

Implementation of Judgments of the European Court of Human Rights:
Opportunities and Challenges for the Rule of Law

Event Report

Date: 15 May 2017

Venue: The Bingham Centre for the Rule of Law

Speakers:

- Merris Amos (Reader in Human Rights Law, QMUL)
- Dr Ed Bates (Associate Professor, Leicester Law School)
- Eleanor Hourigan (Deputy Permanent Representative, UK Delegation to the Council of Europe)
- Nuala Mole (Founder and Senior Lawyer, The Aire Centre)
- Prof Philip Leach (Professor of Human Rights Law and Director of the European Human Rights Advocacy Centre (EHRAC), Middlesex University London, and Vice-Chair of the European Implementation Network (EIN))

Chair:

- Murray Hunt (Legal Adviser to the UK Joint Committee on Human Rights and Incoming Director, Bingham Centre for the Rule of Law)

Organisers:

- This event was organised by the Bingham Centre for the Rule of Law and the University of Leicester. It was convened by Lucy Moxham (Associate Senior Research Fellow, Bingham Centre for the Rule of Law) and Dr Ed Bates (Associate Professor, Leicester Law School).

Murray Hunt gave some opening remarks. He explained that the role of the Joint Committee on Human Rights (JCHR) has evolved into publishing a periodic scrutiny report on the government's response to human rights judgments, particularly from the Strasbourg Court (see for example, [this report](#) from 2015). He noted that Lord Bingham's eighth rule of law principle, state compliance with international law obligations, makes it especially clear that national implementation of international human rights judgments is a crucial rule of law issue. Hunt emphasised that overt defiance of the courts is rare and that a failure to implement judgments (as we see in the UK case of prisoner voting) is a persistent problem and an insidious threat to the rule of law.

Merris Amos discussed the UK's record on implementation of ECtHR judgments and recent developments in the UK. Amos noted that there are a range of mechanisms in the UK (such as the Human Rights Act 1998 and the JCHR) which are geared towards preventing human rights violations. However, she noted that two key groups of Strasbourg cases against the UK remain to be implemented: those concerning the blanket ban on prisoner voting; and those relating to

deaths involving security forces in Northern Ireland in the 1980s and 1990s, and the subsequent investigations. As regards prisoner voting, the Grand Chamber of the European Court of Human Rights handed down its judgment in *Hirst (No. 2)* in 2005, finding a violation of the ECHR. In 2007, it was reported that a Scottish Court had issued a declaration that the blanket ban on prisoner voting was incompatible with their human rights. Amos noted that the language has hardened in the [Ministry of Justice's most recent report](#) on human rights judgments: "The Government is clear that the UK's policy on prisoner voting is well established and remains a matter for the UK Parliament to determine". In the Northern Ireland cases, however, Amos believed that there was genuine desire and political will to move forward towards agreement with key stakeholders on these issues.

Amos then discussed three broader threats to implementation in the UK. First, she considered government proposals to repeal the Human Rights Act 1998 and introduce a new British Bill of Rights. Amos noted that proposed changes would weaken human rights protection on the UK, which would inevitably damage the UK's currently positive relationship with the Strasbourg Court. (The [2015 Conservative manifesto](#) stated that "The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights" and that "This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK". In its [2017 manifesto](#) however, the Conservative party stated "We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes" and that "We will remain signatories to the European Convention on Human Rights for the duration of the next parliament".)

Second, Amos highlighted the modification of the meaning of certain Convention rights under national law. In this respect, she cited the Court of Appeal's recent judgment in [Rhuppiah v Secretary of State for the Home Department \[2016\] EWCA Civ 803](#), which considered the meaning of a number of provisions in Part 5A of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014), which bear upon the assessment of Article 8 claims.

Lastly, Amos noted that some issues are becoming increasingly politicised. Here she referred to the 2011 landmark judgment of the Grand Chamber of the European Court of Human Rights in *Al-Skeini and Others v UK* (a case concerning six civilians killed in Iraq in incidents involving British soldiers), which found that the victims fell within the UK's jurisdiction and held that the UK had breached the procedural obligation under Article 2 to carry out an adequate and effective investigation into five of the deaths. She noted that this issue has subsequently become highly politicised with the [government's recent announcement](#) of its intention to protect UK armed forces from "persistent legal claims by introducing a presumption to derogate from the European Convention on Human Rights (ECHR) in future conflicts".

Amos concluded that, while in some states non-implementation may be a question of a lack of resources, the UK grapples almost solely with political obstacles. She suggested we need a new conversation in the UK in particular about the place and role of international human rights law and international supervision.

Dr Ed Bates looked at the wider picture, reflecting on the [Committee of Minister's 2016 Annual Report](#) to assess the state of implementation across the Council of Europe. He started by highlighting several grounds for optimism, noting that: the number of pending cases fell below 10,000 in 2016 for the first time since 2010; a record number of cases were closed (2066); and there were more "leading cases"¹ closed (282) than there were new leading cases transmitted for supervision (206). There was also an increase in the number of leading, "enhanced supervision cases"² that were closed in 2016.

While the message from the Committee of Minister's report is relatively positive in its assessment of implementation, the numbers may show a different picture. For example, Bates suggested that recent achievements must be qualified by the fact that the number of leading cases pending has actually remained relatively constant over recent years; and since there were 1493 leading cases pending at the end of the year, it will be many years until they are all closed. In addition, the number of leading, enhanced supervision cases that were closed in 2016 (only 45) is very small when seen in the wider picture (although it is positive that 816 enhanced supervision cases were closed in 2016). Furthermore, the influx of enhanced supervision cases remains high (295 out of a total 1352 new cases) and similar to recent years; and, while we see a positive downward trend in the number of pending enhanced supervision cases, the number of such cases remains very high (5950 out of a total 9941 pending cases).

Bates then identified several grounds for serious concern. First, he considered prolonged implementation. There are a growing number of leading cases that have been pending for more than five years (in 2016, almost 50% of leading cases that are pending, have been pending for over five years (compared to approx. 7% in 2010)). Of leading cases pending for more than five years, the proportion of those under enhanced supervision has also increased (from 110 in 2011, to 171 in 2016). Second, he emphasised that the main themes under enhanced supervision typically relate to actions of security forces, conditions of detention, the lawfulness of detention, right to life / protection against ill-treatment, length of judicial proceedings, and the execution of domestic judicial decisions – reflecting particularly significant rule of law areas. Third, he noted that pending enhanced supervision cases relate disproportionately to countries like Russia, Ukraine, Turkey, who together account for 44% of cases under enhanced supervision (based on leading cases). Finally, he highlighted other signs for concern including for example a decrease in the payment of just satisfaction within the deadlines.

Finally, Bates reflected on some of the challenges to implementation across the Council of Europe. He noted that the Committee of Minister's 2016 Annual Report refers to four key challenges, including those linked to "*Important and complex structural problems*"; "*The absence of a common understanding as to the scope of the execution measures required*"; "*Slow*

¹ Leading cases are defined as cases which have been "identified as revealing new structural and/or systemic problems" and which require "the adoption of new general measures to prevent similar violations in the future".

² Enhanced supervision is defined as the supervision procedure for "cases requiring urgent individual measures, pilot judgments, judgments revealing important structural and/or complex problems" and is "intended to allow the Committee of Ministers to closely follow progress of the execution of a case, and to facilitate exchanges with the national authorities supporting execution".



or blocked execution”; and “A refusal to adopt, notwithstanding strong insistence from the Committee of Ministers, the individual measures required or to pay just satisfaction – situations which frequently hide more fundamental disagreements with the Court’s conclusions or the requirements of execution”. He commented that the fourth category here is concerning – What is meant by situations which “hide more fundamental disagreements”? What examples of this are there? Does the sheer number of cases involved help or hinder the member states to “hide” in this way?

In conclusion, Bates referred to recent statements of concern from key, senior Council of Europe figures which he said indicate a growing threat of resistance and a direct challenge to the authority of the Court. For example, the [Commissioner for Human Rights Nils Muižnieks commented](#) in August 2016 that “In recent years direct challenges to the authority of the Court within a handful of member states have also become more explicit and vocal. They have gone beyond prolonged non-implementation of a few of the Court’s judgments. They are of particular concern because the integrity and legitimacy of the Convention system is at stake”. He continued, “... the Convention system crumbles when one member state, and then the next, and then the next, cherry pick which judgments to implement. Non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer”.

Similarly, in a speech in January 2016 the [Secretary General Thorbjørn Jagland stated](#) “There have always been those who challenge the authority of international institutions, but these forces have slipped into the mainstream – and they are gaining traction. When we join the dots, the danger to our Convention system begins to feel very real indeed” and “When individual states ignore their obligations, or when there are attempts to pick and choose which rules should be followed and which should not, it pulls at the very fabric of the Convention, and if it begins to unravel, it will be very difficult to stop”. In conclusion, Bates asked, how then should the Committee of Ministers and the Convention system handle this threat of open conflict?

For more information, see Dr Bates’ presentation [here](#).

Eleanor Hourigan provided a government perspective “from the inside” on the execution process and the role of the Committee of Ministers. She spoke in her personal capacity. First, she spoke about how the execution process works in practice. The Committee of Ministers first classifies a case as requiring standard or enhanced supervision. This normally takes place at the first DH (human rights) meeting after a judgment becomes final. She clarified that cases can move between the two procedures. For cases under standard supervision, the Committee will not normally be particularly involved until the respondent country’s Action Report is submitted and, where all the necessary measures have been taken, supervision is then closed by the adoption of a Final Resolution.

A state has six months from the judgment becoming final to submit an Action Plan (or Action Report) on the steps they plan to take (or have already taken) to implement the judgment. These cover three points (as applicable to a given case): 1) just satisfaction, 2) individual measures, and 3) general measures. Hourigan observed that general measures are typically the more difficult to implement, as they can require broader structural reform or legislative change. The



Committee of Ministers will then supervise implementation and the state will submit an Action Report when it believes it has taken all necessary measures to implement the judgment. Hourigan noted that in most cases, the member state will work with the Department for the Execution of Judgments (DEJ) to progress a case as swiftly as possible. The last stage of the process is the Committee of Ministers adopting a Final Resolution, closing the case.

Second, Hourigan explained what occurs at the “DH meetings” (i.e. execution of human rights meetings). DH meetings occur quarterly, usually for three days at a time, and provide a forum for discussing cases under the Committee’s supervision. She noted that there is a rotating chairmanship of the Committee of Ministers, and the incoming Committee Chair chairs the DH meetings with the support of the Secretariat. In theory, all cases can be on the Agenda and therefore discussed; however in reality, the discussions focus on (some of) the cases under enhanced supervision. So, those cases listed on the Agenda will not all be discussed and they tend to prioritise cases where there are challenges to implementation and where discussion will help progress a case. Hourigan emphasised that there is an overriding focus on what will benefit from discussion in that forum and suggested that sometimes more progress towards implementing a judgment can be made outside of the DH room, for instance through visits, initiatives or projects in country – rather than focusing solely on DH debates. Hourigan commented that the DH process can lead to the same cases being discussed at DH meetings (to the exclusion of other deserving cases) which, in general, is inefficient and should be avoided. This is especially so since states only have a couple of weeks following one DH meeting to submit an Action Plan in order to meet the deadlines of the next DH meeting – so unless used carefully, this could risk more effort being put into servicing the DH process than on actual implementation. However, cases requiring urgent individual measures do merit being addressed at each meeting and specific rules deal with this.

Hourigan explained that they might expect to cover, say, two or three cases in the morning session and four in the afternoon. The respondent state usually makes a statement first. Subsequent member state interventions are capped at three minutes. In some cases, draft decisions are issued in advance. States might then intervene, for example, to call for further progress to be made, to ask questions around implementation, to welcome progress made, or to suggest amendments to the draft decision etc. In other cases, no draft decisions are put forward and, in such cases, the debate informs the decision. Informal side meetings can be needed in the margins of DH if states are not in agreement on a draft decision.

Third, Hourigan offered some reflections on what works well and some of the challenges. She cautioned against looking at the execution process in isolation from the Court and suggested implementation should be viewed in the context of a feedback loop which goes both ways – increased and better-quality implementation means fewer and less difficult cases coming to the Court; equally, well-reasoned, clear judgments were generally easier to implement. Hourigan also noted that a constructive tool to help implementation could lie in securing funding for projects in country (around e.g., justice sector reform). If the rule of law is not working properly in a member state, then the same issues will keep coming back to the Court. Hourigan questioned whether it is helpful to focus on individual cases having very different natures or whether we should also include a thematic focus which would offer an opportunity to share best

practice on particular issues. Finally, she noted that a significant number of complex cases frequently discussed in DH meetings are about complex jurisdictional issues and effective control.

Nuala Mole reflected on her 20+ years of experience litigating before the European Court of Human Rights, and commented on obstacles to effective execution and limitations of the supervision process. She highlighted the untapped potential of the infringement procedure under Article 46(4) of the Convention, which was introduced by Protocol No. 14. Article 46(4) provides that if the Committee of Ministers considers that a state “refuses to abide by a final judgment in a case to which it is a party”, the Committee may refer the case to the Court and ask whether the state has failed to fulfill its obligations under Article 46(1). The infringement procedure has never been used and Mole suggested that there is a reluctance to invoke it as it is perceived by the Ministers’ Deputies as a “nuclear option” and there is a fear of fragmentation of the Convention system. She suggested that rather than directing the measures to one single state, it might be seen as less targeted criticism if a number of cases were grouped together and referred back to the Court, and if this were to happen more or less automatically under certain conditions. Practically speaking, it is not clear what is required in order to trigger Article 46(4) – Is it enough that a state has failed to implement a judgment or must there be an explicit refusal to do so? What are the consequences of an adverse judgment under Article 46(4), except issuing another judgment?

Mole then identified four key obstacles to the effective and efficient implementation of judgments. First, a lack of resources – She noted that the DEJ lacks the resources to process case documents and has a skeletal staff, without even one lawyer from each jurisdiction of the Council of Europe familiar with the language and legal system of the case in question. Second, many governments face logistical difficulties in implementing Strasbourg judgments even where they have the political will to do so – For example, she highlighted the need to coordinate the agreement of several government departments or public authorities, a shortage of parliamentary time, intervening elections, and difficulties finding the necessary budgetary resources to put the reforms into effect. Third, governmental indifference, especially as regards repetitive cases – Here, Mole also noted that in states which have a systemic failure to execute their own national judgments, failing to execute a judgment of the European Court of Human Rights has less psychological impact.

Finally, she noted that governments can be politically intransigent and here she noted differences between member states on the same issues (e.g., prisoner voting) – While noting that these types of cases are very rare in practice, Mole thought they are “absolutely impossible to overcome”. She concluded by noting that the execution of judgments is a key feature of the rule of law and it is important that a mechanism exists to uphold the rule of law and the efficient and effective execution of judgments. In her view, the Convention system is as necessary today as it was when it was first created.

Prof Philip Leach provided a practitioner perspective on the execution process and possible reform options. He began by highlighting a positive example of implementation, which demonstrates the potential of the Convention system to effect concrete change. In [Oleksandr](#)

[Volkov v Ukraine \(Application no. 21722/11\) \(2013\)](#), the applicant, who had been dismissed from his position as a judge of the Supreme Court in Ukraine, was reinstated following the Court's judgment; and as regards general measures, laws regarding the appointment and removal of judges are currently undergoing substantial reform to prevent political interference in the process. However, Leach then went on to consider several cases against Russia arising out of the conflict in Chechnya. He noted Russian intransigence in the face of adverse Strasbourg judgments, with many judgments relating to the Chechnyan conflict remaining unimplemented.

Like Mole, Leach also addressed the Article 46(4) infringement procedure and suggested its effective use was crucial for fulfilling the collective duty of member states. He noted the lack of political will to use the mechanism and asked why. Is it the countries involved? Is it the lack of sanctions? Is there a concern that if the infringement procedure is used and the member state still does not abide by the judgment, then what are we left with? Leach noted that the Committee of Ministers has raised the possibility of invoking the infringement procedure for the first time in respect of Azerbaijan's repeated refusal to release Ilgar Mammadov (see discussion of that case and the Article 46(4) procedure [here](#) and [here](#)).

Leach then discussed two groups of cases to demonstrate the potential of the Convention system, but he also acknowledged the real difficulties around implementation. First, [Sargsyan v Azerbaijan \(Application no. 40167/06\) \(2015\)](#) and [Chiragov and Others v Armenia \(Application no. 13216/05\) \(2015\)](#), cases which relate to a loss of homes, land and property as a result of the Nagorno-Karabakh conflict. In both cases, the Grand Chamber was innovative in recommending a property claims mechanism be established to enable the applicants (and others in their situation) "to have their property rights restored and to obtain compensation for the loss of their enjoyment". While acknowledging the complexities of this decades-long conflict, Leach argued that the Council of Europe has the possibility (and arguably the responsibility) of having an impact here, to assist the large numbers of people affected by this conflict.

Second, [Rasul Jafarov v Azerbaijan \(Application no. 69981/14\) \(2016\)](#), which concerns the unjustified arrest and detention of a human rights defender. The Court found that "the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights" and found violations of Articles 5 and 18 of the Convention. Leach saw significant potential in the Court's use of the (fairly obscure) Article 18 provision to find in the applicant's favour here and asked what implementation requires in Article 18 cases. Does it require re-trial or re-opening of proceedings in the national system, as we often see in Article 6 fair trial cases?

Leach made a broader point about the risks of contagion further afield from anti-Strasbourg sentiment. For example, in 2015, Russia passed a law enabling the Constitutional Court to declare the rulings of international bodies "impossible to implement". Then, in 2016, the Russian Constitutional Court ruled that it was impossible to implement the final judgment of the European Court of Human Rights in the prisoner voting case [Anchugov and Gladkov v. Russia \(Applications nos. 11157/04 and 15162/05\) \(2013\)](#) (see discussion [here](#)). More recently, in January 2017, the Constitutional Court ruled that Russia was not bound to implement the

European Court of Human Rights decision in the Yukos oil company case, as it would violate the Russian Constitution (see discussion [here](#)).

Leach noted that the Russian law discussed above should raise serious concerns about its degrading effect on the legitimacy and effectiveness of the Convention system. He also noted that the [Commissioner for Human Rights Nils Muižnieks had commented in 2013](#) that the UK's continued non-compliance with the prisoner voting judgments "... would have far-reaching deleterious consequences; it would send a strong signal to other member states, some of which would probably follow the UK's lead and also claim that compliance with certain judgments is not possible, necessary or expedient. That would probably be the beginning of the end of the ECHR system, which is at the core of the Council of Europe".

Against this background, Leach questioned where we will get with implementation of judgments in key cases such as [Roman Zakharov v Russia \(Application no. 47143/06\) \(2015\)](#) concerning secret surveillance of mobile phone communications; and [Tagayeva and Others v Russia \(Application no. 26562/07 and 6 other applications\) \(2017\)](#) concerning the Beslan school siege in 2004. In response to the Tagayeva judgment from the European Court of Human Rights, Russia is [reported](#) to have said that the ruling was "utterly unacceptable" and that it would appeal.

On possible reforms to the supervision process, Leach called for increased openness and accessibility of the Committee of Ministers, especially in those cases which come back before the Committee on a regular basis. In response to those who suggest that this would prevent confidential discussion, Leach argued that increased transparency might be necessary in cases where no progress has been made. He suggested that the Council of Europe's Parliamentary Assembly (PACE) might have a role to play here, for example, in holding hearings with member state officials. Leach thought that a task force or expert group within the Committee of Ministers process may also be helpful in raising the profile of specific cases, undertaking country visits and allocating more resources to the Department for the Execution of Judgments.

For more information, see Prof Leach's presentation [here](#).

The panel was followed by a Q&A session with the audience.

This report was prepared by Lucy Moxham, Associate Senior Research Fellow at the Bingham Centre for the Rule of Law, with assistance from Victoria Wicks, a volunteer research intern.