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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT (DH-GDR)

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IMPLEMENTATION OF THE INTERLAKEN DECLARATION:

DRAFT REPORT ON THE ISSUE OF ACCESS TO THE COURT - FEES FOR APPLICANTS

(Adopted by the DH-GDR at its 3rd meeting,
5-7 May 2010)

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3rd Meeting
Strasbourg, 5-7 May 2010

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Implementation of the Interlaken Declaration

Draft report on the issue of access to the Court – fees for applicants[1]

1. The declaration adopted at the High Level Conference on the Future of the Court in Interlaken in February 2010 states in section A ("Right of individual petition"):

> 1. The Conference reaffirms the fundamental importance of the right of individual petition as a cornerstone of the Convention system which guarantees that alleged violations that have not been effectively dealt with by national authorities can be brought before the Court.
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> 2. With regard to the high number of inadmissible applications, the Conference invites the Committee of Ministers to consider measures that would enable the Court to concentrate on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights.
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> 3. With regard to access to the Court, the Conference calls upon the Committee of Ministers to consider any additional measure which might contribute to a sound administration of justice and to examine in particular under what conditions new procedural rules or practices could be envisaged, without deterring well-founded applications.

2. Around 90% of the applications received by the Court are clearly inadmissible. At present, an applicant to the European Court of Human Rights is not obliged to pay any application fee or deposit upon making their application, nor is there any penalty where an applicant makes an application that is entirely without merit or clearly inadmissible. Reflecting the practice of high-level courts in many member states, it has been suggested that some form of fee, deposit or penalty for applicants could be introduced to deter inadmissible applications. The objective of doing so would not be to raise revenue for the Court. However, it is clearly important that the amount of money received through any such scheme and the resources saved through any consequent reduction in inadmissible applications must together outweigh the cost of administering a scheme.

3. Preliminary discussions in [CDDH and its sub-group] DH-GDR have revealed a wide divergence of view on this suggestion, including on the philosophical and practical arguments underpinning it. This paper therefore sets out some possible models for a fee, deposit or penalty for applicants to the Court, and a brief analysis of the arguments in favour of and against introducing such a system. It also notes some of the further work that would be required to develop a full proposal.

4. Proposals have been made for other ways, not involving money, in which to regulate access to the Court. It has also been suggested that financial penalties could be levied against respondent states in repetitive cases. These ideas are beyond the scope of this paper, and are being considered separately.

5. The Interlaken Declaration also seeks to reduce the volume of inadmissible applications by calling upon States Parties and the Court to provide better information to potential applicants and their representatives about applications procedures and admissibility criteria. The Declaration also recommends that the establishment in the Court of a more extensive filtering mechanism for clearly inadmissible cases should be considered. CDDH and its sub-groups continue to work on these issues.

[1] Adopted by the DH-GDR at its 3rd meeting, 5-7 May 2010.

6. Based on the information in this paper, CDDH invites the Committee of Ministers to indicate whether or not it would be interested in considering this issue further, including proposals for introducing a fee or deposit for applicants to the Court that CDDH and its sub-groups could develop within their existing terms of reference. If there is such interest, CDDH further invites the Committee of Ministers to endorse the proposals for further work set out in the final section of this paper.

Models for a fee, deposit or penalty system

7. Under most models, an applicant to the Court would be required to pay a sum of money before their application is considered. This would *prima facie* be required from every applicant.

8. The amount of money required could be set absolutely regardless of the applicant's location, or by reference to the relative value of money in the applicant's state of origin or in the state(s) against which the application is made. Some consider that varying the amount of money in this way is discriminatory. However, others contend that a uniform amount of money across Europe would disadvantage applicants from states with lower relative incomes or weaker currencies.

9. In the event that the amount of money were linked to the applicant's state of origin, arrangements may need to be made for unusual circumstances, such as:

(a) an applicant who is a national of (one of) the member state(s) against whom they seek to make an application, but who is (or claims to be) resident in another state; or

(b) an applicant who is not resident within the territory of the Council of Europe.

10. A system could allow for the amount of money to be reduced or waived entirely if the applicant is unable to afford it. The ability to pay could be assessed in many ways, such as whether the applicant:

(a) is entitled to certain state benefits in their state of origin;

(b) would be entitled to free legal representation or to remission from court fees in their state of origin; or

(c) has an income that is below a certain proportion of the median income in their state of origin.

Any assessment in this way would need to be supported by evidence, and may require a system of appeal.

11. A system could also allow for the amount of money to be reduced or waived entirely in respect of certain types of proceedings; for example, many national systems recognise cases relating to the custody of children as a special case. Alternatively or additionally, a system could also allow for the requirement to pay to be waived where the applicant is deprived of their liberty, whether for a criminal offence or for immigration reasons.

12. As a further alternative, the amount of money could be sought only in respect of certain types of proceedings, or from certain types of applicants. For example, some national systems link the amount of money to the value of the proceedings, or require payment only from businesses. However, an approach of this nature would not appear to be consonant with the intention of reducing inadmissible applications, as opposed to raising funds for the Court.

13. A system would need to permit urgent applications to be made, particularly where an indication under Rule 39 of the Rules of the Court is sought.

14. The amount of money paid by the applicant could be refunded in certain circumstances, such as:

(a) if their application is not declared clearly inadmissible by a single judge;

(b) if their application is declared admissible; or

(c) if their application results in the finding (or acceptance) of one or more violations.

Where the money is refunded in this way, particularly in situation (a), it could have more of the character of a deposit than a fee. The money could be refunded either by the Court (especially in situations (a) and (b)), or by the respondent state(s) (especially in situation (c), in which it would form part of the costs awarded).

15. There are alternative models under which an amount of money would not be requested at the time that an application is made. For example, an applicant whose application is considered by a Registry lawyer to be entirely without merit or clearly inadmissible could be advised of this, and invited to withdraw their application; the applicant could however opt for their application to be judicially considered upon the payment of a sum of money that would be refunded if a Judge of the Court disagrees with the Registry lawyer's assessment. It is however questionable whether such a system would help to reduce the number of inadmissible applications received by the Court.

16. A second alternative would be for a fee to be charged to an applicant whose case is declared clearly inadmissible by a single judge. However, given that the applicant at this point would have no further incentive to engage with the Court, it is questionable whether it would usually be possible to collect such a fee. The "jeopardy" posed by such a fee, particularly if set at such a level to be a real discouragement to inadmissible applications, could also be a greater disincentive to well-founded applications than an initial payment.

17. A variation on this latter approach would be to levy such a fee against the legal representative (if any) of a person, and not to permit that representative to present further applications until the fee if paid. However, if no fee were then levied upon unrepresented applicants, this could result in many applicants simply not declaring that they are legally represented until their application has passed the point at which this fee could be levied.

Advantages of a fee, deposit or penalty system

18. People tend to value less something that they receive for free. The right of individual application to the Court is an important feature of the system for the protection of human rights in Europe; it therefore has a great moral value. The intention of any fee, deposit or penalty system would be to place on the right of application a financial value to reflect its

moral value, and to ensure that applicants therefore appreciate the significance of an application to the Court. In this way, applicants would be discouraged from abusing the right of application, or treating it frivolously.

19. Anecdotal evidence suggests that many inadmissible applications to the Court arise from a perception that, as an application is free, an applicant has nothing to lose by making their application. Anecdotal evidence also suggests that the potential gain of a sum of money is a motivating factor for applicants to the Court, especially if they stand no personal risk in applying. A fee, deposit or penalty would discourage applicants whose application to the Court is purely speculative.

20. In this way, applicants without a well-founded case whose interest in applying to the Court is based purely on financial considerations could be discouraged. Applicants could also be encouraged to pay greater attention to advice whether their application has merit before they send their application to the Court. The payment of a sum of money upon application is well-accepted in national legal systems for these reasons as part of the good administration of justice.

Disadvantages of a fee, deposit or penalty system

21. The free availability of individual application to the Court is considered by some to be one of its key features, reflecting the Court's accessibility to all regardless of means or situation. For some, the objection to a fee, deposit or penalty is therefore one of principle, even if a system could be shown not to deter a single well-founded application.

22. There would however remain with any system the risk, however small, that it would deter well-founded applications, even with fee reduction criteria, refund arrangements and other easements: there might be considered always to be applicants with well-founded applications for whom the financial risk or administrative difficulty would be too great.

23. It would be a challenging task to set and maintain the level of a fee or deposit. This is particularly true if the amount differs between member states, as variations in the cost of living and the exchange rate of currencies would need to be considered and quantified. Similarly, if a system to reduce or waive fees were established, it could be difficult to establish financial thresholds and evidence requirements that operate equitably across all member states or, if set separately for each member state, that do not particularly disadvantage applicants from certain member states. The administration of such a system could also be challenging: while it would be difficult for a centralised administration in Strasbourg to assess and verify evidence of an inability to pay, some applicants would equally be unwilling to be required to engage with their national authorities to provide this evidence, especially where their application is against their own state.

24. The payment system for a fee or deposit could also present administrative issues; the Registry has however indicated that it would be willing to explore feasible approaches to administration. Cross-border transactions, particularly for member states that do not use the Euro, tend to be expensive and difficult to arrange. States could themselves provide arrangements for the collection of fees in the national currency and the certification of their payment for an application, but this could present a barrier to applicants who are unwilling to engage directly with their national authorities in making their application. Alternatively, the Court could itself provide a means by which fees could be paid in the national currency in each member state.

25. Collectively, there would be a risk that a fee or deposit system could cost more to administer than would be justified by its benefits, and more than the money received and the resources saved from a reduction in inadmissible applications.

Further considerations

26. If the Committee of Ministers indicates that it wishes further examination to be given to this subject, CDDH expects that the following questions may be among those that would need to be resolved, in addition to the issues noted above:

(a) Would the introduction of a fee, deposit or penalty require the amendment of the Convention?

(b) Who should set the amount of a fee or deposit and, if relevant, the criteria and evidence requirements for its remission? How often should this be reviewed?

(c) To whom should the fee or deposit be paid, and how would this be certified?

(d) Should the money raised from fees, unreturned deposits or penalties be retained directly by the Court, or should it be returned to the general budget of the Council of Europe? Alternatively, should a proportion be paid to the state(s) against whom an unsuccessful application was made?

(e) What happens to an application where the applicant refuses to pay an application fee or deposit?

27. CDDH also notes the lack of empirical evidence on why applicants present clearly inadmissible applications, on why applications are declared inadmissible, and on what effect a fee or deposit would have on applicants' motivation to apply to the Court. [CDDH therefore recommends that such evidence should be sought if this subject is examined further. CDDH also notes that it would greatly assist any further consideration of this subject for it to seek expert assistance in quantifying the costs and benefits of any preferred model for a fee or deposit, but equally notes that the engagement of such expert assistance may require additional budget provision.]