

THE EQUALITIES AND HUMAN RIGHTS COMMITTEE
INQUIRY INTO HUMAN RIGHTS AND THE SCOTTISH PARLIAMENT
Visit to European human rights institutions, Strasbourg, France
on 22-24 April 2018

In attendance:

Christina McKelvie MSP (Convener)
Alex Cole-Hamilton MSP (Deputy Convener)
Mary Fee MSP
Jamie Greene MSP

Supported by:

Murray Hunt, Committee Adviser
Claire Menzies, Clerk to the Committee
Nicki Georghiou, SPICe researcher
Angus Evans, SPICe researcher

The European Court of Human Rights

Members met with Stanley Naismith and Pamela McCormack Registry lawyers

Section II of the European Convention on Human Rights established the European Court of Human Rights (the Court) in Strasbourg. The Court oversees the implementation of the Convention in the member states. It can receive applications from any individual claiming to be a victim of a violation of the Convention and gives judgments which are binding on the State concerned. It has the power to interpret the Convention and its interpretations are authoritative.

The Court Process

The Court's judges are elected by the Parliamentary Assembly of the Council of Europe from lists of three candidates proposed by each State. They are elected for non-renewable terms of nine years. Although judges are elected in respect of a State, they hear cases as independent individuals and do not represent that State. They are not permitted to engage in any activity that would be incompatible with their duty of independence and impartiality. For further details see the [Court's webpage on the composition of the Court](#).

Individuals can bring complaints of human rights violations to the Court once all possibilities of appeal have been exhausted in the member state concerned. Admissibility and merits of a case can be considered under four possible judicial formations:

1. **Single judges** which can take decisions on manifestly inadmissible applications.
2. **Three-judge Committees** which can rule by a unanimous vote on the admissibility and merits of cases already covered by well-established case-law.
3. **Seven-judge Chambers** which rule by a majority vote, mostly on the admissibility and merits of a case.
4. **A Grand Chamber of 17 judges** which exceptionally hear cases referred to it either after relinquishment of jurisdiction by a Chamber or when a request for referral has been accepted (i.e. the parties have asked for a Grand Chamber).

“National judges” (i.e. ones of the same nationality as the origin of the case) cannot sit in the single-judge formation. In exceptional cases, they may be invited to sit in a Committee. The composition of the Court always includes the “national judge” when it hears cases as a seven-judge Chamber or a seventeen-judge Grand Chamber.

A plenary of judges only meets to discuss administrative issues and to elect a President.

The Court’s website provides a [flowchart](#) with more detail on the Court process as does the Court’s document “[the ECHR in 50 questions](#)”. See also the [Court’s FAQs on Grand Chambers](#).

Historical background and type of cases

Stanley Naismith explained the historical context to the court and its current workload. He said the Convention was the first international petition system for individuals claiming to be the victim of human rights violations as well as for interstate geo-political situations. Also, cases that were previously handled by the Commission for Human Rights were merged with the Court in 1999.

We were advised that there were more than 800 million potential individual claimants.

The Court has 650 members of staff. Lawyers are grouped by country or region. A single judge is able to reject a case as inadmissible, but not the national judge

The Court works in either English or French, there is no translation.

Pilot judgements allow a judgement to cover groups of similar cases which all raise the same Convention issue, which helps the Court to manage its caseload.

Applicants can apply in most languages. There is no fee although applications must be submitted by post. An individual can self-represent and receive legal aid. If successful, costs can be recovered from the state government. Applications can be rejected for administrative reasons e.g. non-exhaustion of remedies. Consideration

of cases is mostly in written form, rather than through oral evidence. It is possible for a third party to intervene in a case e.g. a non-government organisation or the European Commissioner for Human Rights.

There were currently 50,000 cases pending (this was down from 160,000). 80% of cases originated from Russia and Turkey. Procedures introduced by Protocol 14 had streamlined the number of cases. The Court has also begun to spell out more clearly to States what measures needed to be taken to remedy a violation. “Friendly settlements” occurred where the state accepted there had been a violation. The overriding aim was for subsidiarity i.e. for the domestic court to resolve issues. The majority of the Court’s cases arose under Articles 2 & 3, Right to life and Freedom from Torture; Article 5 Detention, concerning reasonable evidence to detain and length of detention; Article 6, the right to a fair trial including access to a lawyer; and Article 8, the right to respect for Private Life, including secret surveillance. There were a low number of Scottish/UK cases, although these were at times high profile concerning, for example, prisoner voting, the “Naked Rambler”, under Articles 8 and 10; other Article 8 cases related to medical treatment and children, for example, Alfie Evans and Charlie Gard. The themes of immigration and asylum, detention, proceeds of crime and DNA were other common themes in cases currently pending against the UK.

Our attention was also drawn to [Protocol 16](#) (due to come into force August 2018), which allowed national courts to ask the Court for an advisory opinion. It was anticipated this might result in a bigger workload for the Court. The UK is not a signatory to Protocol 16 and this will not therefore be an option in UK cases.

Brexit and the role of parliaments

In relation to Brexit, Mr Naismith said there was “not much concern” about the implications for the Court of Human Rights, although he noted that the public appeared to conflate European institutions including the European Court of Justice and the Court, and that this also applied to the main human rights instruments, such as the Charter of Fundamental Rights and the Convention. On the role of parliaments, he considered states were much less likely to go against Court decisions/observations where parliaments had debated issues thoroughly, and this contributed to subsidiarity. Also, he said Hungary, Poland, Switzerland and Denmark are all discussing coming out of the Convention. Most of the concern was about Article 8 relating to immigration, otherwise there was a lot of support for the system.

Subsidiarity

When asked about whether the Court cares about parliamentary consideration of human rights, Mr Naismith confirmed that the trend towards increased importance of subsidiarity in the international reform process means that parliaments are more important in the ECHR system. There are lots of examples of the court looking closely at the quality of parliamentary scrutiny of Convention issues. The Court is more reluctant to interfere with a law that has been the product of careful, balanced parliamentary debate.

Commissioner for Human Rights

Members met with the current Commissioner, [Dunja Mijatović](#), a citizen of Bosnia and Herzegovina, who was elected Commissioner for Human Rights on 24 January 2018 and who took up the position on 1 April 2018. She was the fourth Commissioner and succeeded Nils Muižnieks.

The delegation from the Scottish Parliament was her first parliamentary delegation since becoming Commissioner. She advised she was currently working with her team to identify her priorities for her term of office and would concentrate on thematic issues which could alleviate the number of cases going to the Court. She explained that her role involved monitoring states progress but also encouraging states to make advances through finding common ground. She expected to announce her priorities shortly. Working with parliaments was a big part of her work and she's impressed by the documents she's seen about the Committee's inquiry.

In preparing for this meeting she told members she had been impressed by the way Scotland had approach human rights, particularly the approach to the Scottish National Action Plan.

The role of parliaments

Her advice to Parliamentarians was to take a human rights-based approach to their work, particularly where case law was not clear or where different approaches to execution of judgments had been taken in different jurisdictions. In relation to consideration of rights, she said she was "allergic to balancing rights, and that sometimes you need boldness".

Also, she advised parliaments should push for human rights impact assessments to be systematised. Incorporation of international human rights into domestic law was also highlighted as meeting best international practice and advised that in some countries UN conventions had direct effect under the constitution, e.g. in the Netherlands. It was vital she said that national human rights institutions (NHRIs) worked independently of government and parliament and had sufficient budget to do so. An area which was felt to be lacking was oversight of implementation of recommendations from international treaty bodies. Although governments were responsible for prioritising recommendations, parliaments needed to hold the government accountable and seek updates on actions. She said this could be done through having an oversight committee and involvement with the Universal Periodic Review (UPR) and that there was a lot of good practice internationally.

Parliamentary Assembly of the Council of Europe (PACE), Legal Affairs and Human Rights Committee

Members met with the PACE Legal Affairs and Human Rights Committee and its staff: Frank Schwabe MdB, Committee Chair; Olena Sotnyk MP, Committee Vice Chair; Guenter Schirmer, Head, and David Milner, Deputy Head of the Department of Legal Affairs and Human Rights which provides the secretariat to the Committee. The Committee's terms of reference are to promote the rule of law and defend human rights. The Current Chair was from the Social Democratic Party in Germany. Chairs were nominated from political groups. The Committee had 84 members. A

quorum of one third was required and about 30/40 members attended at any one time.

The life-cycle of a PACE report

** A **motion** on a particular topic is tabled by a group of members and, if approved, referred to a committee.*

** The committee appoints a **rapporteur**, who – usually after visits or hearings – prepares a report which is first discussed by the committee.*

** The Assembly **debates** the report and may amend the draft text or texts in it before voting to adopt or reject them.*

Current committee business included ‘whistle-blowers’, which was in response to the murder of a journalist in Malta. We heard that draft reports could take 1-2 years to complete. Committees met between Assembly sessions to approve draft reports or hold hearings. Rapporteurs were trusted to undertake investigations and prepare reports for consideration by the Committee and were assisted in this task by the secretariat, which in the case of the Legal Affairs and Human Rights Committee included three Parliamentary lawyers.

Following a debate and voting, the Assembly adopts three types of text:

1. **Recommendations** – these are addressed to the Committee of Ministers
2. **Resolutions** – expressions of its own viewpoint
3. **Opinions** – on membership applications, draft treaties or other issues referred to it

Members were advised that resolutions were used as a device to push government authorities to change, although countries had no obligation to follow recommendations, whilst recommendations, as a consensus view, could be used by the Court.

It was noted that as a devolved Parliament there was no mechanism for Scotland to be part of PACE, however, Members were told there were subjects of inquiry that were of relevance to Scotland: Homophobia, Gypsy/Travellers, hacking and democracy. The Committee advised it was holding a hearing on cyber-sharing where evidence had been taken from Edward Snowden.

Delegation of the European Union to the Council of Europe

Members met with Jari Vilén, Head of EU Permanent Delegation to the CoE and Jose Mendes Bota, First Counsellor High-Level Political and Parliamentary Adviser.

The EU Delegation in Strasbourg is one of the 139 EU Delegations and Offices operating around the world. Its role is to represent the interests of the European Union and its 28 Member States, in the Council of Europe.

Members were advised that the Delegation contributed to establishing a common European position taken together with the Council of Europe and ensured the best possible coordination between the two organisations. In particular, the Head of Delegation chaired the European Union coordination meeting, aimed at discussing the upcoming issues debated in the Council of Europe and at aligning European Union positions to achieve unity.

Other tasks of the delegation included:

- following the work of the Council of Europe in relevant areas and reporting back on progress to Brussels
- providing accurate, timely and relevant political reporting and analysis
- supporting decision and policy-making (including making policy suggestions) in Brussels in respect of Council of Europe issues
- ensuring the representation of the European Union and its active participation in the Council of Europe
- enhancing visibility and understanding of the European Union's role and policies in the areas related to the Council of Europe.

Areas of discussion

In common with what Members heard at the Court, Jari Vilén, also talked about issues regarding Russia and Turkey. There are concerns about their level of participation in the Council of Europe (After Russia's annexation of Crimea in 2014, Russian delegates' voting rights in the Council of Europe's Parliamentary Assembly (PACE) were suspended. That suspension has been renewed repeatedly since. In summer 2017, Russia suspended its annual payment of €33 million to the Council.) as well as these countries' implementation of Court judgements. There is the possibility in 2019 of some positive developments on these fronts.

Talking about the global context, there was discussion about populist and illiberal views which were becoming more prevalent in Europe and elsewhere e.g. a hate campaign in Hungary, not seen since Nazi Germany and of the biggest challenge to the world being was what happened in the USA - this unpredictability affected everything.

The need for the UK/Scotland to keep engaged with European developments post-Brexit was discussed. The possibility of Scotland following the Norway example was referred to, i.e. where people were permanently stationed at European institutions with the responsibility to monitor and report on relevant developments. This could be achieved by taking a 'stagiaire' or intern approach. A further area noted was the UK's approach to prisoner voting rights.

Foundation René Cassin - International Institute of Human Rights

The René Cassin Foundation - International Institute of Human Rights was created in 1959 by René Cassin, the winner of the Nobel Prize for Peace and the first president of the European Court of Human Rights. The institute organises training

sessions each year for lawyers, judges, diplomats, national and international civil servants and members of Government from all over the world, covering topics related to the protection of fundamental rights.

The aim of the Foundation is to protect and promote human rights and fundamental freedoms through teaching and research. It is independent and apolitical and forms links with the European Court of Human Rights, the Council of Europe and the University of Strasbourg, while remaining separate.

In 2015 the name was changed from the International Institute of Human Rights, to the – Foundation René Cassin - the International Institute of Human Rights. The Foundation is chaired by Jean-Paul Costa, another former President of the Court.

Members met with Agathe Petit, Research Assistant, and Nadia Nahman (PhD candidate) advised that as a state-approved foundation it received sponsorship and had 15,000 members since created. They ran a Human Rights Law Clinic which was a two-year course, set up in partnership with the University of Strasbourg. It allowed students to deepen their human rights knowledge, as well as work on real cases. Summer schools were held for three weeks every year. They were composed of courses and conferences given by internationally recognised specialists. This year the summer school would focus on Human Rights Defenders. In 2017 the focus was on Health and International Human Rights Law.

Ms Petit confirmed that the Foundation had no links with the British Institute of Human Rights. She advocated that countries needed to keep up to date with Strasbourg case law. When asked how the Scottish Parliament can keep up with the Strasbourg case law and identify which judgments have implications for Scots law, she pointed to the *Marckx v Belgium* judgment as good example of the Court making the position clear in 1979, but other countries e.g. France not changing its law for more than 20 years. So it is important to monitor the case-law of the Court in cases against other countries, not just your own State, and advise Parliament about it.

Ms Petit offered a private workshop with the Scottish Parliament's Information Centre. They questioned why the focus in the UK was on equalities, rather than human rights, when equality was an aspect of human rights.

On subsidiarity, where national authorities have primary responsibility for implementing ECHR, Parliaments have a particular role. She said it required action from Parliaments and not just reaction, as the aim is to prevent human rights violations.

THE EUROPEAN OMBUDSMAN'S OFFICE

Background

The [European Ombudsman](#) is responsible for investigating complaints about maladministration in the institutions and bodies of the European Union.

Any citizen of a Member State of the Union, or anyone who resides in a Member State, can make a complaint to the European Ombudsman. Businesses, associations or other bodies with a registered office in the Union may also complain to the Ombudsman.

The current Ombudsman is Emily O'Reilly who was elected as the European Ombudsman by the European Parliament in July 2013, and took office on 1 October 2013. She was re-elected in December 2014 for a five-year mandate

Members met with Fintan Butler, Deputy Head of Cabinet and Senior Advisor to EU Ombudsman. He contrasted the work of national ombudsmen, who dealt with issues such as social security, education, housing and respect for human rights, and the work of the EU Ombudsman.

We were provided with examples where human rights had featured in their work.

The Ombudsman had opened an inquiry into Frontex, the EU's border agency, after criticisms from the Council of Europe. The Ombudsman made several recommendations to Frontex, including the requirement for a fundamental rights officer. Frontex didn't accept the Ombudsman's recommendation about the need for a complaints mechanism, but Frontex will develop a complaints mechanism as part of new regulation, so this recommendation was eventually accepted.

Also an NGO had brought to the Ombudsman's attention a forthcoming EU Commission trade agreement with Vietnam. Concerns were raised about women's rights, religious freedom etc. The Ombudsman recommended that EU do a Human Rights Impact Assessment on the deal, but they had refused. In the end, all the Ombudsman could do was criticise the EU commission.

Other areas of interest included:

Lobbying transparency – i.e. contacts between the European Commission and expert groups and businesses which inform policy making. At the end of 2016 the Ombudsman noted in [a decision](#) her strong disapproval of the Commission's stance regarding the transparency of its meetings with tobacco lobbyists.

Transparency in economic and financial decision-making – i.e. public access to material linked to decision-making by bodies such as the Eurogroup (in other words meetings of the finance ministers of the eurozone), the European Central Bank and the European Investment Bank.

Access to EU documents – this has been a key area of concern for the European Ombudsman for many years and the Ombudsman has been involved in multiple cases, many of which have ultimately been decided by the European Court of Justice (see [here](#) for a recent judgment of the Court requiring access to be given to documents produced in the EU's trilogue negotiations.)

Ethical issues – the European Ombudsman has focused on potential issues of maladministration by existing and previous members of the European Commission. A recent example is the [investigation](#) into former Commission President Jose Manuel Barroso's employment with Goldman Sachs.

EU agencies and other bodies – according to the annual report investigations into the activities of EU agencies were the second largest source of enquiries in 2016

EU contracts and grants – complaints cover areas such as disputes over how projects are audited or the amount of money that potentially should be reclaimed.

In discussing the work of the EU Ombudsman Mr Butler emphasised that under the EU Charter of Fundamental Rights, Article 41, there was a right to good administration and highlighted the Ombudsman has a fast-track complaints procedure.

Members were interested in the EU Ombudsman's powers and in particular her enforcement powers and how these compared to the Scottish Public Services Ombudsman. Mr Butler explained the EU Ombudsman had quite wide discretion to deal with infringements and complaints, for example it could take an issue to the Court or look into maladministration issues. He explained that the public however had a misperception that you could bring a complaint against a member state and that a ruling would have a bearing on an individual case.

There was some discussion of transparency and the balance between disclosure, for example around legal advice. Mr Butler commented that Freedom of Information in the UK and Ireland had increased transparency, but not across all Member States. Diverse views and a lack of political will meant it was unlikely to widen powers to require disclosure of legal advice.