate. It is hoped that the remaining criterion for deciding upon admissibility will be applied in such a way as to ensure that no individual applicant is denied justice.