# Reform of the European Court of Human Rights

A draft report: would closer co-operation with national senior courts help?


# Contents



## Contributors

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# Section 1: Introduction

# Background of reforms

1.1 The Committee of Ministers of the Council of Europe is embarking on a debate about the reform of the European Court of Human Rights (the ***ECtHR***). That debate is the product of a reform process commenced in 2010 at the Interlaken Inter-Governmental Conference and pursued through successive subsequent high level conferences (together the ***Interlaken Process***).[1]

1.2 The Interlaken Process has sought to develop initiatives for the reform of the ECtHR broadly within the confines of its current structure and jurisdiction. Significant reforms have been achieved, notably including the entry into force of Protocol No 14[2] which adopted a single judge composition as well as expanding the competence of Committees of three judges. Protocol No 15[3] is poised to enter into force, reducing the time limit for lodging applications and emphasising the subsidiarity of the ECtHR: human rights protection begins in the domestic courts.

1.3 The Interlaken Conference set a ten year timetable for the assessment of the adequacy of these reforms, leaving open the question, whether 'more profound changes',[4] going beyond the current structures of the ECtHR, would in fact be necessary to enable the ECtHR to function effectively in future.

1.4 Other materials have been developed over some fifteen years of reviewing the prospective development and reform of the ECtHR and the Convention system as a whole, especially by the Steering Committee for Human Rights (CDDH), in its 2016 Report, *The longer-term future of the system of the European Convention on Human Rights*, together with the ECtHR's comments on that Report[5] as well as a variety of earlier material.

1. The Interlaken Conference (2010) has been followed by Izmir (2011), Brighton (2012), Oslo (2014), Brussels (2015) and Copenhagen (2018). Details of the Court's contributions to each and their respective declarations are at https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=
2. Protocol No 14 was opened for signature on 13 May 2004, but only came into force on 1 June 2010
3. Opened for signature on 24 June 2014 and largely the fruit of the Brighton Conference
4. Interlaken Declaration of 19 February 2010: Implementation Point 6: 'Before the end of 2019 the Committee of Ministers should decide on whether the measures adopted have proven to be sufficient to assure the stable functioning of the control mechanism of the Convention or whether more profound changes are necessary.'
5. https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4 The Court's response to the Report is at https://www.echr.coe.int/Documents/2016_Comment_on_CDDH_report_on_longer-term_future_of_Convention_ENG.pdf

# The ECtHR's overload

1.5 No plan for reform can be realistic without a review of what the ECtHR is doing and the progress, and lack of it, which has been made in recent years to improve the throughput of cases.

1.6 The ECtHR's declared aim is to process substantial (but not exceptional) cases in two years to judgment. That aim is optimistic without substantial further reform. Of ten judgments given at the end of February 2019, three had taken just under three years from lodging to judgment,[6] five had taken between eight and nine years,[7] one[8] had taken eleven years and the longest fifteen years. [9]

1.7 Over recent years, thanks to the adoption of a single judge composition for inadmissibility decisions by virtue of Protocol No 14, the total number of pending cases has fallen from 150,000 in 2010 to 56,350 currently. This has been achieved by the ruthless weeding of hopeless applications.

1.8 However, the numerical reduction of pending applications does not reflect the faster processing of more complex cases. In 2018 the total number of judgments given by the ECtHR was stable at little over 1,000, and thus only two thirds of the number which the ECtHR achieved for five years between 2006 and 2010.[10] Although the docket of allocated applications fell back, the ECtHR acknowledges that some ten thousand serious, novel, i.e. non-repetitive, cases are pending awaiting their first judicial examination. As of the end of 2018 more than 1,500 such cases, equivalent to the ECtHR's maximum annual output of judgments, had been awaiting that first judicial examination for over ten years.[11] Given that that first judicial examination is likely to involve communication to the respondent Government, these backlog cases are at the beginning of the procedure, not near the end.

1.9 Special efforts will be required within the ECtHR to address this backlog, quite apart from new streamlined procedures for handling the comparable number of repetitive cases which require less close scrutiny. Similarly, the supervision of the execution of judgments also needs acceleration if delays in the ECtHR are not simply to be replicated in the Committee of Ministers, where the execution of judgments in a stubborn core of 700 cases have been under enhanced supervision for over five years.

6. No 4755/16, Beghal v UK Arts 3 & 8, No12267/16 Khan v France Art 3 and No 19951/16 HA and others v Greece Arts 3, 13 & 5
7. Cases concerning Georgia (Art 3), Bulgaria (Art 6(2)) Turkey (Art 3) and Ukraine (Art 6) lodged in 2010 or 2011
8. No 35432/07 Mammadov v Azerbaijan involving violations of Arts 2 (substantive and procedural), 3 and 5
9. No 19788/03 Ionescu and others v Romania concerning violations of A1P1
10. In 2016 there were 993 judgments, in 2017, 1068 and in 2018 there were 1014 judgments, some of which dealt with more than one application. Between 2006 and 2010 the Court gave between 1499 (in 2010) and 1625 (in 2009) judgments annually; similarly some judgments dealt with more than one application.
11. The cases concern Albania, Armenia, Azerbaijan, Georgia, Italy, Moldova, Poland, Russia, Serbia, Switzerland, Slovenia, Turkey and Ukraine

# The proposal for co-operation with Senior Courts

1.10 In short, reforms are needed to accelerate the throughput of pending cases and to improve the speed of national execution and its supervision by the Committee of Ministers. The ECtHR has already shown great ingenuity in adapting its procedures in recent years and greater efforts and new ideas will be required. Certainly respondent Governments will have to come good on their oft-repeated commitments to the prompt and effective execution of judgments.[12]

1.11 However, vital though those reforms are, if current cases before the ECtHR are to be dealt with in anything like a reasonable time and the credibility of the European Convention on Human Rights (the ***Convention***) machinery is to be preserved for the future, more needs to be done to address the scale of applications which are made to the ECtHR and to accelerate the initial *triage* of new cases. If the right of individual application is to be preserved, the burden of its operation must be shared if the ECtHR is not simply to be submerged under the weight of new applications.

1.12 It is with this prospective view that the present report advocates a new measure of co-operation between the senior national courts (the ***Senior Courts***) and the ECtHR (the ***Proposal***). The Proposal recognises the subsidiary, though essential, role of the ECtHR and the primary role of national courts in the protection of human rights. The object of the Proposal is to concentrate on the handling of human rights cases in the Senior Courts so as to make clear the way in which Convention arguments have been raised and dealt with in domestic proceedings and to identify judicially the importance of the issues raised from the perspective of the national legal system.

1.13 This Proposal envisages the adoption of a rule of procedure or a practice by Senior Courts to the effect that, in any judgment rejecting a claim based on the Convention, the judgment should state in a defined part, and not spread out in different parts of the judgment, a succinct statement of the reasons for dismissing the Convention claim and of the significance of that claim.

1.14 As a first step this approach is rooted in the recognition that the protection of human rights is primarily the responsibility of the national courts. The Proposal, if implemented, may enhance and should clarify the extent to which Convention arguments have been deployed in the national appeal process and are analysed in the Senior Courts and the reasons why those arguments were unsuccessful. In addition, the Senior Courts would be expected to indicate the importance of the issues raised in the appeal, applying their local knowledge to that assessment. This approach is described in what follows as 'endorsement'.

1.15 In those cases where the applicant then chose to apply to the ECtHR, they would be able to rely on the endorsement to show, not merely that they had exhausted domestic remedies, but what the heart of the Convention issues in the case were and, in appropriate cases, that the Senior Court had indicated that, in its opinion, the case was of significance in the national legal order.

1.16 The ECtHR for its part would be assisted by the national endorsement in various ways, both with the immediate *triage* of the new application and in the subsequent prioritisation and handling of the case. Nevertheless, the ECtHR could accommodate endorsements without amending the Convention or even its existing Rules. These issues are explored further in Section 5 of this report.

12. These commitments are set out more fully that previously in the Brussels Declaration and the Copenhagen Declaration. The scale and urgency of this issue should not be underestimated; https://rm.coe.int/copenhagen-declaration/16807b915c especially at paras 21 to 25.

1.17 The report deals first in Section 2 in greater detail with the scope and content of the endorsement Proposal and what an endorsement should contain. This is a question which can be viewed first from the perspective of the relevant Senior Court, which is seeking to explain the rejection of the Convention arguments in a succinct and conclusive manner, so that the reasons for the rejection of the appeal are clear and decisive. Similarly the content of the endorsement will obviously affect the value of the endorsement to the ECtHR.

1.18 Section 3 of the report draws comparison with the operation of comparable systems of assessment in other legal contexts. The first comparison is with the United Kingdom court practice of permission to appeal, and particularly with the 'certification of points of law of public importance' as a precondition for certain appeals. While every legal system would adapt its existing procedures to accommodate the endorsement proposal in its own way, the experience of permission and certification in the UK is one example of the way in which endorsement could operate and may provide a useful point of comparison for other jurisdictions. The operation of permission in relation to judicial review claims and in appeals is briefly summarised in Appendix 1 and the statistical information about the operation of appeals to the UK Supreme Court are set out in Appendix 2.

1.19 The comparison is continued by reference to the experience of references to the CJEU as a means of assessing, again by comparison, whether the endorsement proposal would be likely to impose an undue burden on Senior Courts. The procedure for references is briefly described in Appendix 3. Comparison and, more especially, contrast should also be made in due course with the ECtHR's new advisory responsibility under Protocol 16 which has now been ratified by 10 of the 22 signatories to the Protocol.[13] As the ECtHR has only just given its first advisory opinion in the first reference under this provision, this analysis will have to be added to the present draft.

1.20 Section 4 consists of a brief review of the relevant procedures for amending the rules of court or practice of a selection of Senior Courts in several European jurisdictions. This initial survey underlines the devolved responsibility for human rights protection which is implicit in the Proposal: each national legal system will adapt and adopt the endorsement approach in accordance with its own legal traditions and systems.

1.21 It is an important aspect of the endorsement proposal that it does not require the adoption of a Protocol to the Convention. The ECtHR needs reforms which can be implemented without the inevitable delays that drafting a Protocol and awaiting its ratification by all parties to the Convention imply. A further advantage of the Proposal is that the procedure of endorsement can be brought into operation progressively, at a pace reflecting the capacity of the relevant Senior Courts concerned, although it is to be hoped that its implementation will be as rapid as possible so that it can contribute to alleviating the current pressure of new applications on the ECtHR. The comparison of national provisions relating to the adoption of such amendments confirms that further comparative analysis of State practice would be justified.

13. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=x6NKIjsJ

1.22 Part 5 of the report reviews the way in which the Proposal might assist the ECtHR and the extent to which this would, or would not, necessarily disrupt the ECtHR's current practice in handling applications. The necessarily tentative conclusion is that the Proposal is capable of making a material contribution to the acceleration of the processing of cases by the ECtHR and merits further study as a means to enhance the protection of human rights by the courts of Europe.

1.23 Finally, the contributors to this report are very grateful to the British Institute of International and Comparative Law for providing the opportunity for a seminar at which the draft report can be aired and opened to comment and constructive criticism.

# Section 2: The Proposal

# The Context

2.1 The fundamental feature of the Convention was the introduction of the right of individual petition whereby individuals, NGOs and legal persons could lodge applications against States which have signed and ratified the Convention (***Convention States***), including their own, alleging a violation of their rights protected by the Convention. Initially the right of petition was optional and provided access to the former European Commission of Human Rights and not the ECtHR. The acceptance of the right of individual petition was cautious, with many Convention States limiting the duration of their acceptance to a fixed, renewable, period and certain Convention States, such as the United Kingdom and France, postponing their acceptance of the right for a considerable time.[14] The acceptance of the jurisdiction of the ECtHR was similarly optional and, critically, the process of determining whether a case was referred to the ECtHR depended on a reference procedure which involved the former Commission and the respondent Government, but not the applicant, whose status before the ECtHR was only gradually recognised in practice, if not fully, under the terms of the Convention. The United Kingdom was the first State to ratify the Convention, but first accepted the right of individual application in 1966 for a time limited period, which generated some debate as each renewal date approached. France first accepted the right of individual application in 1981.

2.2 Those restrictions were swept away in 1998 by Protocol No 11 to the Convention which introduced the unconditional right of individual application to the new full time ECtHR, whose jurisdiction was therefore original and mandatory. This is the bedrock of the Convention system and the primary basis for the ECtHR's jurisdiction.

2.3 In parallel with the right of individual petition and thereafter application, there was also jurisdiction for inter-State applications. Few in number, inter-State cases seemed to have been abandoned following the creation of the full time ECtHR,[15] until 2007 when Georgia lodged its first inter-State case against Russia. That case has led to a marked increase in inter-State cases, which raise their own particular problems of scale and complexity for the ECtHR, which the Proposal is not capable of resolving. The *Georgia v Russia* (No. 13255/07) case was only the fourth inter-State case which had come before the Court, the majority of the previous cases having been determined in the Committee of Ministers and not referred to the Court.

2.4 From the outset of the 'new' ECtHR, it may be doubted that there were adequate facilities or procedures to keep up with the flow of new cases, and particularly to carry out the initial *triage* between baseless, serious and urgent cases. Without the flexibility in the composition of the ECtHR to deal with different grades of case with a different judicial composition, the ECtHR was hampered in addressing what has become the backlog.

14. The United Kingdom was the first State to ratify the Convention, but first accepted the right of individual application in 1966 for a time limited period, which generated some debate as each renewal date approached. France first accepted the right of individual application in 1981.

15. The Georgia v Russia case was only the fourth inter-State case which had come before the Court, the majority of the previous cases having been determined in the Committee of Ministers and not referred to the Court.

2.5 But, apart from the restructuring and reforms of the ECtHR, from the 1990s a major change was also taking place in the domestic legal systems of the Convention States. Progressively, with each Convention State adapting its own legal traditions as to the status of treaties in domestic law, the Convention became part of the domestic legal systems of all the Convention States. In many Convention States the provisions of the national constitutions already contained similar and, sometimes, more extensive guarantees, with the result that reliance on the ECtHR in domestic proceedings would be unusual, but the possibility of doing so created for the first time the idea of a judicial dialogue between the Senior Courts and the ECtHR; a dialogue which was based expressly on the terms of the Convention.

2.6 That process of dialogue was based on the enormous growth in the number of cases decided by the ECtHR in judgments. In concentrating on the ECtHR's overload, there is a risk of forgetting the large corpus of case law interpreting the Convention and the availability of precedent judgments concerning almost every Convention State. Whereas an important part of the former Commission's case law depended on its interpretation of cases declared inadmissible, the ECtHR's case law is almost exclusively founded on judgments. Furthermore, statistically at least, the judgments usually involve the finding of at least one violation of the Convention.

2.7 This development is due firstly to the growing corpus and authority of the ECtHR's case law, which enables the ECtHR to rapidly identify cases where the previous interpretation of the Convention makes the outcome of many applications clear; and secondly the focusing of the Court's resources on cases where the Convention has been violated.

2.8 Difficulties in the language of the ECtHR's judgments remain, but both the ECtHR and the Committee of Ministers through the CDDH are striving to enlarge the availability of reliable translations, so that the leading case law is far more accessible than previously.

2.9 Against the background of these developments in the scale and accessibility of the ECtHR's case law and in the status of the Convention in domestic European legal systems, and in the face of the acute overload of applications which the ECtHR is facing, the time is now right for the endorsement Proposal.

# The Proposal

2.10 The Proposal set out in this report is for the adoption of a rule of procedure or a practice by Senior Courts in the Convention States to the effect that, in any judgment rejecting a claim based on the Convention (whether the claim is a central part of the case before the Senior Court or arises as a peripheral or incidental feature of the case) the judgment should state in a defined part of it (not spread out in different parts of the judgment) a succinct statement of the reasons for dismissing the claim and of the significance of the claim.

2.11 For the purposes of this Proposal a Senior Court is a court against whose decision on the claim there is no appeal or other form of judicial control that the losing party may initiate as of right. This is, first, to ensure continuity in the operation of the Proposal; second, to limit the scale of the imposition which this will impose on national courts; third, to ensure that that burden falls on the Senior Courts which are best able to shoulder the responsibility; and finally, because these Senior Courts are those to which a prospective applicant to the ECtHR would be expected to make an appeal as part of the normal process of exhaustion of domestic remedies.

2.12 It follows that it would not be precluded for other national courts to be encouraged or even required to adopt a system of endorsement, and that benefits might flow from such a course. This would be a question of domestic implementation. One aim of the Proposal is to encourage the articulation of Convention arguments and the reasons for their rejection by the national courts and for reasons referred to below, the Senior Court may, in rejecting an appeal, in any case properly rely on the reasons which have been set out by the court or courts below. The crucial element is, however, that the Senior Court of final appeal should be the court primarily responsible for the endorsement because any subsequent application to the ECtHR would follow from the decision of that court.

2.13 The Proposal envisages a statement that is in two parts. The first part covers the merits of the claim (as perceived by the Senior Court in question). The extent of this part will obviously vary extensively from case to case. Just as in single judge cases, the ECtHR declares applications inadmissible on the basis of short or very short reasoning, so the Senior Court may be able to summarise its conclusion on the Convention aspects of an appeal succinctly. In other cases, by contrast, especially where the Senior Court has been drawn into a full analysis of the issues in the Convention aspects of the appeal, somewhat fuller reasoning would be required. This will be a matter of judgment and no doubt developing practice in the Senior Courts concerned.

2.14 The key objective of this aspect of the Proposal would be twofold. First, and critically, the aim would obviously be to summarise the Convention arguments which had been made and the reasons why the Senior Court rejected those arguments. The more clear and persuasive those reasons, the more likely that the litigation will end at that point because it will be clear, and expressly made clear in relation to the Convention arguments which have been raised, that those arguments are unpersuasive or even without merit. Appellants who are provided with convincing, even if succinct, reasons for the rejection of their appeal will often accept that outcome.

2.15 The second objective, which is fully congruent with the first and should require no further or additional explanation, is that if the unsuccessful appellant decides to nevertheless make an application to the ECtHR, the ECtHR will have available to it, amongst the key materials which every applicant will have to lodge, the summary of the heart of the Convention case as it has been run in the national appeals and the reasons, expressed by the Senior Court concerned, why those arguments were not successful. For reasons developed below, but which are quite obvious, this information is bound to be of value to the ECtHR in assessing and allocating new applications more quickly and reliably.

2.16 It is of course axiomatic that the Senior Court's assessment of the Convention arguments which have been run in the domestic proceedings is not decisive for the ECtHR. If they were, without further scrutiny, there would be no purpose in the ECtHR receiving applications. The ECtHR will retain, as now, its autonomy to review the applications before it and to differ in its assessment of the interpretation of the Convention from the interpretation reached by the Senior Court. This does not alter the fact that the presence of the Senior Court's succinct assessment of those arguments is bound to assist the ECtHR as described below.

2.17 The second part of the Proposal covers the Senior Court's assessment of the significance of the claim from the perspective of the parties to the case and more generally. "Significance" encompasses such matters as:

a. the impact on the parties of dismissing (or upholding) the claim;

b. the temporal aspect (such as whether or not the dismissal of the claim will have an impact immediately or only after an interval of time, whether or not the impact is reversible, the effect on the claim and the claimant's position over time); and

c. the question whether or not the claim relates to a human rights issue that affects only the parties to the case or has a broader effect on a wider class of persons or situations.

2.18 The assessment of significance is an aspect of an application when first lodged with the ECtHR which the ECtHR is not well placed to assess. Some applications may arise from notorious national disputes, but that does not necessarily mean that they are of general significance. As the ECtHR's case law has repeatedly recognised, national courts and authorities are frequently better placed than the ECtHR to assess various aspects of their national social and legal requirements.[16]

2.19 This assessment would again not be binding on the ECtHR, but the recognition that a given judgment of a Senior Court had been a test case, or was one of a large number of pending cases relating to the same legal issue, would be invaluable information for the ECtHR and would alert it to factors relevant to processing the application which it might otherwise not know and which the applicant might have no particular reason to draw attention to.

16. Especially in the assessment of moral and social standards, see case law since *Handyside v UK* (No. 5493/72).

2.20 The second point of importance about this second element of the Proposal is that it is likely that the Senior Court's assessment would quite frequently be that the case was of no particular significance, especially if the Convention arguments had not been fully argued or were, in the Senior Court's assessment, baseless.

2.21 As noted above, such an assessment would not be binding on the ECtHR, but it would be significant, taking account of the fact that it would be a judicial assessment by a Senior Court. The ECtHR would remain free, as it is now, to reach its own (even different) conclusion. Nevertheless, it would be equipped to be able to focus immediately on what the Senior Court had identified as a defect, which had prevented that court from considering Convention issues, because they had not been effectively raised by the appellant.

2.22 One frequent defect in applications to the ECtHR (and in the advice and practice of inexperienced practitioners), is the idea that it is sufficient to appeal to the highest national court of appeal in order to satisfy the requirement of exhaustion of remedies. The correct position is that such an appeal must not only be attempted, but the appellant is also required to invoke the Convention, or a close national analogy to its provisions, so that the national legal system has the opportunity to redress the alleged violation of fundamental rights at issue. This is especially clearly the case now that the Convention is part of the domestic legal system of all Convention States.

2.23 The absence of an endorsement in the judgment of a Senior Court coupled with an assessment that the case did not raise an issue under the Convention would be a very important indicator to the applicant to explain in their application why they disagreed with that assessment; the ECtHR could then quickly identify cases in which the applicant had not, in fact, raised the relevant arguments in the domestic proceedings.

# Section 3: Parallels to the Proposal

# Permission to apply or to appeal as a threshold issue in UK procedure

3.1 One of the intrinsic features of the Proposal is that its implementation will be by each Senior Court, reflecting their respective legal traditions and procedures. This enhancement of the judicial dialogue between the ECtHR and Senior Courts will be based upon a variety of different national assumptions and practices as to the normal form of judgments.

3.2 A key aspect of the Proposal is that the endorsement should nevertheless reflect the two features described above, by succinctly summarising in one place the Convention arguments made in the appeal and the reasons for rejecting them and evaluating the significance of the appeal.

3.3 One consequence is that even those Senior Courts which currently adopt a discursive analysis of Convention arguments in their judgments would be asked to compress those arguments and their conclusion into one place in order to comply with the Proposal. This underlines that, first, the Proposal is addressing the Senior Courts' compliance with an existing obligation: given that the Convention is part of the domestic law of every Convention State, the Senior Courts of all Convention States are required to address Convention arguments which are properly raised before them just as any other argument.

3.4 Ideally, however, the form of the endorsement should reflect a distillation of the main issues and arguments which have been raised, rather than a lengthy recital of all of them. The greatest advantage to the ECtHR will be derived from a condensed and succinct summary, which the ECtHR itself may well adopt in terms.

3.5 In the United Kingdom, this 'condensed approach' is familiar as a procedural device in relation to the commencement of judicial review proceedings, where the right to challenge the lawfulness of a public law act depends upon the court granting permission for the claim to be made. A similar approach is adopted in relation to almost all appeals, both in civil and criminal proceedings: permission to appeal must be sought from the court against whose judgment it is proposed to appeal and, if such appeal is refused, permission can then be requested from the appeal court which would hear the appeal if permission were granted. Furthermore, in criminal matters appeals on points of law depend on the trial court or the court of appeal certifying that a point of law of public importance is at issue in the appeal and this criterion applies as a threshold question for all appeals to the UK Supreme Court.

3.6 Given this extensive practice which may be of interest to jurisdictions which operate on the assumption of appeals as of right, Appendix 1 sets out a brief summary of the approach towards, first, permission for judicial review and, second, permission for civil and criminal appeals to the UK Supreme Court. Appendix 2 sets out statistical information about the applications for permission to appeal which are determined by the UK Supreme Court and the equivalent figures for the substantive appeals which are actually determined. It may be noted in this respect that the appeal form issued by the Registry of the UK Supreme Court requires an appellant to identify whether or not their appeal involves an argument under the Human Rights Act 1998, the legislation which enacted the Convention into domestic law.

3.7 For clarity, it should be pointed out that the endorsement Proposal does not envisage that the Senior Court would be involved in deciding whether or not permission should be granted for an application to be made to the ECtHR: by definition, the right of individual application is not dependent upon 'permission' and particularly not permission granted or withheld by a national authority. Nevertheless, even though the question of whether or not to apply to the ECtHR is an unfettered right under Article 34 Convention, the evaluation of the Convention arguments made in the domestic appeal and their significance is at the heart of the Proposal, which is why the UK experience of permission and certification may be thought relevant.

# Parallels with the reference procedure to the CJEU under EU law

3.8 Although the relationship between the CJEU and the national courts of EU Member States is very different from that between the ECtHR and the courts of Convention States, there are some parallels in the EU system to the Proposal.

3.9 When a national court of an EU Member State makes a reference for a preliminary ruling to the CJEU: (a) it should (amongst other things) provide to the CJEU a statement of the reasons prompting the referring court's enquiry into the meaning or validity of a provision of EU law; and (b) the referring court may express its own view on the answer to be given by the CJEU to the question referred.[17]

3.10 So far as is known, neither of those has caused any difficulties for senior courts of the EU Member States.

3.11 The requirement referred to in (a) above is directed essentially at enabling the CJEU to ascertain that the request for a preliminary ruling is admissible, and at providing the CJEU with contextual information that enables it to provide a ruling on the question(s) referred to it that addresses effectively the concerns of the referring court that led to the making of the reference. Another function of (a) is that it enables the CJEU to decide how, procedurally, to deal with the reference. Depending upon the circumstances, that may mean disposing of the reference otherwise than in the normal way under the CJEU Rules of Procedure, that is, summarily by reasoned order under Article 99 of its Rules of Procedure, expediting the reference, or dealing with it under the urgent procedure (referred to below).

3.12 The invitation given to the referring court to express its own view on the answer to be given to the question referred – (b) above – is stated (by the CJEU) to be useful to the CJEU, particularly when it is asked to deal with the reference by way of an expedited or urgent procedure[18].

3.13 In the context of references for a preliminary ruling, the expedited and urgent procedures are special procedural tracks for dealing with cases whose nature requires them to be dealt with in a short time (expedition) and cases in specified areas of EU law that are urgent, which is understood to mean absolutely necessary for the CJEU to give its ruling quickly (the urgent procedure).[19] In order to operate either procedure, it is necessary to provide to the CJEU contextual information about the case that sheds light on its intrinsic importance and on the effect on the parties of the passage of time. The CJEU's website records a large number of cases in which either of the expedited or urgent procedures have been invoked before the CJEU and shows how the courts of EU Member States have approached the need to provide information about the merits of the EU law claim and the importance of the case.

3.14 For present purposes, it is not necessary to go into any further detail about the procedural background. In Appendix 3 the procedure for making a reference and for its disposal is briefly summarised. It suffices to note that courts of the EU Member States already have experience of a system in which a court (not necessarily a Senior Court) sets out in a discrete part of a decision made by it either or both of a summary of its view on the issue of EU law before it and contextual information about the ramifications of the issue of EU law, both for the parties to the case and, where appropriate, others.

17. Rules of Procedure of the Court of Justice, art 94(c); Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para 17.

18. See Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para 17, last sentence.

19. Rules of Procedure, arts 105(1) and 107(1); Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, para 32.

3.15 In the context of the relationship between the courts of EU Member States and the CJEU, the exercise of providing such information has, of course, a procedural consequence because it forms part of a formal procedure: the making of a reference to the CJEU. The Proposal is different because it does not have immediate procedural consequences: it does not cause complaints to be made to the ECtHR but merely assists the ECtHR in the event that a complaint is made.

3.16 Nonetheless, that difference does not appear to detract from the fact that, when presented with a procedural rule or practice envisaging that a national court shall provide information that is to be of use to another court (in context, the CJEU), national courts (in the EU Member States) have found no difficulty in operating such a rule or practice effectively and properly. There is no obvious reason why national courts in other Convention States would encounter difficulties in doing so.

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# Section 4: Review of the procedures for amending Senior Court rules or practice in selected European jurisdictions

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# Overview

4.1 Introducing the Proposal by way of an additional Protocol to the Convention would confer authoritative, legally-binding status; but it would likely require a lengthy, legally and politically complex process.

4.2 Rather, this report envisages a "softer" implementation process, whereby the Senior Courts (or other competent body) in Convention States are asked to adopt a new rule of procedure directing judges to include a statement on Convention issues of the kind described above in each relevant judgment.

4.3 Clearly, the extent to which national court procedural rules currently (or could ever) prescribe the content of judgments – and competence for amendments to the relevant rules – is not the same across Convention States. However, preliminary multijurisdictional analysis across eight major States suggests that there is no barrier to the introduction of guidance enjoining specific consideration of specific Convention issues in judgments delivered by Senior Courts. In some jurisdictions this can be achieved straightforwardly by Senior Courts themselves amending unilaterally the relevant rules of procedure in line with the Proposal; and in others, there may be scope for the introduction of (at least) non-binding guidance to that effect. In some jurisdictions it is acknowledged that domestic legislation may be required.

4.4 A summary of the position in each of these states is set out below, but in overview:

a. In Austria, France, Germany and the UK, it appears Senior Courts (or the senior judges thereof) may unilaterally adopt new or amended rules of practice or procedure which could prescribe the content of judgments in the manner envisaged in the Proposal. This would be a relatively novel initiative in the UK and Austria (and in Germany it could only be applied to cases in which the Senior Court must already provide a reasoned judgment), but there is clear precedent in France, where the Cour de Cassation and the Conseil d'Etat have recently published reforms to the rules governing the content of their judgments.

b. In Belgium and The Netherlands, amendment to the relevant procedural rules could only be accomplished via a legislative process. However, there may be scope for Senior Courts to issue non-binding guidance on the content of their judgments, which individual judges could choose to follow. The position is similar in Spain, where the judicial governing body could (in theory) issue non-binding guidance, although this would be somewhat outside of its current mainstream activities.

c. Amendments to the relevant rules would similarly require legislative action in Italy; here, however, there is less scope for Senior Courts to adopt even non-binding guidance in line with the Proposal, given potential conflicts with national constitutional principles.

4.5 Against that background, the present report does not suggest that the Proposal could be implemented in an entirely uniform fashion throughout Convention States. Clearly, it is up to the Senior Courts of each Convention State to identify whether, and if so how, they might each implement the Proposal, in accordance with relevant national law and judicial practice. That is, however, entirely consistent with the principle of subsidiarity.

4.6 We consider, therefore, based on this preliminary review that there is scope and sound basis for the ECtHR and Senior Courts to explore in further detail the possibility of potential co-operation in this regard, without resort to a further Protocol.

# Procedure in selected jurisdictions

## Austria

4.7 Austria has three Supreme Courts: the Supreme Court for civil and criminal matters, the Supreme Administrative Court and the Constitutional Court. New or amended rules of procedure in these courts often require a legislative process/ratification, but the justices of the Constitutional Court and the Supreme Administrative Court have a limited power to decide certain procedural rules (*Geschäftsordnung*). For the Supreme Court for civil and criminal matters, the President of the Court is competent to enact the *Geschäftsordnung*.

4.8 These rules mostly deal with organisational matters and usually do not refer to the required content of a judgment. It is perhaps more likely that a change along the lines of the Proposal would be adopted via a legislative process, which would take several months (as a broad estimate); but it would seem at least *possible* to introduce an appropriate recommendation/requirement into the Supreme Courts' procedural rules, without needing to follow the legislative process.

4.9 Such an amendment would be aligned with current judicial practice in Austria: judgments of the Austrian Supreme Courts generally already include an explanation on why a Convention argument has been dismissed.[20]

4.10 Amendments of the Courts' *Geschäftsordnung* would be made on an ad hoc basis and, in the case of the Constitutional Court and Supreme Administrative Court, during the regular meetings of the Justices of the Court.

## Belgium

4.11 The main court of last resort in Belgium is the Court of Cassation. Although the Court's President has not done so to date, it is possible that he/she could invite his/her judges to adopt the Proposal. Such a recommendation would not be binding on other judges; but as they must already respond to each of the arguments developed by the parties in their written pleadings, the Proposal would (in practice) require little change to current judicial practice.

4.12 To effect a legally binding change in court procedure, it would be necessary to amend Article 780 Judicial Code, which sets out the required contents of a court judgment. This would require a legislative process, but it would seem possible to amend the Article in a matter of months (and possibly as little as a month).

## France

4.13 French Senior Courts are able to amend their own rules on the content of their judgments. Indeed, the Cour de Cassation and the Conseil d'Etat (respectively the Civil/Criminal Supreme Court and Administrative Supreme Court) have recently published reports setting out reforms to the way their decisions are drawn up:

a. The Cour de Cassation created a commission in March 2017, whose report, published on 5 April 2019, invites judges to describe lower courts' interpretation of relevant provisions; identify rejected alternative solutions which have been seriously discussed;

20. Although in practice reasons are almost always given, Austrian law provides that the Supreme Court for civil and criminal matters does not always have to give reasons when it dismisses cases. A legislative amendment would be required before the Court's President could amend the Court's rules to require reasons to be given in all such cases.

# Section 4: Review of the procedures for amending Senior Court rules or practice in selected European jurisdictions

and quote relevant precedents, and/or impact studies, if they have played a significant role in the decision. The reforms are expected to be implemented by the end of 2019; and the Cour de Cassation expressly specified that they should apply to judgments requesting the advisory opinion of the ECtHR.

b. Similarly, the Conseil d'Etat has adopted a *vade mecum* published in December 2018 on the drafting of administrative decisions, to ensure their clarity and enrich their grounds. These rules became applicable in the administrative courts on 1 January 2019.

4.14 In both cases, the reforms were implemented via an internal, non-legislative process, following work conducted by internal commissions/working groups.

4.15 These reforms suggest that, given the Proposal would not involve any amendment to fundamental judicial powers, the French Senior Courts may be able to amend their rules accordingly, without the need for a time-consuming legislative process.

## Germany

4.16 In Germany, complaints made under the Convention must be heard by the Federal Constitutional Court (the ***FCC***) before they can be brought to the ECtHR, in order to exhaust domestic remedies. While in practice the FCC will generally address Convention arguments in its reasoned decisions, the vast majority of complaints lodged are struck out at the admissibility stage (without detailed reasoning) due to lack of general constitutional significance or, on the basis they are not necessary to enforce constitutional rights.

4.17 It follows that an entirely comprehensive introduction of the Proposal in Germany would need to include two elements:

a. introduction of an obligation for the FCC to provide reasons for non-acceptance orders; and

b. introduction of an obligation for the FCC to provide reasons specifically concerning Convention arguments put forward by the parties in all of its decisions.

4.18 A recent bill proposed to the Bundestag by *Alternative für Deutschland* sought to introduce something akin to step (a) above, i.e. an obligation on the FCC to state reasons in non-acceptance decisions. In April 2019, the expert committee recommended voting against the bill (stressing the need for an effective handling of the 5,000-6,000 constitutional complaints lodged each year). Given the expected failure of this proposal, it seems unlikely that Parliament and the judges of the FCC would support a change to the admissibility stage.

4.19 There are three ways in which the reform suggested in this report could conceivably be introduced:

a. Amendment to the *Bundesverfassungsgerichtsgesetz*, i.e. the Act on the Federal Constitutional Court (***AFCC***): as the AFCC is a federal law, the usual legislative procedure would need to be followed. If each party participating in the legislative procedure agrees to the bill (which is very unlikely in this case), and the bill is urgent, it could, theoretically, be adopted in as little as a week. Otherwise, the legislative procedure usually takes around 200 days on average. There would, however, be potential issues of legality and constitutionality involved in introducing a duty to provide specific reasons in all decisions.

b. The justices of the FCC could themselves amend the *Geschäftsordnung des Bundesverfassungsgerichts*, i.e. the Rules of Procedure of the FCC (the ***RPFCC***). The RPFCC only contains very limited supplementary procedural provisions, which effectively fill any gaps left unregulated by the AFCC. As the RPFCC ranks below the AFCC, it cannot set rules which deviate from provisions of the AFCC, and it is unlikely that it would be possible to amend the RPFCC to introduce an obligation for the FCC to provide reasons for non-acceptance orders. However, it would, in theory, be possible to amend the RPFCC to include an obligation for the FCC to refer to Convention arguments in the way outlined in this Proposal, provided such obligation is limited to cases in respect of which the FCC is already obliged to give a reasoned decision.

c. The FCC published a Code of Conduct in 2017 (the ***Code***). Future development to the Code can be agreed on by all judges in plenary session. This is not a binding document, but rather a voluntary commitment of each individual judge which will only bind new judges to the extent that they commit to it. Currently, the Code does not regulate the process of decision making, but only contains behavioural rules for judges during and after their term of office; and therefore does not seem a natural route by which the Proposal may be implemented (and given the legal/constitutional barriers noted above, the Code could not influence the judicial approach to cases in which the FCC is not already under an obligation to provide a reasoned decision).

## Italy

4.20 Due to the separation of powers principle, there is a clear distinction of functions between the three organs of the State. A corollary of this principle is that courts cannot amend their own procedural rules. These rules are set out in procedural codes, which can only be amended via a full legislative process (under Articles 70 et seq. of the Italian Constitution). There is no set timetable for this process.

## The Netherlands

4.21 In The Netherlands, as in Austria, there are two types of procedural/court rules. First, there is the Judiciary Organisation Act (*Wet op de rechterlijke organisatie*) and the Dutch Code of Civil Procedure. The Judiciary Organisation Act mostly contains rules about the internal organisation of the courts. The Dutch Code of Civil Procedure contains rules about civil proceedings and the jurisdiction of the Dutch courts. These are formal rules prescribed by the legislator and changing these rules would require a time-consuming legislative process.

4.22 Second, the district courts, courts of appeal and Supreme Court all have their own set of procedural rules. These procedural rules are drafted by the courts themselves and can be seen as soft law. Examples from the Supreme Court procedural rules include rules concerning deadlines for submitting briefs, reformulating preliminary questions and requesting oral pleadings. There is no set timetable for changes to procedural/court rules, but minor changes can be made on an ad hoc basis.

4.23 Article 230 of the Dutch Code of Civil Procedure contains the requirements for a judgment, such as names of the parties and reasoning, but does not prescribe the structure of a judgment. Neither the

Judiciary Organisation Act nor the procedural rules of the courts currently prescribe the content or structure of a written judgment. The current standard structure of written Supreme Court judgments is common practice and can in theory be changed overnight by the judiciary. To that end, the Supreme Court could publish guidance on the content of judgments in cases where an argument based on Convention rights has been raised; we have not identified any precedent for the introduction of similar guidance, and it would not be binding, but judges would be free to follow it.

## Spain

4.24 The Spanish Supreme Court's case law allows judges a great deal of flexibility in developing their judgments, as long as they comply with the law. There is no obvious route to direct judges as to what their judgments should contain.

4.25 Supreme Court jurisprudence directs that all Spanish court judgments must be consistent with the claims brought by the parties and the reasons for the admission or dismissal of claims must be set out in the judgment. However, judges are not required to go into every detail discussed in the proceedings and do not need to explain thoroughly or in depth the legal reasoning behind their decision.

4.26 A judicial body such as the *Consejo General del Poder Judicial* could, in theory, issue non-binding guidance on how Convention arguments should be addressed in relevant judgments. The competences of this entity are mainly organizational (i.e. appointing the president of the Supreme Court, supervising the judicial system, organizing the workload of the different courts, etc.), so such a recommendation would be somewhat novel, and judges would not be obliged to follow its recommendations.[21]

## The United Kingdom

4.27 There are two ways by which the UK Supreme Court could conceivably alter its own rules to reflect the Proposal: by way of an amendment to the Supreme Court Rules 2009, or by introducing a new Practice Direction:

a. The President of the Supreme Court may propose an amendment to the Supreme Court Rules. This would not involve the passing of primary legislation but, pursuant to the Constitutional Reform Act 2005, it could only be implemented following a detailed consultation with the UK Government, relevant Law Societies and other associations, and after being laid before Parliament for a 40-day period without objection. When the current Supreme Court Rules were introduced, this process took more than two years (although it seems reasonable to assume an amendment could be adopted more swiftly than an entirely new set of rules).

b. More straightforwardly, the President of the Supreme Court may issue Practice Directions in order to provide general guidance and assistance to parties and their legal representatives. Conventionally, this involves consultation with the sitting judges of the Supreme Court, but is not otherwise subject to a formal consultation or legislative process.

21. In Spain, individual judicial independence is highly important and not even senior judges can instruct judges in lower courts; accordingly, any guidelines issued by either the *Consejo General del Poder Judicial* or other government body cannot be binding on them.

# Section 4: Review of the procedures for amending Senior Court rules or practice in selected European jurisdictions

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4.28 In general, the Supreme Court Rules and its Practice Directions deal with practical matters about the conduct of proceedings, rather than the content of judgments; but they both include some direction as to the content of certain decisions. Rule 42(1) provides that, where the Supreme Court refuses to hear an appeal in which a preliminary reference to the CJEU is sought under Article 267 TFEU, the court must give "brief reasons" for its decision; and Practice Direction 11.1.2 notes that (in the same context) the court will provide "additional reasons" for its refusal, indicating the grounds on which it believes the request for a reference is unmeritorious.

4.29 Whilst there is no direct precedent for the Supreme Court amending its Rules or adopting a new Practice Direction in line with the Proposal, such action appears possible, given the Proposal is procedural and does not involve the broadening of judicial powers or obligations, or the establishment of a new justiciable right.

# Section 5: How the Proposal may assist the ECtHR

# The reasons for the Proposal and its value to the ECtHR

5.1 For the reasons developed above, the endorsement Proposal would be a concrete expression of the role of Senior Courts in providing the primary protection of human rights and, by extension, of the subsidiary role of the ECtHR. Nevertheless a systematic reform operating by the adoption of the Proposal would be of immediate benefit to the ECtHR: it would involve a measure of direct burden sharing between the Senior Courts and the ECtHR at a time when, without measures of this kind, the viability of the Convention system is threatened.

5.2 Senior Courts are already required to apply the Convention, so to that extent the Proposal does not impose a new obligation. Lawyers would be encouraged to focus their Convention submissions in national appeals, facilitating the Senior Courts' role in providing the primary protection of human rights. The precise means of implementing the new rule or practice would vary with the relevant rules of the Senior Courts, but its object would be to make clear that Convention arguments had been raised and dealt with, why they had been rejected and whether the arguments (and the case in general) were of importance in the national legal system. Each of these issues is one which the Senior Courts are well placed to assess.

5.3 Where the rejected appeal gave rise to an application to the ECtHR, the applicant could rely on the Senior Court's endorsement, both to illustrate immediately that domestic remedies had been exhausted by reference to the Convention, and as to the Senior Court's view of the importance of the case in the national legal system. Relevant factors might be that the case represented one of many raising similar issues, or a unique factual situation, or that the case was a remnant of a former legal rule, since amended.

5.4 The value to the ECtHR of such a national judicial endorsement, or its absence, would vary and operate at different points depending upon the strength of the application. At present, the ECtHR Registry undertakes a *triage* of new applications soon after they are lodged. As a first step this involves checking compliance with the strict requirements of the revised Rule 47 of the ECtHR Rules. Assuming that this formal hurdle is cleared, the Filtering Section's task is to identify the priority cases and those which are so clearly inadmissible that they are fast tracked to disposal as inadmissible by a single judge.

5.5 Each of these steps could be assisted by the Proposal. First, the succinct summary of the Convention arguments relied on in the domestic proceedings would be apt to be referred to and included in the brief application form in which the whole application must be set out. The form allows three pages for the facts, two for the alleged violations and one for the domestic remedies which have been exhausted. Plainly the ECtHR wants a focused summary and applicants who drew on an endorsement statement for part of the material in the form would have the additional authority that it derived from a Senior Court.

5.6 Secondly, an endorsement would identify the heart of the Convention case as argued in the Senior Court. This would not only satisfy the exhaustion criterion, but also identify the scope of the Convention issues at once. The Registry would be able to tell immediately whether the issue raised in the application had really been raised and argued in the domestic proceedings and briefly why the argument had failed. Applicants would no doubt disagree with the rejection of their domestic appeal, but the endorsement would provide the basis for that argument which the ECtHR would

of course be called upon to evaluate. Applicants and their lawyers would be encouraged to focus on the Senior Court's reasons, rather than trying to argue the case from scratch. A 'silent dialogue' between the Senior Court's reasons and the ECtHR's analysis would be established, in which the applicant would have to concentrate on the way in which the national court had failed to apply the Convention standard.

5.7 If the endorsement identified that an appeal had been regarded as baseless, that assessment would not be decisive. The ECtHR exists to second guess the national protection of human rights. Nevertheless, the inclusion in the endorsement of the principal reasons in one part of the judgment would simplify and accelerate the first assessment of whether the national court had been right or whether, notwithstanding the national court's position, the applicant raised an arguable issue to be determined.

5.8 Thus in each of these respects, although the ECtHR would still be called upon to make its own assessment, that assessment would be assisted by the succinct and focused statement in the endorsement.

5.9 Where the endorsement identified an appeal as of significance, the ECtHR would be put on immediate notice of the overall significance of the application in a way which has no equivalent at present. The Senior Courts are intrinsically better placed than the ECtHR to make such an assessment. Under the present system operated by the ECtHR the fact that a case was systemically significant might only emerge when it was communicated to the respondent Government (if then) or by the uncertain possibility that the ECtHR received a high number of comparable applications.

5.10 The immediacy of the notification through the endorsement would certainly be relevant for the prioritisation of the application. Notably, at present, the second highest category of priority is accorded by the ECtHR to cases 'having major implications for the national legal system', but the ECtHR has no systematic way of identifying such cases. Furthermore, if the endorsement indicated that the appeal was one of many pending on a given question or a test case, that might suggest that a pilot procedure would be appropriate. Again, at present the ECtHR lacks any system for identifying such cases, beyond the number of applications to which they give rise over time. Endorsement would be a faster and more reliable method.

5.11 The ECtHR would retain, as now, control over its priority policy, including the option to prioritise a case which the national legal system had mis-evaluated, but national judicial endorsement would be a valuable aid to the rapid *triage* of newly lodged applications and a guide to their future handling. No amendment of the Convention, nor even of the ECtHR's Rules, would be necessary for the ECtHR to be able to consider endorsements. Furthermore, as experience of endorsement grew, its operation in practice would contribute to the dialogue between the Senior Courts and the ECtHR, to the potential benefit of proceedings before both. The viability of that dialogue would be strengthened if the endorsement system helped the ECtHR to deal with new applications faster and indeed better, whereas the current dialogue involves long gaps in transmission, where the Senior Court has to wait for many years before the ECtHR gives its judgment.

# Conclusion

5.12 In short, the Proposal is capable of increasing the ease and efficiency of the management of cases coming before the ECtHR without additional cost. In addition, given that with all due respect, not every judgment of every Senior Court currently deals as thoroughly as it might with the Convention arguments raised in the proceedings, there is a real prospect that the more systematic approach to such arguments which the Proposal would engender may give rise to fuller and more persuasive judgments at the national level. If so, appellants may be satisfied that their Convention based claims are not substantial and not take their cases on to the ECtHR. As has been seen in the large burden of insubstantial cases which have distracted the ECtHR especially over the last ten years, a reduction in the number of such cases would free the ECtHR to focus on its more serious work.

5.13 Finally in this respect, the Proposal does not cut across the approach followed in a number of ECtHR cases, most recently *Harisch v Germany* (11 April 2019).[22] As that case illustrates, the Convention does not require Senior Courts to include in a judgment reasoning that is superfluous; and, depending upon the circumstances, a Senior Court may simply refer to the reasoning of a lower court in order to discharge its obligation to give reasons for its own decision. The Proposal builds upon the Convention requirement to give reasons for a (judicial) decision, without, it is submitted, imposing an obligation which would simply shift the burden of human rights protection exclusively onto the national legal systems.

22. App No. 50053/16.

# Appendix 1: Comparison to permission proceedings and certification proceedings in appeals in UK

## Appendix 1: Comparison to permission proceedings and certification proceedings in appeals in UK

# The Permission Test in Judicial Review claims

A1.1 Judicial Review refers to a particular process by which a claimant can challenge the decision of a public body in the Courts of England and Wales and obtain certain remedies. A claim for Judicial Review is concerned with the lawfulness of either an enactment by a public body,[23] or a decision, action or failure to act in relation to the exercise of a public function.[24] The remedies which may be granted include a mandatory, prohibiting or quashing order, a declaration or an injunction.[25] A claim for Judicial Review is usually commenced in the High Court, and usually so in the Administrative Court, which is a division of the High Court.

A1.2 The Civil Procedure Rules, provide that the court's permission to proceed with a claim for judicial review is required.[26] This is commonly known as the permission stage of a claim for judicial review. If permission is granted, directions are then made for the claim to be considered at a substantive hearing. In *R v Inland Revenue Commissioners Ex p National Federation of Self-employed and Small Businesses Ltd*,[27] Lord Diplock explained the purpose behind the requirement for permission:

"*Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.*"

A1.3 Therefore, in determining an application for permission, the court should not engage in a "full-scale rehearsal" of the substantive hearing of the claim,[28] or a detailed examination of the case on the papers. The purpose of the permission requirement is to allow for an expeditious decision to be made as to whether the claim is of sufficient merit, such that it justifies full determination by the court at a future stage.

A1.4 The test as to whether or not permission should be granted is nearly always whether the claim is "arguable".[29] This test may be relaxed in exceptional circumstances where the court considers permission should be granted because of the importance or significance of public interest issues raised by the case.[30] The burden is on the claimant to satisfy the court that there is an arguable ground of challenge within his/her claim. Where the claimant seeks to advance more than one ground of challenge by way of his/her claim, it is open to the court to grant permission in respect of some grounds and refuse it for others.

23. Which includes an inferior court or tribunal or any person or body performing public duties or functions. Persons exercising powers or performing duties derived from statute or the prerogative (a reference to powers traditionally exercised by the Sovereign, but today exercised by the Prime Minister/the Executive) are commonly regarded as public bodies and actions and omissions done in the exercise of their statutory functions or prerogative powers are generally amenable to judicial review (see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374).
24. Civil Procedure Rules (which apply in the County Court, High Court and Court of Appeal of England and Wales,) Rule 54.1(2)
25. S. 31(1) of the Senior Courts Act 1981
26. Rule 54.4 Self-employed and Small Businesses Ltd , Lord Diplock explained the purpose behind the requirement for permission: "Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."
27. [1982] AC 617 at 642
28. See the judgment of Auld LJ in the Court of Appeal in R (Mount Cook Land Ltd.) v Westminster City Council [2003] EWCA Civ 1346 at [71].
29. See R v Secretary of State for the Home Department, ex p Swati [1986] 1 WLR 477, per Sir John Donaldson MR who explained, at 485, "To say that he must show a prima facie case that such grounds do in fact exist may be putting it too high, but he must at least show that it is a real, as opposed to a theoretical, possibility. In other words, he must have an arguable case."
30. See R (Gentle) v The Prime Minster, The Secretary of State for Defence, The Attorney General [2006] EWCA Civ 1078, which considered claims for judicial review challenging the refusal by the Government to hold an independent inquiry into the circumstances which led to the invasion of Iraq. Despite the Court of Appeal stating "at once" they were reluctant to grant permission and that "the applications for judicial review were unpromising", they nevertheless granted permission because of "the importance of the issue and the great public concern that it has aroused."

# Appendix 1: Comparison to permission proceedings and certification proceedings in appeals in UK

A1.5 The court may determine whether to grant or refuse permission to proceed, with or without a hearing. At the point of determining permission the court would normally have received a claimant's claim form and statement of facts and grounds for judicial review, and any accompanying evidence, and the defendant's Acknowledgment of Service, with summary grounds for contesting the claim. It is therefore common for the court to determine the permission decision "on the papers", without a hearing. However, the court has discretion to decide that the permission decision should be taken after a hearing, where both parties are permitted to make oral submissions. The court may wish to hear submissions on: (a) whether it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred; and if so (b) whether there are reasons of exceptional public interest which make it nevertheless appropriate to give permission.[31]

A1.6 Where permission is refused on the papers, an applicant may renew their application for permission and obtain a hearing before the court, as of right, in order for their renewed application to be determined.[32] The only circumstance in which this right may not be exercised is where the court refuses permission on the papers and, in doing so, records the fact that the permission application is "totally without merit".[33] In this eventuality, a claimant is still permitted to appeal that decision to the Court of Appeal. A claimant may also appeal a decision to refuse permission to proceed to the Court of Appeal, after a hearing on the renewed application.[34]

31. Rule 54.11A.

32. See Rule 54.12. The claimant must file his renewed application for permission to apply for judicial review within 7 days after service of the reasons by the court for refusing permission (Rule 54.12(4)).

33. Rule 54.12(7). The test for determining whether an application for permission to apply for judicial review is totally without merit is that it is bound to fail (R (Grace) v Secretary of State for the Home Department [2014] EWCA Civ 1091. This is a distinct to the permission application merely being "not arguable" (R (Wasif) v Secretary of State for the Home Department [2016] EWCA Civ 82; [2016] 1 WLR 2793.

34. An application to appeal a refusal to grant permission to the Court of Appeal must be made within 7 days of the date of the decision of the High Court refusing permission (Rule 52.8). The Court of Appeal may, on considering that application, grant permission to apply for judicial review and, if so, the claim will proceed in the High Court in the usual way (Rules 52.8(5) and (6)).

# Appeals to the Supreme Court in civil proceedings

A1.7 In civil proceedings, an appeal to the Supreme Court against the decision of the Court of Appeal of England and Wales lies only with the permission of the Court of Appeal or the Supreme Court.[35] The same applies in respect of appeals against decisions of the Northern Ireland Court of Appeal,[36] and, since 2015, in respect of appeals against decisions of the Inner House of the Court of Session.[37]

A1.8 Whilst the lower court may grant permission to the Supreme Court, this is extremely rare. Where the lower court refuses permission (as is the usual course), the appellant can then apply to the UKSC for permission.

A1.9 The test applied by the Supreme Court to determine whether to grant permission to appeal is as follows:

"*Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time…*"[38]

A1.10 The rationale for adopting a permission stage were explained by Lord Bingham of Cornhill in *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222, 2228, at a time when the final court of appeal was the House of Lords:

"*In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.*"

A1.11 Applications for permission to appeal to the Supreme Court are considered by an Appeal Panel, consisting of at least three Justices. Applications are generally decided on paper without a hearing.

A1.12 The Appeal Panels meet around once a month during term-time to discuss a batch of applications (roughly five to ten applications per Panel). The constitution of each Panel changes with each round of applications, with each Panel chaired by one of the most senior Justices. The Justices are provided with the applications in advance of the meeting and are assisted in their preparation for the meeting by a bench memorandum for each application, summarising the facts, the reasoning of the courts below, and the parties' arguments in relation to whether permission should be granted.

A1.13 At the meeting, each application is considered in turn. Each Justice expresses a preliminary view about whether or not permission should be granted, having formed a view independently in advance of the meeting. For this exercise, the Justices usually speak in increasing order of seniority, from most junior to most senior. After each Justice has expressed their initial view, the Justices then debate whether or not permission should be granted. This discussion varies in length depending on the extent of agreement between the Justices,

35. Section 40 of the Constitutional Reform Act 2005 ("**CRA 2005**").

36. Section 42 of the Judicature (Northern Ireland) Act, as amended by the CRA 2005.

37. Section 40 of the Court of Session Act 1988, as amended by the Courts Reform (Scotland) Act 2014. The 2014 Act replaced the previous arrangement for Scottish appeals, under which an appeal lay to the Supreme Court from the Inner House of the Court of Session, in certain cases, upon the certification by two counsel. See the Scottish Government's Consultation paper, "Making Justice Work – Courts Reform (Scotland) Bill: Consultation on the treatment of civil appeals from the Court of Session", published May 2013, explaining the background to these reforms.

38. UKSC Practice Direction 3 on Applications for Permission to Appeal at paragraph 3.3.3.

# Appendix 1: Comparison to permission proceedings and certification proceedings in appeals in UK

and on other matters such as the complexity of the case. Generally, if only one of the Justices strongly considers that permission should be granted, and is unpersuaded by the reasons advanced by the other two Justices who favour refusing permission, then permission will be granted – although there is no formal rule requiring this. Usually, however, by the end of their discussion, the Justices resolve any disagreement between them as to the proper course.

A1.14 The Panel gives brief reasons for refusing permission to appeal. This has been the Court's practice since around February 2012. The reasons are published on the Supreme Court's website. The reasons given for refusing permission to appeal are not to be regarded as having any value as a precedent.[39]

A1.15 When the Court refuses permission to appeal in a case where the application includes a contention that a question of EU law is involved, the Supreme Court gives additional reasons for its decision not to grant permission to appeal.[40] These reflect the reasoning of the CJEU in *CILFIT v Ministry of Health* (Case C283/81). The CJEU there made clear that no reference need be made to it in relation to any such question of interpretation or validity as referred to in Article 267 where (a) the question raised is irrelevant; (b) the EU law provision in question has already been interpreted by the CJEU; (c) the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case; or (d) the correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question of interpretation or validity is to be resolved.

A1.16 Lord Reed, Deputy President of the Supreme Court, has recently commented as follows on the advantages of applying a test for permission to appeal:

"*That criterion enables us to hear a small number of cases raising important issues of principle, and because there are only a limited number of them at any one time, we can devote greater resources to them than an intermediate court of appeal can afford.*

*… the first function of the Supreme Court is to enable important questions of law to be considered with a degree of depth, time, combined intelligence, and breadth of legal experience, which the intermediate courts of appeal cannot normally be expected to devote to them. Our aim is to ensure, so far as we can, that the law is clear, principled and suitable for our times.*"[41]

A1.17 One academic has observed, in relation to the permission to appeal test in the House of Lords:

*"Due to the permission to appeal system, the case-load of the House of Lords is not so heavy as that of the Continental highest courts. On the other hand, the average time spent on one case is much longer compared to the time spent by a cassation or revision institution."* [42]

39. UKSC Practice Direction 3 on Applications for Permission to Appeal at paragraph 3.3.3.

40. UKSC Practice Direction 11 at paragraph 11.1.2.

41. Lord Reed, "The Supreme Court Ten Years on" (The Bentham Association Lecture 2019, University College London), 6 March 2019, pp.3-4, available at https://www.supremecourt.uk/docs/speech-190306.pdf (accessed 14 May 2019).

42. Sofie M. F. Geeroms. "Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated…" The American Journal of Comparative Law, vol. 50, no. 1, 2002, pp. 201–228. JSTOR, www.jstor.org/stable/840834, p.223.

# Appeals to the Supreme Court in criminal proceedings

A1.18 In criminal proceedings in England, Wales and Northern Ireland, appeals from the lower courts to the Supreme Court are limited to cases involving points of law of general public importance. [43]

A1.19 Permission (also called 'leave') to appeal to the Supreme Court may only be granted if:

a. the court below (the High Court or the Court of Appeal) certifies that a point of law of general public importance is involved in its decision; **and**

b. it appears to the court below or to the Supreme Court that the point is one which ought to be considered by the Supreme Court. [44]

A1.20 The consequence of requirement (a) is that, in cases where the court below does not certify a point of law of general public importance, the Supreme Court has no jurisdiction to consider the appeal. [45]

A1.21 An application for permission to appeal to the Supreme Court from a decision of the Court of Appeal is often made orally at the conclusion of the Court of Appeal hearing, and dealt with on that basis. As a matter of law, however, it is open to the Court of Appeal to deal with an application on the papers.[46] The English courts have held that not affording a party seeking permission to appeal an opportunity to make oral submissions does not involve a violation of the right to a fair trial guaranteed by Article 6 of the Convention.[47]

A1.22 Before the Court of Appeal, there are three possible outcomes of an application for permission to appeal to the Supreme Court:

a. Permission is not granted, and no point of law of general public importance is certified.

b. Permission is not granted, but a point of law of general public importance is certified.

c. Permission is granted, and a point of law of general public importance is certified.

A1.23 Scenario (b) is far more common than scenario (c), because even where the Court of Appeal certifies that a point of law of general public importance is involved, it is very unusual for the Court of Appeal to determine that the point is one which ought to be considered by the Supreme Court (i.e. requirement (a) at A1.19 above). In 2007, for example, there were only five grants of permission outright by the Court of Appeal.[48] This is because, consistently with the Court of Appeal's practice in civil cases, the question of whether the point ought to be considered by the Supreme Court is generally regarded as a matter for the Supreme Court (see A1.7).

43. There is no appeal in criminal proceedings from any Scottish Court, except where they come before the Supreme Court as devolution issues under the Scotland Act 1998. For present purposes, the discussion focuses on applications for permissions to appeal from the Court of Appeal of England and Wales.

44. S.33(2) Criminal Appeal Act 1968; s. 1(2) Administration of Justice Act 1960. See also (in relation to Northern Ireland) s.41(2) Judicature (Northern Ireland Act) 1978; s.31(2) Criminal Appeal (Northern Ireland) Act 1980.

45. Gerberg v Miller [1961] 1 WLR 459; Jones v DPP [1962] AC 635.

46. R. v Daines and Williams 45 Cr App R 57.

47. R v Steele [2006] EWCA Crim 2000; [2007] 1 WLR 222.

48. Crown Prosecution Website, "Appeals to the Supreme Court" available at https://www.cps.gov.uk/legal-guidance/appeals-supreme-court (accessed 8 May 2019).

# Appendix 1: Comparison to permission proceedings and certification proceedings in appeals in UK

A1.24 If the Court of Appeal certifies that a point of law of general public importance is involved, the certificate should state what the point of law is that is certified.[49]

A1.25 When the Court of Appeal refuses an application for a certificate, it is not its practice to give reasons,[50] and there is no appeal from the refusal.[51] This appears compatible with Article 6 of the Convention, since the Commission has held, in relation to the requirement for a point of 'great and general importance' or a 'grave injustice' in certain appeals to the Privy Council[52] that, "where a supreme court refuses to accept a case on the basis that the legal grounds for such a case are not made out, very limited reasoning may satisfy the requirements of Article 6…".[53]

A1.26 The requirement for certification of a point of law of general public importance by the lower court, as a condition precedent to the obtaining of permission to appeal, has been held by the English courts to be compatible with Article 6 of the Convention.[54] The Court of Appeal explained its reasoning in the following terms:

"*The business of the Supreme Court should be limited to those rare cases which involve points of general public importance. A filtering mechanism is essential. Otherwise the workload of the Supreme Court would soon become clogged by hopeless cases. The deserving cases would not be heard speedily. Section 33(2) is a provision which properly regulates second appeals. It serves that legitimate purpose… In our view, for this court, which, as we have concluded, is an independent and impartial tribunal when it does so, to play a part in filtering those cases which may go to the Supreme Court, serves that legitimate purpose. That other jurisdictions may do it differently is not to the point. There is nothing objectionable in the way it is done in this jurisdiction…*".

49. Jones v. DPP [1962] A.C. 635 per Lord Reid at 660.
50. R v. Cooper and MacMahon, 61 Cr.App.R. 215
51. Gelberg v Miller [1961] 1 WLR 459.
52. The Judicial Committee of The Privy Council (JCPC) is the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.
53. Webb v United Kingdom (1977) 24 EHRR CD 73 at 74.
54. R. v. Dunn [2010] EWCA Crim 1823; [2010] 2 Cr.App.R. 30.

# Appendix 2: Statistics on appeals to the UK Supreme Court 2017/18

# UK Supreme Court Appeal Statistics

## Note

A2.1 The first three tables in this Appendix (Figure 1) are taken from the Supreme Court's Annual Report for 2017-2018.[55] The tables contain the following information for 2017-2018:

a. statistics on the total number of permission to appeal applications received, granted, and refused, and statistics on the number of appeals heard, allowed and dismissed;

b. applications for permission to appeal disposed of by subject matter; and

c. appeals disposed of by judgment by subject matter.

A2.2 The table at Figure 2 shows the number of applications for permission to appeal to the Supreme Court involving an argument under the Human Rights Act 1998.

55. Available at https://www.supremecourt.uk/about/planning-and-governance.html

# Figure 1: Tables from UKSC Annual report 2017/18

**Table 1: Total UKSC statistics, including all jurisdictions: 1 April 2017 – 31 March 2018**

| | Total |
|---|---|
| PTA applications received | 228 |
| PTA applications granted (not all filed during period)* | 65 |
| PTA applications refused (not all filed during period)* | 130 |
| PTA applications other result | 4 |
| PTA fee remissions | 17 |
| PTA fee deferred | 7 |
| Appeals/references lodged with permission or as of right | 6 |
| Number of appeals heard | 85 |
| Number of appeals allowed | 35 |
| Number of appeals dismissed | 36 |
| Number of appeals other outcomes | 7 |
| Number of appeals referred to CJEU | 7 |
| Number of sitting days | 95.5 |
| Number of judgments given | 78 |

*Not all applications which are filed are ready for determination during the same reporting year period.

# Appendix 2: Statistics on appeals to the Supreme Court 2017/18

## Table 2: UKSC Applications for Permission to Appeal disposed of, by subject area: 1 April 2017 – 31 March 2018

| Subject area | Number Granted | Number Refused | Number other | Total |
|---|---|---|---|---|
| Arbitration | 0 | 2 | 0 | 2 |
| Banking | 2 | 1 | 0 | 3 |
| Betting | 0 | 0 | 0 | 0 |
| Charities | 0 | 0 | 0 | 0 |
| Children | 0 | 0 | 0 | 0 |
| Company | 0 | 3 | 0 | 3 |
| Competition | 0 | 0 | 0 | 0 |
| Confidence | 0 | 0 | 0 | 0 |
| Consumer credit | 0 | 0 | 0 | 0 |
| Conflict of laws | 0 | 0 | 0 | 0 |
| Contract | 1 | 4 | 0 | 5 |
| Copyright | 0 | 1 | 0 | 1 |
| Coroners | 0 | 0 | 0 | 0 |
| Costs | 0 | 0 | 0 | 0 |
| Crime | 7 | 7 | 0 | 14 |
| Defamation | 0 | 2 | 1 | 3 |
| Devolution | 1 | 1 | 0 | 2 |
| Discrimination | 1 | 2 | 0 | 3 |
| Ecclesiastical law | 0 | 0 | 0 | 0 |
| Education | 0 | 0 | 0 | 0 |
| Employment | 4 | 4 | 0 | 8 |
| Environment | 0 | 3 | 0 | 3 |
| Equity | 0 | 0 | 0 | 0 |
| EU law | 1 | 2 | 0 | 3 |
| Evidence | 0 | 0 | 0 | 0 |
| Extradition | 0 | 0 | 0 | 0 |
| Family | 2 | 6 | 0 | 8 |
| Financial services | 0 | 0 | 0 | 0 |
| Freedom of information | 0 | 0 | 0 | 0 |
| Highways | 1 | 0 | 0 | 1 |
| Housing | 2 | 1 | 0 | 3 |
| Human rights | 0 | 4 | 0 | 4 |
| Immigration | 5 | 17 | 2 | 24 |
| Insolvency | 1 | 2 | 0 | 3 |
| Insurance | 2 | 1 | 0 | 3 |

# Appendix 2: Statistics on appeals to the Supreme Court 2017/18

## Table 2: UKSC Applications for Permission to Appeal disposed of, by subject area: 1 April 2017 – 31 March 2018

| Subject area | Number Granted | Number Refused | Number other | Total |
|---|---|---|---|---|
| Judicial review | 9 | 9 | 0 | 18 |
| Land | 1 | 4 | 0 | 5 |
| Landlord and tenant | 1 | 3 | 0 | 4 |
| Legal profession | 0 | 0 | 0 | 0 |
| Licensing | 0 | 0 | 0 | 0 |
| Limitation | 0 | 0 | 0 | 0 |
| Mental health | 1 | 1 | 0 | 2 |
| Mortgage | 0 | 0 | 0 | 0 |
| Negligence | 1 | 2 | 0 | 3 |
| Occupier's liability | 0 | 0 | 0 | 0 |
| Partnership | 0 | 0 | 0 | 0 |
| Patents | 2 | 4 | 0 | 6 |
| Pensions | 1 | 0 | 0 | 1 |
| Personal injury | 2 | 2 | 0 | 4 |
| Planning | 0 | 8 | 0 | 8 |
| Police | 0 | 1 | 0 | 1 |
| Probate | 0 | 0 | 0 | 0 |
| Procedure | 7 | 23 | 0 | 30 |
| Rating valuation | 3 | 0 | 0 | 3 |
| Road traffic | 0 | 1 | 0 | 1 |
| Sale of goods | 0 | 0 | 0 | 0 |
| Shipping | 1 | 0 | 0 | 1 |
| Statutory interpretation | 0 | 0 | 0 | 0 |
| Solicitor | 0 | 0 | 0 | 0 |
| Social security | 0 | 0 | 0 | 0 |
| Taxation | 6 | 7 | 2 | 15 |
| Tort | 0 | 1 | 0 | 1 |
| Trade mark | 0 | 1 | 0 | 1 |
| Trusts | 0 | 0 | 0 | 0 |
| Wills | 0 | 0 | 0 | 0 |
| **Total** | **65** | **130** | **5** | **200** |

The table above follows the subject headings of Halsbury's Laws and Incorporated Council of Law Reporting.

# Appendix 2: Statistics on appeals to the Supreme Court 2017/18

## Table 3: UKSC appeals, disposed of by judgment, by subject matter: 1 April 2017 – 31 March 2018

| | Allowed | Dismissed | Other | Total number of judgments |
|---|---|---|---|---|
| Arbitration | 0 | 0 | 0 | 0 |
| Banking | 0 | 0 | 0 | 0 |
| Betting | 0 | 1 | 0 | 1 |
| Charities | 0 | 0 | 0 | 0 |
| Children | 0 | 0 | 0 | 0 |
| Company | 1 | 1 | 0 | 2 |
| Competition | 0 | 0 | 0 | 0 |
| Confidence | 0 | 0 | 0 | 0 |
| Consumer credit | 0 | 0 | 0 | 0 |
| Conflict of laws | 0 | 0 | 0 | 0 |
| Contract law | 1 | 0 | 0 | 1 |
| Contract | 0 | 0 | 0 | 0 |
| Copyright | 0 | 0 | 0 | 0 |
| Coroners | 0 | 0 | 0 | 0 |
| Costs | 0 | 1 | 1 | 2 |
| Crime | 1 | 4 | 1 | 6 |
| Defamation | 0 | 0 | 0 | 0 |
| Devolution | 0 | 1 | 0 | 1 |
| Discrimination | 2 | 1 | 0 | 3 |
| Ecclesiastical law | 0 | 0 | 0 | 0 |
| Education | 1 | 0 | 0 | 1 |
| Employment | 4 | 3 | 1 | 8 |
| Enforcement costs | 0 | 0 | 0 | 0 |
| Environment | 0 | 0 | 0 | 0 |
| Equity | 0 | 0 | 0 | 0 |
| EU law | 1 | 0 | 0 | 1 |
| Evidence | 0 | 0 | 0 | 0 |
| Extradition | 0 | 0 | 0 | 0 |
| Family | 3 | 0 | 0 | 3 |
| Financial services | 0 | 0 | 0 | 0 |
| Freedom of information | 0 | 0 | 0 | 0 |
| Highways | 0 | 0 | 0 | 0 |
| Housing | 0 | 1 | 0 | 1 |
| Human rights | 2 | 1 | 0 | 3 |

# Appendix 2: Statistics on appeals to the Supreme Court 2017/18

## Table 3: UKSC appeals, disposed of by judgment, by subject matter: 1 April 2017 – 31 March 2018

| | | | | |
|---|---|---|---|---|
| Immigration | 1 | 0 | 1 | 2 |
| Insolvency | 0 | 0 | 1 | 1 |
| Insurance | 0 | 0 | 0 | 0 |
| Judicial review | 5 | 6 | 1 | 12 |
| Land | 0 | 0 | 0 | 0 |
| Landlord and tenant | 0 | 0 | 0 | 0 |
| Legal profession | 0 | 0 | 0 | 0 |
| Licensing | 1 | 0 | 0 | 1 |
| Limitation | 0 | 0 | 0 | 0 |
| Mental health | 0 | 0 | 0 | 0 |
| Mortgage | 0 | 0 | 0 | 0 |
| Negligence | 2 | 1 | 0 | 3 |
| Occupier's liability | 0 | 0 | 0 | 0 |
| Patent | 1 | 0 | 0 | 1 |
| Partnership | 0 | 0 | 0 | 0 |
| Pensions | 0 | 0 | 0 | 0 |
| Personal injury | 2 | 0 | 0 | 2 |
| Planning | 0 | 3 | 0 | 3 |
| Probate | 0 | 0 | 0 | 0 |
| Procedure | 3 | 4 | 0 | 7 |
| Rating valuation | 0 | 1 | 0 | 1 |
| Road traffic | 0 | 0 | 0 | 0 |
| Sale of goods | 0 | 0 | 0 | 0 |
| Shipping | 2 | 1 | 0 | 3 |
| State immunity | 0 | 1 | 0 | 1 |
| Statutory interpretation | 0 | 0 | 0 | 0 |
| Solicitor | 1 | 0 | 0 | 1 |
| Social security | 0 | 1 | 0 | 1 |
| Taxation | 1 | 4 | 1 | 6 |
| Tort | 0 | 0 | 0 | 0 |
| Trade mark | 0 | 0 | 0 | 0 |
| Trusts | 0 | 0 | 0 | 0 |
| Wills | 0 | 0 | 0 | 0 |
| **Totals** | **35** | **36** | **7** | **78** |

The table above follows the subject headings of Halsbury's Laws and Incorporated Council of Law Reporting.

# Figure 2

**Number of applications for permission to appeal to the Supreme Court involving an argument under the Human Rights Act 1998**

**Source: UK Supreme Court Registry**

| Year | Civil cases | Criminal cases |
|---|---|---|
| 2014 | 54 | 2 |
| 2015 | 56 | 7 |
| 2016 | 38 | 4 |
| 2017 | 66 | 0 |
| 2018 | 52 | 3 |
| 2019 (up to May) | 31 | 3 |
| Total | 297 | 19 |

# Appendix 3: Summary of procedure for references to the CJEU from national courts

# Appendix 3: Summary of procedure for references to the CJEU from national courts

## What is a preliminary reference?

A3.1 Preliminary references are requests to the CJEU from courts of Member States for the interpretation or validity of EU law and acts adopted by EU bodies, pursuant to Article 267 of the Treaty on the Functioning of the European Union.

A3.2 The preliminary reference procedure serves three purposes:[56]

a. Assisting the national courts when EU law is not clear in a given context and an authoritative interpretation is needed to resolve a case before the domestic court. The issue is usually the scope of EU law in the context of domestic provisions which may conflict with EU law;

b. Enabling the uniform interpretation and validity of EU law across all the EU member states; and

c. Creating an additional mechanism in the EU for verifying the conformity of acts of EU bodies with EU law.

A3.3 Preliminary references are part of a special co-operative procedure between the CJEU and the national courts with 'judicial dialogue' at its core:

a. In its preliminary judgment, the CJEU sets out the applicable EU law principles and answers to the requests from the domestic courts. It is then for the national courts to apply these to the facts of the national proceedings and resolve the dispute before the domestic court.

b. It is ultimately for the national court to determine the final disposal of any matter, with the CJEU's responses to the questions referred being automatically sent to the national court once delivered by the CJEU.

## How does the preliminary reference procedure work?

A3.4 A party to the proceedings in the national court can apply to that court for a reference to be made to the CJEU during the domestic proceedings. A national court may also make a preliminary reference of its own volition.

A3.5 A reference to the CJEU as to the interpretation of an EU measure will be mandatory where that question is raised before a 'court of last resort', i.e. where there is no further possibility of appeal. Note that any court (lower courts or a court of last resort) are under an obligation to refer questions concerning the validity of an EU measure where substantial doubt has been raised as to the validity of this measure.

A3.6 The reference to the CJEU must be in a prescribed form and should not exceed ten pages.[57] The reference must include the following content:[58]

a. clearly and succinctly the question(s) on which the national court seeks the ruling of the CJEU;

b. a statement setting out the subject matter of the dispute and relevant facts;

c. a statement of reasons which prompted the referring court's inquiry into the meaning or validity of a point of EU law; and

d. relevant national law and an indication of applicable EU provisions.

56. European Parliament Think Tank, 'Preliminary reference procedure', 6 July 2017.

57. Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, [2016] OJ C 439/1–8, paragraph 14.

58. Rules of Procedure of the Court of Justice, [2012] OJ L 265/1–42, Article 94.

# Appendix 3

A3.7 The question(s) should appear in a separate and clearly identifiable section of the reference, ideally at the start or end. They must be capable of being understood on their own terms without reference to the rest of the request.

A3.8 The reference may also include a summary of the parties' arguments and the national court's view on the answer to the question(s) referred. clearly and succinctly the question(s) on which the national court seeks the ruling of the CJEU;

## What are urgent and expedited procedures and how do they work?

A3.9 Since the average duration of proceedings before the CJEU can take up to 15 months,[59] there are urgent and expedited procedures for certain types of pressing cases. This procedure speeds up the process to (in some cases) around 2-3 months, by streamlining the formal requirements (or compressing the timetable) for service of documents, the making of submissions and adjudicating on the reference.

A3.10 Although (exceptionally) the CJEU can decide that certain cases should be dealt with under either of these procedures of its own volition, it is generally for the national court to justify such treatment in its reference.

A3.11 Such a reference must:[60]

a. set out precisely the matters of fact and law which establish the urgency;

b. the risks involved in following the ordinary procedure;

c. if possible, include a brief summary of the national court's view on the answer to be given to the questions referred; and

d. be submitted in an unambiguous form that enables the Registry of the CJEU to establish immediately that the file has to be dealt with in a particular way.

A3.12 As the relevant CJEU guidance makes clear, this kind of statement makes it easier for the CJEU to assess the need for adopting a compressed timetable, and for parties to the main proceedings and the other interested persons to define their positions (which similarly contributes to the rapidity of the procedure).[61]

59. Annual Report of the Court of Justice of the European Union, 2018, 'The Year in Review', page 43.

60. Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 3) on the Statute of the Court of Justice of the European Union, [2016] OJ C 202/210–229, Article 23a and Rules of Procedure of the Court of Justice, [2012] OJ L 265/1–42, Articles 105 – 114.

61. Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, [2016] OJ C 439/1–8, paragraph 32.

# Appendix 3

## Helpful resources on preliminary references to the CJEU

A3.13 Article 267 of the Treaty of the Functioning of the European Union (the legal basis for the preliminary reference procedure).

A3.14 Article 19 of the Treaty on European Union (basis of the CJEU's obligation to provide preliminary rulings if there is a question of interpretation or validity of EU law).

A3.15 Rules of Procedure of the Court of Justice, [2012] OJ L 265/1–42. The relevant sections are in Title III:

a. Articles 93 to 104 on the general rules (i.e. Article 94 on the content and format of a request for a preliminary ruling);

b. Articles 105 to 106 on the expedited procedure (see section 3 above); and

c. Articles 107 to 114 on the urgent procedure (see section 3 above).

A3.16 Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, [2016] OJ C 439/1–8 (setting out the essential characteristics of the preliminary ruling procedure and the factors to be taken into account by the national courts before making a reference, while providing some practical indications as to the form and content of a request for a preliminary ruling)

A3.17 Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 3) on the Statute of the Court of Justice of the European Union, [2016] OJ C 202/210–229 (setting out the role of the Advocate General and the preliminary reference procedures, i.e. Articles 23 and 23a provide information on the expedited or accelerated preliminary procedure).

A3.18 European Parliament, Think Tank (short summary on the preliminary reference procedure, also discussing the binding nature of a CJEU ruling and its scope).

A3.19 CJEU website (general information about the CJEU and its function).