



Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

I. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up within the Council of Europe by the Steering Committee for Human Rights and adopted by the Committee of Ministers, was opened for signature by the member States of the Council of Europe on 22 November 1984.

II. The text of the explanatory report prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Protocol, although it might be of such a nature as to facilitate the understanding of the provisions contained therein.

Introduction

1. On 16 December 1966, the General Assembly of the United Nations adopted the International Covenants on Human Rights. In October 1967, the Committee of Ministers of the Council of Europe, aware that problems might arise from the coexistence of the European Convention on Human Rights and the United Nations Covenants, instructed the Committee of Experts on Human Rights to investigate these problems. In 1969 the committee of experts submitted a report to the Committee of Ministers concerning the differences between the rights guaranteed by the European Convention and those covered by the International Covenant on Civil and Political Rights (Doc. H (70) 7).

2. On 23 October 1972, the Parliamentary Assembly of the Council of Europe adopted Recommendation 683 (1972) on action to be taken on the conclusions of the Parliamentary Conference on Human Rights held in Vienna from 18 to 20 October 1971. In this recommendation the Assembly recalled that the objectives of the Council of Europe entailed "not only the maintenance but also the further realisation of human rights and fundamental freedoms". After noting "the work already done for the maintenance of human rights, thanks to the establishment and day-to-day functioning of the European Convention on Human Rights and its Protocols", and emphasising that "the growth of Europe can be soundly based only if it is founded on respect for the human being and if it endeavours to provide an increasingly wide guarantee of his fundamental rights", the Assembly made proposals for a short- and medium-term programme for the Council of Europe in the field of human rights. It recommended, in particular, the study of the question of extending the rights guaranteed by the European Convention on Human Rights. Finally, in its Recommendation 791 (1976) on the protection of human rights in Europe, the Assembly recommended that the Committee of Ministers endeavour to insert as many as possible of the substantive provisions of the Covenant on Civil and Political Rights in the Convention.

3. The aforementioned report of the Committee of Experts on Human Rights (see above, paragraph 1) served as a basis for work undertaken in 1976 by a sub-committee of that body, and later by the Committee of experts for the extension of rights embodied in the European Convention on Human Rights, in the framework of the objectives of the medium-term plans 1976-1980 and 1981-1986 of the Council of Europe, entitled respectively: "Extension of human rights-Extending the human rights set forth in the European Convention on Human Rights and its Protocols (United Nations Covenant on Civil and Political Rights)" and "Extension of the list of civil and political rights and freedoms set forth in the European Convention on Human Rights".

In preparing the new draft protocol to the European Convention on Human Rights, the committee of experts kept in mind in particular the need to include in the Convention only such rights as could be stated in sufficiently specific terms to be guaranteed within the framework of the system of control instituted by the Convention.

4. It was understood that participation of member States in this Protocol would in no way affect the interpretation or application of provisions containing obligations, among themselves, or between them and other States, under any other international instrument.

5. Once the draft protocol was finalised by the Steering Committee for Human Rights, it was transmitted to the Committee of Ministers of the Council of Europe which finally adopted the text at the 374th meeting of the Ministers' Deputies and opened it for signature by member States of the Council of Europe, on 22 November 1984.

Commentary on the provisions of the Protocol

Article 1

6. In line with the general remark made in the introduction (see above, paragraph 4), it is stressed that an alien lawfully in the territory of a member State of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) ⁽¹⁾ of the European Convention on Human Rights, as interpreted by the European Commission and Court of Human Rights and – in those States which are Parties – by the European Convention on Establishment of 1955 (Article 3), the European Social Charter of 1961 (Article 19, paragraph 8), the Treaty establishing the European Economic Community of 1957 (Article 48), the Geneva Convention relating to the status of refugees of 1951 (Articles 32 and 33) and the United Nations Covenant on Civil and Political Rights of 1966 (Article 13).

7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the European Convention on Human Rights in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the European Convention on Human Rights.

(1) In its judgment of 6 September 1978 in the case of *Klass and others*, the Court stated that this article should be interpreted "as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated" (*Case of Klass and others*, Series A, Vol. 28, paragraph 64).

8. Whilst affording "minimum" guarantees, this article contains some important specifications as compared with the United Nations Covenant. In particular, unlike Article 13 of the Covenant, paragraph 2 of Article 1 determines the circumstances in which an alien may be expelled before exercising the rights laid down in paragraph 1.

9. As to its field of application, this article only concerns an alien lawfully resident in the territory of the State in question.

The word resident is intended to exclude from the application of the article any alien who has arrived at a port or other point of entry but has not yet passed through the immigration control or who has been admitted to the territory for the purpose only of transit or for a limited period for a non-residential purpose. This period also covers the period pending a decision on a request for a residence permit.

The word lawfully refers to the domestic law of the State concerned. It is therefore for domestic law to determine the conditions which must be fulfilled for a person's presence in the territory to be considered "lawful" ⁽¹⁾.

The provision applies not only to aliens who have entered lawfully but also to aliens who have entered unlawfully and whose position has been subsequently regularised. However, an alien whose admission and stay were subject to certain conditions, for example a fixed period, and who no longer complies with these conditions cannot be regarded as being still "lawfully" present.

10. The concept of expulsion is used in a generic sense as meaning any measure compelling the departure of an alien from the territory but does not include extradition. Expulsion in this sense is an autonomous concept which is independent of any definition contained in domestic legislation. Nevertheless, for the reasons explained in paragraph 9 above, it does not apply to the refoulement of aliens who have entered the territory unlawfully, unless their position has been subsequently regularised.

11. Paragraph 1 of this article provides first that the person concerned may be expelled only "in pursuance of a decision reached in accordance with law". No exceptions may be made to this rule. However, again, "law" refers to the domestic law of the State concerned. The decision must therefore be taken by the competent authority in accordance with the provisions of substantive law and with the relevant procedural rules.

12. Sub-paragraphs a, b and c of this same paragraph go on to set out three guarantees. Unlike the wording of Article 13 of the United Nations Covenant, the three guarantees have been clearly distinguished in three separate sub-paragraphs.

(1) On this notion of lawful residence", see for example the following provisions:

Article 11 of the European Convention on Social and Medical Assistance (1953):

a. Residence by an alien in the territory of any of the Contracting Parties shall be considered lawful within the meaning of this Convention so long as there is in force in his case a permit or such other permission as is required by the laws and regulations of the country concerned to reside therein. Failure to renew any such permit, if due solely to the inadvertence of the person concerned, shall not cause him to cease to be entitled to assistance;

b. Lawful residence shall become unlawful from the date of any deportation order made out against the person concerned, unless a stay of execution is granted."

Section II of the Protocol to the European Convention on Establishment (1955):

a. Regulations governing the admission, residence and movement of aliens and also their right to engage in gainful occupations shall be unaffected by this Convention insofar as they are not inconsistent with it;

b. Nationals of a Contracting Party shall be considered as lawfully residing in the territory of another Party if they have conformed to the said regulations.

13.1. The first guarantee is the right of the person concerned to submit reasons against his expulsion. The conditions governing the exercise of this right are a matter for domestic legislation. By including this guarantee in a separate sub-paragraph, the intention is to indicate clearly that an alien can exercise it even before being able to have his case reviewed.

13.2. The second guarantee is the right of the person concerned to have his case reviewed. This does not necessarily require a two-stage procedure before different authorities, but only that the competent authority should review the case in the light of the reasons against expulsion submitted by the person concerned. Subject to this and to sub-paragraph c, the form which the review should take is left to domestic law. In some States, an alien has the possibility of introducing an appeal against the decision taken following the review of his case. The present article does not relate to that stage of proceedings and does not therefore require that the person concerned should be permitted to remain in the territory of the State pending the outcome of the appeal introduced against the decision taken following the review of his case.

13.3. Sub-paragraph c requires that the person concerned shall have the right to have his case presented on his behalf to the competent authority or a person or persons designated by that authority. The "competent authority" may be administrative or judicial. Moreover, the "competent authority" for the purpose of reviewing the case need not be the authority with whom the final decision on the question of expulsion rests. Thus, a procedure under which a court, which had reviewed the case in accordance with sub-paragraph b, made a recommendation of expulsion to an administrative authority with whom the final decision lay would satisfy the article. Nor would it be inconsistent with the requirements of this article or of Article 14 of the Convention for the domestic law to establish different procedures and designate different authorities for certain categories of cases, provided that the guarantees contained in the article are otherwise respected.

14. The article does not imply a right for the person concerned or his representative to be physically present when his case is considered. The whole procedure may be a written procedure. There need not be an oral hearing.

15. As a rule, an alien should be entitled to exercise his rights under sub-paragraphs a, b and c of paragraph 1 before he is expelled. However, paragraph 2 permits exceptions to be made by providing for cases where the expulsion before the exercise of these rights is considered necessary in the interest of public order or when reasons of national security are invoked. These exceptions are to be applied taking into account the principle of proportionality as defined in the case-law of the European Court of Human Rights.

The State relying on public order to expel an alien before the exercise of the aforementioned rights must be able to show that this exceptional measure was necessary in the particular case or category of cases. On the other hand, if expulsion is for reasons of national security, this in itself should be accepted as sufficient justification. In both cases, however, the person concerned should be entitled to exercise the rights specified in paragraph 1 after his expulsion.

16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does "not involve a determination of his civil rights and obligations or of any criminal charge against him" ⁽¹⁾ within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6.

(1) Decision of 17 December 1976, Decisions and Reports (DR), Vol. 7, p. 176. See also: Application No. 7902/77, decision of 18 May 1977, DR, Vol. 9, p. 225; Application No. 8244/78, decision of 2 May 1979, DR, Vol. 17, p. 157; Application No. 9285/81, decision of 6 July 1982, paragraph 4, DR, Vol. 29, p. 211.

Article 2

17. This article recognises the right of everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher tribunal. It does not require that in every case he should be entitled to have both his conviction and sentence so reviewed. Thus, for example, if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence. As compared with the wording of the corresponding provisions of the United Nations Covenant (Article 14, paragraph 5), the word "tribunal" has been added to show clearly that this provision does not concern offences which have been tried by bodies which are not tribunals within the meaning of Article 6 of the Convention.

18. Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law, such as the *recours en cassation*. In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law.

19. In some States, a person wishing to appeal to a higher tribunal must in certain cases apply for leave to appeal. The right to apply to a tribunal or an administrative authority for leave to appeal is itself to be regarded as a form of review within the meaning of this article.

20. Paragraph 2 of the article permits exceptions to this right of review by a higher tribunal:

- for offences of a minor character, as prescribed by law;
- in cases in which the person concerned has been tried in the first instance by the highest tribunal, for example by virtue of his status as a minister, judge or other holder of high office, or because of the nature of the offence;
- where the person concerned was convicted following an appeal against acquittal.

21. When deciding whether an offence is of a minor character, an important criterion is the question of whether the offence is punishable by imprisonment or not ⁽¹⁾.

Article 3

22. This article provides that compensation shall be paid to a victim of a miscarriage of justice, on certain conditions.

(1) The Committee of Ministers, at the 375th meeting of the Deputies (September 1984), decided to add this paragraph "having regard to the importance of the explanatory report for the purpose of interpreting the Protocol".

First, the person concerned has to have been convicted of a criminal offence by a final decision and to have suffered punishment as a result of such conviction. According to the definition contained in the explanatory report of the European Convention on the International Validity of Criminal Judgments, a decision is final "if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them" ⁽¹⁾. It follows therefore that a judgment by default is not considered as final as long as the domestic law allows the proceedings to be taken up again. Likewise, this article does not apply in cases where the charge is dismissed or the accused person is acquitted either by the court of first instance or, on appeal, by a higher tribunal. If, however, in one of the States in which such a possibility is provided for ⁽²⁾, the person has been granted leave to appeal after the normal time of appealing has expired, and his conviction is then reversed on appeal, then subject to the other conditions of the article, in particular the conditions described in paragraph 24 below, the article may apply.

23. Secondly, the article applies only where the person's conviction has been reversed or he has been pardoned, in either case on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice - that is, some serious failure in the judicial process involving grave prejudice to the convicted person. Therefore, there is no requirement under the article to pay compensation if the conviction has been reversed or a pardon has been granted on some other ground. Nor does the article seek to lay down any rules as to the nature of the procedure to be applied to establish a miscarriage of justice. This is a matter for the domestic law or practice of the State concerned. The words "he has been pardoned" have been included because under some systems of law pardon, rather than legal proceedings leading to the reversal of a conviction, may in certain cases be the appropriate remedy after there has been a final decision.

24. Finally, there is no right to compensation under this provision if it can be shown that the non-disclosure of the unknown fact in time was wholly or partly attributable to the person convicted.

25. In all cases in which these preconditions are satisfied, compensation is payable "according to the law or the practice of the State concerned". This does not mean that no compensation is payable if the law or practice makes no provision for such compensation. It means that the law or practice of the State should provide for the payment of compensation in all cases to which the article applies. The intention is that States would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge.

Article 4

26. This article embodies the principle that a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted (*non bis in idem*).

(1) Commentary on Article 1. a: Explanatory report of the European Convention on the international Validity of Criminal Judgments, publication of the Council of Europe, 1970, p. 22.

(2) See above, paragraph 19.

27. The words "under the jurisdiction of the same State" limit the application of the article to the national level. Several other Council of Europe conventions, including the European Convention on Extradition (1957), the European Convention on the International Validity of Criminal Judgments (1970) and the European Convention on the Transfer of Proceedings in Criminal Matters (1972), govern the application of the principle at international level.

28. It has not seemed necessary, as in Articles 2 and 3, to qualify the offence as "criminal". Indeed, Article 4 already contains the terms "in criminal proceedings" and "penal procedure", which render unnecessary any further specification in the text of the article itself.

29. The principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. This means that there must have been a final decision as defined above, in paragraph 22.

30. A case may, however, be reopened in accordance with the law of the State concerned if there is evidence of new or newly discovered facts, or if it appears that there has been a fundamental defect in the proceedings, which could affect the outcome of the case either in favour of the person or to his detriment.

31. The term "new or newly discovered facts" includes new means of proof relating to previously existing facts. Furthermore, this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person.

32. Article 4, since it only applies to trial and conviction of a person in criminal proceedings, does not prevent him from being made subject, for the same act, to action of a different character (for example, disciplinary action in the case of an official) as well as to criminal proceedings.

33. Under the terms of paragraph 3, this article may not be subject to derogation under Article 15 of the Convention in time of war or other public emergency threatening the life of the nation.

Article 5

34. Under this article, spouses shall enjoy equality of rights and responsibilities as to marriage, during marriage and in the event of its dissolution.

35. Under the terms of this article, equality must be ensured solely in the relations between the spouses themselves, in regard to their person or their property and in their relations with their children. The rights and responsibilities are thus of a private law character; the article does not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical or labour laws.

36. The fact that spouses shall enjoy equality of rights and responsibilities in their relations with their children shall not prevent States from taking such measures as are necessary in the interests of the children. In this connection, the case-law of the organs of control instituted by the Convention should be noted, relating, in particular, to Articles 8 and 14 of the Convention. As regards Article 8 (right to respect of family life), the European Commission and Court of Human Rights have stressed the need to take account of the interests of the child. As for Article 14 (principle of non-discrimination), the Court has stated that it is violated "if the distinction has no objective and reasonable justification" (Case relating to certain aspects of the laws on the use of languages in Belgium, judgment of 23 July 1968, Series A, Vol. 6, p. 34, paragraph 10).

37. This article, which is concerned with the case of "spouses", excludes the period preceding marriage and does not apply to conditions of capacity to enter into marriage provided by national law (see Article 12 of the Convention). The words "as to marriage" relate to the legal effects connected with the conclusion of marriage.

38. Finally, this article should not be understood as preventing the national authorities from taking due account of all relevant factors when reaching decisions with regard to the division of property in the event of dissolution of marriage.

39. The words "in the event of its dissolution" do not imply any obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution.

Article 6

40. This article deals with the territorial application of the Protocol and corresponds, as to the principle it embodies, to Article 63 of the Convention, Article 4 of Protocol No. 1 and Article 5 of Protocol No. 4, but is formulated in terms which take account of the relevant provisions in the model final clauses adopted by the Committee of Ministers in February 1980.

41. Paragraph 5 specifies that a State which has extended the Protocol to certain territories may treat each of them and the territory to which the Protocol applies by virtue of its ratification, acceptance or approval by that State as separate territories for the purpose of Article 1.

42. It is to be noted that this article is not intended to allow a federal State to exclude acceptance of the Protocol in respect of part of its territory.

Article 7

43. The first purpose of this article is to clarify the relationship of this Protocol to the Convention by indicating that all the provisions of the latter shall apply in respect of Articles 1 to 6 of the Protocol. Among those provisions, attention is drawn in particular to Article 60, under the terms of which "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party". It is clear that this article will apply in the relations between the present Protocol and the Convention itself. Indeed, as has already been mentioned above (see paragraphs 4 and 6), the Protocol cannot be interpreted as prejudicing the rights guaranteed in the Convention and in Protocols Nos. 1 and 4.

44. The second objective of the article is to stipulate that the recognition of the right of individual petition (Article 25 of the Convention) or the acceptance of the compulsory jurisdiction of the Court (Article 46 of the Convention) shall not be effective in relation to the Protocol unless the State concerned makes a statement to that effect. This article thus corresponds to Article 6 of Protocol No. 4, with the difference that States may not choose the rights to which their acceptance of the competence of the Commission and the jurisdiction of the Court extends.

Articles 8 and 9

45. These articles contain the provisions under which a member State of the Council of Europe may become bound by the Protocol. They are formulated in terms which take account of the new model final clauses adopted by the Committee of Ministers.

Article 10

46. This article contains provisions which are now usual regarding the functions of the Secretary General of the Council of Europe as the depository of the Protocol.