COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 3 December 2010

DH-GDR(2010)021

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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REPORT

5th meeting

1-3 December 2010

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Item 1: Opening of the meeting, adoption of the agenda and order of business

1. The Committee of experts on the reform of the Court (DH-GDR) held its fifth meeting in Strasbourg from 1-3 December 2010 with Mrs Anne-Françoise TISSIER (France) in the chair. The list of participants appears at Appendix I. The agenda, as adopted, appears at Appendix II.

Item 2: Information on relevant events since the last meeting

2. Mr Jan KLEIJSSEN, Director of Standard Setting, informed the Committee that following the High-Level Meeting on Roma, held in Strasbourg on 20 October 2010, the Secretary General had appointed Mr Jeroen SCHOKKENBROEK, Head of the Human Rights Development Department, as his Special Representative for Roma issues. Consequently, Mr Jörg POLAKIEWICZ, Head of the Law Reform Department, would take over the latter's duties and would thus be responsible for the Secretariat's work on both Interlaken follow-up and EU accession to the ECHR. The Committee expressed its thanks to Mr Schokkenbroek for his invaluable contributions to its work over the years.

3. The Secretariat then provided the following information on developments in other bodies involved in Interlaken follow-up:

- following finalisation by the GT-SUIVI.Interlaken of a draft initially presented by the Court, the Committee of Ministers had adopted a Resolution on the establishment of a panel of experts on judicial nominations to the European Court of Human Rights;
- on the basis of a draft initially prepared by the Committee of experts on the improvement of procedures for the protection of human rights (DH-PR) and transmitted by the CDDH to the Committee of Ministers, the latter had adopted a Resolution on member States duty to respect and protect the right of individual application to the European Court of Human Rights;
- the Committee of experts on a simplified procedure for amendment of certain provisions of the ECHR (DH-PS) had held its first meeting;[1]
- the GT-SUIVI.Interlaken would next meet on 15 December 2010, when it would:
    - examine the CDDH's Final report on measures that result from the Interlaken Declaration that do not require amendment of the ECHR, initially prepared by the DH-GDR;
    - consider a revised Roadmap for implementation of the Interlaken Declaration Action Plan, to be presented by the Secretary General;
- the Secretary General would present to the Committee of Ministers by the end of 2010 proposals for enhancing the provision of information to potential applicants on the Convention and the Court's case-law, in particular on the application procedure and admissibility criteria.

Item 3: Filtering – inadmissible applications & Repetitive applications – judicial treatment

4. The Committee heard a presentation by Mr John DARCY of the Registry of the Court on the current system of filtering of inadmissible applications in the Court and the Court's

[1] For further details, see the meeting report, doc. DH-PS(2010)003.

prioritisation policy. The text, along with tables, of Mr Darcy's presentation can be found at Appendix III.

5. In the discussion that followed, Mr Darcy responded as follows to certain questions posed:

Functioning of Protocol No. 14

- the number of inadmissibility decisions taken in June-October 2010 had fallen in comparison with the same periods in 2009 and 2008. This was probably linked to the necessary "running-in" of the single judge system. At the same time, the number of such cases decided for 2010 as a whole was expected to be higher than that for 2008 or 2009;
- the proposal to reduce the number of single judges to five rather than any other number was because this appeared to be the minimum number required to deal with the draft decisions prepared by the Registry. Also, this would mean just one judge from each Section acting in this capacity at any given time;
- the assistant lawyers that to be recruited in 2011 thanks to a voluntary contribution by the Russian Federation would have the status of Council of Europe officials, no of seconded staff;

Prioritisation of applications

- for every case the relevant Registry lawyer made an initial assessment of the appropriate category of priority. This would be reviewed at each stage of the process, especially by the Judge Rapporteur, to see whether any change was called for;
- the prioritisation policy did not amount to a "pick-and-choose" power being exercised by the Court, the key difference being that no case would be rejected without judicial examination at some stage. Instead, it was a question of effective case management based on clearly identified priorities. The prevailing view within the Court was opposed to a pick-and-choose system;
- once a case had been identified as potentially suitable for the pilot judgment procedure, it would be categorised as Priority II, whilst pending similar applications would be categorised as Priority V;

Information to (potential) applicants

- while applicants were instructed to fill in the admissibility checklist, failure to do so would not exclude their application from examination. The checklist was simply intended to make applicants aware of any clear problems of admissibility, the expectation being that many of them would understand that there was no point in applying to the Court.
- while the admissibility handbook might not be very accessible for a general readership, other information resources were available or were under preparation, such as the case-law guides that had been written by the Court's press service, and an "admissibility clip" that would be made available via the Court's website (subject to funding).

6. The Committee then heard a presentation by Mrs Almut WITTLING-VOGEL (Germany), its Rapporteur on the issues of filtering – a new filtering mechanism and repetitive applications – judicial treatment, of a Further revised report on these issues. The Committee examined and adopted the draft report as it appears at Addendum I. This draft report will be submitted to the CDDH at its meeting on 29 March – 1st April 2011, with a view to possible transmission to the Committee of Ministers as part of the CDDH's interim

report on proposals for measures requiring amendment of the Convention, required by 15 April 2011.

7. During the exchange of views, the following points were emphasised:
- the draft report reflected an interim stage in the Committee's work, in accordance with the CDDH's ad hoc terms of reference, with final, detailed proposals not required until presentation of the final activity report in April 2012;
- although the Committee was not itself in a position to prioritise the existing options, certain experts felt that it would be useful of the CDDH could endeavour to do so;
- the Committee considered it premature to reduce the number of options, partly because the majority were in favour of retaining them, partly because the terms of reference called for "proposals, with different options";
- a few experts wished to express their view that any additional budgetary resources for a new filtering mechanism would have to be found from within the ordinary general budget of the Council of Europe, at the expense of other activities.

Item 4: Papers prepared by the Court's Jurisconsult on the issues of the principle of subsidiarity and on the clarity and consistency of the Court's case-law

8. The Committee held a lengthy and detailed exchange of views with Mr Vincent BERGER, the Court's Jurisconsult, on the Court's notes on Clarity and consistency of the Court's case-law and on the Principle of subsidiarity. Mr Berger stated that the Court had approved the distribution of the two notes in the context of its dialogue with the States parties. They were addressed to the member States as a basis for reflection and were open to further discussion in the light of the comments submitted by several of them.

9. Mr Berger responded as follows to questions concerning the note on clarity and consistency of the Court's case-law:

- consistency of the Court's case-law: the Court attempts to explain in its judgment what are the principles of the case-law that are applied and give reasons in case it departs from them;

- decisions to refer a case to the Grand Chamber and providing reasons for it: providing reasons is not explicitly requested by the Convention, although it was conceivable that such decisions might in future be reasoned; the criteria for allowing or rejecting requests for referral had never been formalised, but in general, requests were usually accepted in the following circumstances: (i) cases raising a new question of interpretation of the Convention, (ii) cases with a particular social, moral or political dimension or, a frequent situation, which concern several states, and (iii) if there is a divergence of views on a particular issue between different Court sections that risked leading to conflicting interpretation of the Convention;

- improvement of HUDOC system: the current problem is how to target the requested case-law and how to find the most recent relevant judgment; several IT companies had been consulted with a view to making improvements to this end and their responses were being analysed prior to making a call for tender; any improvement, however, would carry some cost, albeit it relatively limited, which should be covered by

voluntary contributions;[2] preparing abstracts of judgments would entail significant work which would additionally burden the Registry and detract from other tasks;

- new admissibility criterion introduced by Protocol No. 14: the Court is further clarifying the criterion through new case-law, to date, some 3 decisions had applied the criterion;

- just satisfaction and the Court's tables on non-pecuniary damages: there is no consensus among the judges whether the tables should be publicised; what would be more feasible and reduce the risk of counter-productive consequences would be to indicate the ranges within which awards could be made, taking into account particular circumstances of each case and with adjustment for relative national income levels based on World Bank data; in any case, the Court's case-law was public and provided guidance on the Court's practice.

10. Mr Berger responded as follows to questions concerning the note on the principle of subsidiarity:

- changing the Court's interpretation: it was unlikely that the Court would change its interpretation of the principle of subsidiarity;

- 4th instance cases: concerning a very limited number of issues, such as freedom of expression or prohibition of torture, the Court might in fact act as a 4th instance Court; in these cases, the Court carefully examines all necessary information, including e.g. domestic decisions and medical reports;

- the respective roles of the Court and national authorities: in a number of sensitive cases, such as those including family law issues under Art. 8 ECHR, the Court's judgments are limited to finding procedural violations of the Convention provisions resulting from, e.g. lack of an effective investigation.

11. Ms Laura DAUBAN, the United Kingdom expert, volunteered to prepare a draft collective response to the Jurisconsult's papers based on the views expressed during the Committee's exchange. A preliminary draft text was discussed by the Committee with a view to its revision prior to and further discussion at the Committee's next meeting and subsequent submission to the CDDH at the latter's April 2011 meeting for adoption and eventual transmission to the Court. Experts were invited to send their written comments on the preliminary draft to the United Kingdom expert (laura.dauban@fco.gov.uk) by 31 December 2010.

Item 5: Information to be provided by States parties to the Committee of Ministers by the end of 2011

12. As requested by the CDDH,[3] the Committee exchanged views on the appropriate structure for member States' reports to the Committee of Ministers on implementation of the

[2] One such contribution has already been received from the German authorities.

[3] At its 71st meeting, the CDDH "agreed that the DH-GDR, at its next meeting, should make proposals for an appropriate, simple structure for such national reports. Its proposals could then be considered by the CDDH at its meeting in April 2011, for possible transmission to the Committee of Ministers and subsequently to member States in the first half of 2011" (doc. CDDH(2010)013).

Interlaken Declaration.[4] It considered that specific targeted information was preferable to general reports of a broad scope and invited the Secretariat to prepare a preliminary draft questionnaire, to be addressed to the member States, which would be structured around the relevant elements contained in the Interlaken Declaration. Experts from States that had already begun considering how to provide this information were invited to send concrete proposals to the Secretariat (david.milner@coe.int) before the end of 2010. The preliminary draft questionnaire will be examined by the Committee at its next meeting, when there will also be a need to discuss how the eventual reports would be examined, by whom and to what end.

Item 6: Consultations with civil society

13. The Committee decided to hold a half-day consultation with civil society organisations (including also national institutions for the protection of human rights and similar bodies) on implementation of the Interlaken Declaration at its next meeting (9-11 February 2011). It instructed its Secretariat, in consultation with the Chairperson as necessary, (i) to identify and invite appropriate civil society organisations to participate in the event and (ii) to establish an appropriate format for it.

Item 7: Future activities

14. The Committee took note of the dates of its meetings in 2011: 6th meeting – 9-11 February; 7th meeting – 30 May - 1 June; and 8th meeting – 7-9 September.

15. The Committee considered that the following issues should be addressed during the 6th meeting:

- consultation with civil society: a half-day event;
- fees for applicants: examination of the study to be presented by the expert consultant and consideration of how to conduct a cost-benefit analysis of the various models that would be set out in the study. The Secretariat was asked to begin exploring how such an analysis could be conducted, including by whom;
- advisory opinions: following a proposal by the Dutch and Norwegian experts, the Committee decided to consider whether or not to resume the examination of this issue that it had begun prior to the Interlaken Conference;
- finalisation of the draft questionnaire for States' provision of information to the Committee of Ministers by the end of 2011 and reflection on treatment of the information received, to be submitted to the CDDH;
- finalisation of the collective response to the Jurisconsult's notes on the issues of the principle of subsidiarity and on the clarity and consistency of the Court's case-law;
- Conference on Interlaken follow-up (Izmir, Turkey, 26-27 April 2011): possible CDDH contribution to preparation of the Conference;
- CDDH interim activity report on specific proposals for measures requiring amendment of the Convention: preparation of relevant parts of the draft report.

The Committee also envisaged the possibility of discussing the question of the judicial composition of the Court.

[4] The Interlaken Declaration called upon the States parties to the Convention "to inform the Committee of Ministers, before the end of 2011, of the measures taken to implement the relevant parts of this Declaration" (see "Implementation," para. 3).

Appendix I

List of participants / liste de participants

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Ms Cynera JAFFREY
Mr Christopher TYCZKA

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Appendix II

Agenda (as adopted)

Item 1: Opening of the meeting, adoption of the agenda and order of business

General background documents *(* documents already distributed at previous meetings)*

- Draft annotated agenda	DH-GDR(2010)OJ003
- Report of the 71st meeting of the CDDH (2-5 November 2010)	CDDH(2010)013
- CDDH Final Report on measures that result from the Interlaken Declaration that do not require amendment of the ECHR	CDDH(2010)013 Add. I
- Report of the 4th meeting of the DH-GDR (15-17 September 2010)	DH-GDR(2010)017
- Decisions of the Committee of Ministers on the action to be taken following the Interlaken Conference & Terms of reference of the CDDH and subordinate bodies involved in follow-up work to Interlaken	CDDH(2010)002 *
- Interlaken Declaration	CDDH(2010)001 *
- "Background documents" for the Interlaken Conference	H/Inf (2010) 2 *
- "Preparatory contributions" for the Interlaken Conference	H/Inf (2010) 3 *
- CDDH Activity Report on guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights	CDDH(2009)007 Add. I *

Item 2: Information on relevant events since the last meeting

Background documents

- Committee of Ministers' Resolution CM/Res(2010)25 on member States' duty to respect and protect the right of individual application to the European Court of Human Rights	CM/Res(2010)25
- Synopsis of the meeting of the GT-SUIVI.Interlaken of 12 October 2010	GT-SUIVI.Interlaken(2010)CB6E
- Synopsis of the meeting of the GT-SUIVI.Interlaken of 26 October 2010	GT-SUIVI.Interlaken(2010)CB7E
- Synopsis of the meeting of the GT-SUIVI.Interlaken of 9 November 2010	GT-SUIVI.Interlaken(2010)CB8E
- Report of the 71st meeting of the CDDH (2-5 November 2010)	CDDH(2010)013
- Report of the 1st meeting of the DH-PS (6-8 October 2010)	DH-PS(2010)003

Item 3: Filtering – inadmissible applications & Repetitive applications – judicial treatment

Background documents

Report of the 71st meeting of the CDDH (2-5 November 2010)	CDDH(2010)013

Working document

- Revised draft report on the issues of filtering – a new filtering mechanism and repetitive applications – judicial treatment — DH-GDR(2010)018
- Filtering by whom? Why judges should be vested with the task of filtering and not the registry staff — Position paper (Germany)
- Admissibility Handbook — Court doc. # 3297299
- Questionnaire for applicants — Court document

Item 4: Papers prepared by the Court's Jurisconsult on the issues of the principle of subsidiarity and on the clarity and consistency of the Court's case-law

Background documents

- Court's Jurisconsult's Note on the principle of subsidiarity — Court_#3188076
- Court's Jurisconsult's Note on clarity & consistency of the Court's case-law — Court_#3197955
- Compilation of comments submitted by member States on Court's Jurisconsult's notes on the principle of subsidiarity and on the clarity and consistency of the Court's case-law — DH-GDR(2010)020rev.
- Report of the 71st meeting of the CDDH (2-5 November 2010) — CDDH(2010)013
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Item 5: Information to be provided by States parties to the Committee of Ministers by the end of 2011

Background documents

- Interlaken Declaration — CDDH(2010)002
- Report of the 71st meeting of the CDDH (2-5 November 2010) — CDDH(2010)013

Item 6: Consultations with civil society

Background document

- Report of the 71st meeting of the CDDH (2-5 November 2010) — CDDH(2010)013

Item 7: Future activities

Background document

- Advisory opinions: previous discussions in the DH-S-GDR and CDDH — DH-GDR(2010)019
- Convention system as a subsidiary source of law — Text of Mr O'Boyle's speech at the Skopje Conference

Item 8: Other business

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Appendix III

Presentation by Mr John Darcy of the Registry of the Court

1. Filtering

A. Filtering statistics

The following table puts into perspective the results of the single judge system over the first 5 months of its full operation.

Committee/Single Judge decisions, 1 June-31 October	
2008	**12,948**
2009	**12,734** (11,793 CTE + 941 SJ)
2010	**10,390**

The decrease is not staff-related, since the number of staff working on cases has changed little since 2008. It is more likely to be a combination of two factors: a "running-in" period for the new procedure, as well as the Court's priority policy, the effects of which are only now being fully felt (further details below).
This does not point to an overall drop in the Court's productivity in this area. The number of such cases decided in the period 1 January-31 October 2010 represents an increase of 4% compared to the same period in 2009.
The true impact of the single-judge system can only be properly evaluated over a longer timeframe.

B. New resources for applicants

- Admissibility Checklist. The Court has drawn up a checklist, in the form of simple questions, to make potential applicants aware of the any obvious problems of inadmissibility with the application they intend to submit, and so to discourage them from applying. This is being tested in a small number of countries, beginning with Latvia. The questions, written in the national language, reflect the specific details of available domestic remedies and were drawn up in light of the typical complaints coming from the country concerned. The checklist is sent to applicants along with the official application form. While applicants are instructed to fill out the checklist, failure to do so is not analogous to failure to complete the form, i.e. it will not prevent the normal processing of the application. In the short time since the checklist has been in use (since early October) no difficulties have been signalled to the Registry.
  Similar checklists have been prepared for Germany and Romania.

- Manual on Admissibility. The Registry has prepared a very detailed guide to the Convention's admissibility criteria, with extensive references to the most recent and relevant case law. It has been drafted mainly for a legal, or at any rate an informed readership. It will be published before the end of 2010 on the Court's website in French and English. Translations are planned for 2011, e.g. into Russian and Turkish. The text

presents all of the pertinent grounds and concepts in Articles 34 and 35 of the Convention, as well as the limits to the Court's competence (*ratione materiae*, *loci*, *personae* and *temporis*). It also explains the material scope of the provisions most often relied on by applicants: Article 6, Article 8 and Article 1 of the First Protocol. The final section explains the various meanings of the term "manifestly ill-founded" in the case law of the Court, and explains the first interpretation of the new "no significant disadvantage" criterion. Being an essentially online publication, it is intended to update it as and when necessary.

- Case law factsheets. The Registry has already published a first collection of factsheets on a range of topical human rights issues. They have been prepared as a resource for journalists (published under the Press rubric of the website), but are aimed at a wide readership. The collection will be extended with new factsheets on 10 December.

C. Recent case law

The Court has further developed its case law on the new admissibility criterion, "no significant disadvantage", through a decision adopted on 19 October 2010 in the case *Rinck v. France*, no. 18774/09.
The applicant is a lawyer who was fined 150€ for exceeding the speed limit (51km/h in a 50km/h zone). He also lost one point from his driving license and had to pay a charge of 22€.
He challenged the procedure at each step, calling into question the accuracy of the speed camera and requesting certain official and administrative documents to use in his defence. The first instance court rejected his arguments. The *Cour de Cassation* dismissed his appeal, finding that there was no violation of the right to equality of arms, since the applicant not been denied the possibility of introducing evidence to contradict the evidence of the speed camera.
The applicant then raised the same complaint before the Court – equality of arms.
The Court found that the financial consequences were not significant for the applicant, nor was the loss of a point from his license.
Concerning the second aspect, respect for human rights, the Court found that there was no pressing reason of European public order to justify continuing its examination of the application. Furthermore, the Court's case law on the burden of proof in minor offences and the duty to disclose relevant elements to the defence was sufficiently clear.
The third condition was also satisfied – the applicant's arguments had been duly considered at the domestic level.
This led the Court to conclude unanimously that the application was inadmissible.

2. Priority policy

The Policy was adopted by the Plenary Court in February 2009, and an explanatory note was recently published on the Court's website (link).
There was a manual check of the entire stock of pending cases during 2009. All of these are now graded by priority. While the rule is that a case placed in a higher category will have priority over a case lower down, the Section President may make an exception where there is good reason to do so.

The Court carried out a review of the effects of the Policy in mid-2010, and the findings were endorsed by the Plenary Court in October.
The situation for each of the categories of priority is as follows:

I – Urgent
2,294 cases, over half of which are expulsion cases.
The remaining types of case add up to something less than 1,000. The great majority of these have passed the point of communication stage, and so the adversarial procedure is underway.

II – Highly significant
190 cases. Case processing data show that in the first year of the policy, the number of such cases processed showed an overall increase of 76% compared to cases of this sort during the previous 12 months.

III – Core rights
3,387 cases. The data show that in the first year of the policy, the number of legal acts (judgment/communication) in cases of this type doubled compared to the previous 12-month period (from 400-800). But more than 60% of the cases in this group have yet to be communicated to the Governments concerned.

IV – Normal
19,797 cases. The effect of shifting emphasis to the higher priorities has been a decrease in the number of legal acts in this category of 21% compared to the year before the policy took effect. For States in the low to medium case-count countries, there is no difference. At the other end, the decrease for Russia is twice the overall figure. This is the logical effect of concentrating resources on cases with higher priority.

V – Repetitive
25,188 cases. No decrease in productivity in this category, but an increase of 26%. This is because cases already communicated when the Policy was adopted have been processed in the normal way. Other factors that have kept productivity high: case grouping; friendly settlements and unilateral declarations; simplified judgments.

VI and VII – inadmissible
90,057 cases. While these cases come last in the system of priority, there has been no decrease in the number decided. This shows that no category of case has been abandoned.