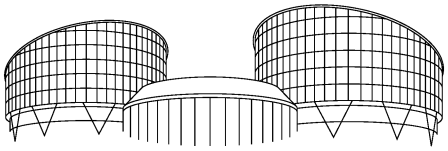

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Revisiting subsidiarity in the age of shared responsibility

Background Document

Contents

Introduction

In accordance with Article 1 of the Convention, it is the national authorities who are the primary guarantors of human rights, subject to the supervision of the European Court of Human Rights ("the Court"). The Court's jurisdiction is limited by Article 19 of the European Convention on Human Rights (hereinafter "the Convention") to ensuring that the Contracting States observe their engagements under the Convention. In this sense, protecting the rights and freedoms defined within the Convention is the shared responsibility of both.

The concept of shared responsibility was set out in the Interlaken Declaration of 19 February 2010. One of the overarching themes of that decade-long reform process, which drew to a close in Athens in November 2021, has been to increase the embeddedness of the Convention at the national level.

In the 2012 Brighton Declaration, it was decided to add a recital to the Preamble of the Convention affirming that the States Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. This recital came into effect with Protocol No. 15 to the Convention on 1 August 2021.

In the 2015 Brussels Declaration, the importance of effective national implementation and execution of judgments was given further emphasis. Most recently, the importance of subsidiarity and shared responsibility were underlined in the Reykjavik Declaration's recommitment to the Convention system as the cornerstone of the Council of Europe's protection of human rights.

Today, the Convention is incorporated, and to a large extent, embedded into the domestic legal order of the States Parties, and the Court has provided a rich and comprehensive body of case law interpreting most Convention rights. This enables the States Parties to play their Convention role of ensuring the protection of human rights to the full.

This background paper aims to highlight the Court's key case-law on the following themes related to subsidiarity and shared responsibility: (1) The impact of Protocol No. 15 on subsidiarity (2) Constitutional review and exhaustion of domestic remedies (3) The age of subsidiarity and the process-based review and (4) A Court that matters: suggestions from the national judiciary.

I. The impact of Protocol No. 15 on subsidiarity

Since the Court was set up in 1959 the Council of Europe's member States have adopted several Protocols to the Convention, aimed at improving and strengthening the control machinery established by it.

In addition, several high-level Conferences on reform of the Convention system have been held.

Since 2010, six high-level Conferences were convened to identify the means to guarantee the long-term effectiveness of the Convention system and the Court[1]. These conferences notably led to the adoption of Protocols No. 15 and 16 to the Convention.

In 2012, during the high-level Conference in Brighton, the Declaration recalled that the case law of the Court "makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged" (§ 11).[2] It added that "[the] margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation" (ibid).

The margin of appreciation therefore reflects that national authorities are better placed than an international court to evaluate local needs and conditions. The codification of the margin of appreciation in the Preamble by virtue of Protocol No. 15 is a reminder that the Court adopts a supervisory role, and its function is subsidiary to the protection of human rights at the national level.

In this regard, the Brighton Declaration"[welcomed] the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation and encourages the Court to give great prominence to and apply consistently these principles in its judgments" (§ 12).

Following the 2012 Brighton Declaration, Protocol No. 15 was adopted in 2013 (coming into effect on 1 August 2021). It added a new recital to the Preamble of the Convention to refer expressly to the principle of subsidiarity and the doctrine of the margin of appreciation. The Explanatory Report to Protocol No 15 states that the intention of Protocol No 15 was "to enhance the transparency and accessibility of these characteristics of the Convention system".[3]

The following overview will present examples of how the parties have relied on Protocol No. 15 and how the Court has referenced Protocol No. 15 in its assessment (1). The second part of the overview will give examples of how the Court has approached the margin of appreciation doctrine in the context of different Convention rights following the entry into force of Protocol No. 15 (2).

1. Protocol No. 15 in the Court's case law

In *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, a case concerning the premature termination of a Supreme Administrative Court judge's term of office as member of the National Council of the Judiciary, the Court relied on Protocol No. 15 to emphasise the importance of shared responsibility and how this is linked to judicial independence. It noted that national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the Convention and underscored that the Convention system cannot function properly without independent judges (§ 324). The Court underlined that the Contracting Parties' task of ensuring judicial independence was thus of crucial importance for the functioning of the Convention system (ibid).

[1] Reform of the Court - ECHR Official Texts - ECHR - ECHR / CEDH (coe.int)

[2] Council of Europe, High Level Conference on the Future of the European Court of Human Rights. Brighton Declaration (2012).

[3] Council of Europe, Explanatory Report to Protocol No. 15 amending the European Convention on Human Rights. Accessible here: https://www.echr.coe.int/documents/d/echr/protocol_15_explanatory_report_eng.

Likewise, in *Thörn v. Sweden*, no. 24547/18, 1 September 2022, a case concerning a fine which was imposed on the applicant for a cannabis offence, the Court relied on Protocol No. 15 to recall its fundamentally subsidiary role in the Convention system, and the impact thereof on the scope of the margin of appreciation. During its assessment, the Court reiterated that matters of healthcare policy were in principle within the margin of appreciation of the domestic authorities, who were best placed to assess priorities, use of resources and social needs (§ 46). It further highlighted that national authorities were also better placed than the international judge to appreciate what is in the public interest on social or economic grounds (ibid). Finally, citing Protocol No. 15, the Court stressed that State parties have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and, in doing so, enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court (§ 48).

In other cases, the Parties have referenced Protocol No. 15. For example, in *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023, the Court dealt with a case concerning a criminal law fine for disclosing to the media confidential documents from a private-sector employer concerning the tax practices of multinational companies. In this case, the applicant stressed that the principle of subsidiarity and Protocol No. 15 did not prevent the Court from carrying out a review, both procedural and substantive, of the grounds and criteria used by the domestic courts in applying the Convention.

The respondent States have also started referencing Protocol No. 15. For example, in *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 July 2015, the respondent government observed that the social and cultural sensitivities of the issue of legal recognition of homosexual couples gave each Contracting State a wide margin of appreciation (§ 123). In support of this argument, the Italian government relied on the provisions of Protocol No. 15 as well as on EU law which, according to the applicants, afforded the same wide margin of appreciation in the choice of the times and modes of a specific legal framework for same-sex partnership (ibid).

2. The margin of appreciation doctrine after Protocol No. 15

It should be noted that, although now expressly referenced in the preamble to the Convention, the principle of subsidiarity and the margin of appreciation doctrine had been firmly anchored in the Court's existing case-law. The cases which the Court handed down after the entry into force of Protocol No. 15 constitute a continuation thereof.

For example, in *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, 17 January 2023, the Court was called to determine the scope of the national authorities' margin of appreciation with regards to the legal recognition of same-sex marriage in the context of an Article 8 complaint. In this regard, the Court considered that particularly important facets of the personal and social identity were at stake and noted a clear ongoing trend towards the legal recognition of same-sex partnerships (§ 187). Consequently, the Court concluded that the States Parties' margin of appreciation was significantly reduced when it comes to affording same-sex couples the possibility of legal recognition and protection. The Court went on to consider that, nevertheless, the States Parties had a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples, which did not necessarily have to take the form of marriage (§ 188). Indeed, the Court observed in this connection that while a clear ongoing trend is emerging towards legal recognition and protection for same-sex couples, no similar consensus can be found as to the form of such recognition and the content of such protection (§ 189). Referring to the principle of subsidiarity underpinning the Convention, the Court concluded that it was for the Contracting States to decide on the measures necessary to secure the Convention rights to everyone within their jurisdiction, and it was not for the Court itself to determine the legal regime to be accorded to same-sex couples (ibid). The Court concluded, after considering the public interest grounds forwarded by the respondent State, that the latter had overstepped its margin of appreciation and had failed to comply with its positive obligation to secure the applicants' right to respect for their private and family life, and thus violated Article 8 of the Convention (§§ 224-225).

In *Sanchez v. France* [GC], no. 45581/15, 15 May 2023, the Court was called to determine whether the fact that an elected politician was fined for failing to delete Islamophobic comments made by third parties from his Facebook "wall" constituted a violation of Article 10. The Court held that where the remarks in question incite violence against an individual or a public official or a sector of the population, the State authorities enjoyed a broader margin of appreciation in assessing the "necessity" of a given interference with the right to freedom of expression (§ 156). In addition, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention (ibid). The Court went on to apply its established case law on liability of third-party comments on the Internet, taking into account the specific circumstances of the case such as the Islamophobic nature of the comments, the political context, and the reasons given by the French authorities for imposing the fine. In this context, the Court also reiterated that its task is not to take the place of the competent national authorities, which moreover enjoy a margin of appreciation, to which the preamble to the Convention now refers expressly, but rather to review the compatibility with Article 10 of the decisions they have delivered pursuant to their power of appreciation (§ 198). On the basis of this assessment, the Court found that the decisions of the domestic courts were based on relevant and sufficient reasons, both as to the liability attributed to the applicant for the unlawful comments and as to his criminal conviction (§ 209). The impugned interference with Article 10 of the Convention was therefore held to have been "necessary in a democratic society" (ibid).

Another example, this time in relation to Article 15 of the Convention, can be found in the case of *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023. This case concerned the conviction for membership of an armed terrorist organisation which was based decisively on the use of an encrypted messaging application. The Court was called to assess the applicant's complaints under Article 6 in light of the derogation clause in Article 15 of the Convention. In this regard the Court reiterated that it fell to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life was threatened by a "public emergency" and, if so, how far it was necessary to go in attempting to overcome the emergency (§ 348). The Court observed that by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities were in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it (ibid). Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, the Court stressed that Contracting Parties did not enjoy an unlimited power of appreciation. Highlighting the fact that the respondent State had not adduced any detailed reasons before it as to whether the specific fair trial issues originated in the special measures taken during the state of emergency, why they were necessary to avert it or whether they were a genuine and proportionate response to the emergency situation, the Court considered that the limitations on the applicant's fair trial rights at issue – which it had already held to be incompatible with the very essence of Article 6 § 1 – could not be treated as having been strictly required by the exigencies of the situation (§ 355). Based on these considerations the Court found a violation of Article 6 § 1 of the Convention.

II. Topic 2: Constitutional review and exhaustion of domestic remedies

At the 2018 high-level Conference in Copenhagen, the Council of Europe member states recalled that shared responsibility was "vital to the proper functioning of the Convention system and, as the ultimate goal, the more effective protection of human rights in Europe" (§ 6). This requirement is laid down in Article 35(1) of the Convention. The member states moreover welcomed "the Court's continued strict and consistent application of the criteria concerning admissibility and jurisdiction, including by requiring applicants to be more diligent in raising their Convention complaints domestically" (§32).

In this regard, the general rule is that "the complaint intended to be made subsequently to the [European Court of Human Rights] must first have been made – at least in substance – to the appropriate domestic body" (*Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

In recent years the Court has had the opportunity to refine its case-law on the requirement that applicants must exhaust their Convention arguments in substance before bringing an application to Strasbourg. New case-law developments relating to the exhaustion of domestic remedies rule partly stem from the fact that the Convention is increasingly embedded in national legal systems, thus facilitating the applicants' reliance thereon during domestic proceedings.

Against this backdrop, it should be reiterated that the Court duly takes into account differences between member states' legal systems as well as national specificities. As evidenced by the reports of the Venice Commission, although the obligations contained in the Convention bind all State parties without distinction, the ways in which those States implement them within their domestic legal orders may differ substantially.[4] In some States human rights treaties form part of the legal order; others need to transpose them into their legal order through national legal acts.

Likewise, a recent report by the Venice Commission shows that although member states increasingly expand individual access to constitutional justice, important national differences persist with regards to the type of access and scope of constitutional review.[5] These differences in turn affect the Court's assessment of whether a constitutional complaint constitutes an effective remedy.

When it comes to assessing whether the requirement of exhaustion of domestic remedies has been fulfilled, the Court has considered the following main elements: the type and phase of domestic proceedings (1); who bears responsibility for raising the Convention complaint (2); and, finally, the substance of this complaint (3). This section will highlight some of the Court's well-established case law on the exhaustion of domestic remedies' rule and elaborate on some recent case examples where the Court was called to refine its case-law in this regard.

1. The type and phase of domestic proceedings

The Court has also dealt with the question of whether a constitutional complaint constitutes a relevant remedy for the purpose of meeting the requirement of exhaustion of domestic remedies.

For instance, *Habulinec and Filipovic v. Croatia* (dec.), no. 51166/10, 4 June 2013 concerned the impossibility to register the paternity of a deceased child born out of wedlock; The applicants' complaints under Article 8 and Article 14 were deemed inadmissible for failure to exhaust domestic remedies, and their complaint under Article 13 that they had no remedy was deemed inadmissible as manifestly ill-founded. The Court paid particular attention to the fact that the applicants had not raised their complaint before the Constitutional Court even though the Constitutional Court had previously recognised that the rights guaranteed in the Convention were considered constitutional

[4] Venice Commission, Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014) CDL-AD(2014)036-e, pp. 5.

[5] Venice Commission, Revised Report on individual Access to Constitutional Justice, adopted by the Venice Commission at its 125th Plenary Session (online, 11-12 December 2020) CDL-AD(2021)001-e, pp. 9.

rights with an equal legal force to the Croatian Constitution (§§ 30-31). The Court stated that finding a case admissible where the complaint had not been made, at least in substance, to the appropriate national courts was not compatible with the Convention's subsidiary character (§ 27). The Court also affirmed that the mere existence of doubts as to the effectiveness of a domestic remedy does not automatically absolve the applicant from the obligation to exhaust it (§ 29).

Another example is provided in *Parrillo v. Italy* [GC], no. 46470/11, ECHR 2015, which concerned the donation of embryos obtained through *in vitro* fertilisation (IVF) to stem-cell research, the Court had to consider whether the applicant had exhausted domestic remedies despite not having lodged a complaint with the Italian Constitutional Court. In this context, the Court recalled that the only remedies which Article 35 § 1 requires to be exhausted are those that relate to the breach alleged and are available and sufficient (§ 87). It further noted that in the Italian legal system litigants were not entitled to apply directly to the Constitutional Court. Along with the fact that the Italian Constitutional Court had decided to suspend its examination of a similar case, these considerations led the Strasbourg Court to reject the objection regarding admissibility raised by the Italian government (§ 105). The case was declared admissible.

To give another example, in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* [GC], no. 21881/20, 27 November 2023, the applicant complained under Article 11 of the Convention of the blanket ban on demonstrations that had resulted from a federal ordinance to fight the Covid-19 pandemic. As regards exhaustion of domestic remedies, the Court observed that although Swiss law did not allow for direct review of the constitutionality of a federal ordinance, it was possible to review the constitutionality of the measure in question via a preliminary ruling, as part of the ordinary examination of a specific case by the judicial bodies at all levels (§ 150-151). The Court therefore concluded that an application for a preliminary ruling on constitutionality, lodged in the context of an ordinary appeal against a decision implementing federal ordinances, was a remedy which was directly accessible to litigants and made it possible, where appropriate, to have the impugned provision declared unconstitutional (§ 152). In this context, the Court recalled that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile was not a valid reason for failing to exhaust that avenue of redress (§ 159). In this regard the Court moreover reiterated its fundamentally subsidiary role, highlighting that the margin of appreciation afforded to States in the area of healthcare policy was a wide one (§160). The Court further stressed that, in light of the unprecedented and highly sensitive context of the Covid-19 pandemic, it was all the more important to first give national authorities the opportunity to strike a balance between competing private and public interests or between different rights protected by the Convention, taking into consideration local needs and conditions as well as the public-health situation (§ 163). The court concluded that the applicant association had failed to take appropriate steps to enable the national courts to fulfil their fundamental role in the Convention protection system (§ 164) and upheld the Government's preliminary objection of non-exhaustion of domestic remedies (§ 165).

Nowadays most member states allow a natural person to lodge a constitutional complaint as long as they have standing.[6] While the question remains open as to whether – under *Parrillo* [GC], cited above, where other factors also came into play - lack of direct access alone can exempt applicants from exhausting domestic indirect constitutional remedies, for those member states allowing individuals' direct constitutional complaints, the Court generally considers that applicants are required to make use of this remedy in order for their complaint to be admissible in Strasbourg."

For example, Turkey introduced the right to individual petition before the constitutional court in its legal system following constitutional amendments in September 2010. In *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, the Court observed that there was no reason for it to consider

[6] Venice Commission, Revised Report on individual Access to Constitutional Justice, adopted by the Venice Commission at its 125th Plenary Session (online, 11-12 December 2020) CDL-AD(2021)001-e, pp. 9.

that the individual petition did not, in principle, provide the possibility of appropriate redress for complaints under the Convention (§ 132). In reaching this conclusion, the Court considered that the Constitutional Court had jurisdiction to find violations of Convention provisions, that it was vested with appropriate powers to secure redress for violations, and that it was able to prohibit the authority concerned from continuing to breach the right in question and order it to restore the *status quo ante* (ibid).

Nevertheless, even if applicants can directly apply to the Constitutional Court, the Court will not automatically consider it an effective remedy. The Court will also take into account other factors such as the scope of the constitutional review.

Consider the case of *Petrova v. Latvia*, no. 4605/05, 24 June 2014 as an example. The facts of the case concerned the removal of organs of a deceased person for the purpose of transplantation. Whilst the removal of the organs had been in conformity with the domestic law, the closest relatives of the deceased had not been informed thereof. In this regard, the Court noted that in the Latvian system the individual constitutional complaint did not allow applicants to challenge the erroneous application or interpretation of a legal provision which, in its content, was not unconstitutional (§ 69). The applicant did not intend to challenge the constitutionality of the Latvian law in question, but rather argued that their wishes as the closest relative had not been taken into account. The Court noted that the applicant's complaint related to the application and interpretation of domestic law and concluded that in such circumstances the applicant did not need to exhaust the proposed remedy (§ 70).

2. Responsibility for raising the Convention complaint

As a rule, the applicant bears the responsibility for raising a Convention complaint before its national courts. It should be noted here that the lack of legal representation does not absolve the applicant from this responsibility (see, for example, *Buchs v. Switzerland* no. 9929/12, §§ 35-38, 27 May 2014).

However, the Court is not bound by the legal grounds adduced by the applicant under the Convention and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under a different provision than the one relied upon by the applicant (see, for example, *Nikolić v. Serbia*, no. 15352/11, §§ 36-37, 19 October 2021). Although, the Court has also confirmed that where domestic courts are entitled to or obliged to examine the case of their own motion (applying the principle of *jura novit curia*), applicants are still obliged to raise before them a complaint which they might intend to subsequently make it to the Court, and in a manner leaving no doubt that the same complaint subsequently submitted to the Court had indeed been raised at the domestic level (*Fu Quan, s.r.o. v. the Czech Republic* [GC], no. 24827/14, 1 June 2023, §§ 171-172). Consequently, while the Court can examine a case under a different provision of the Convention than the one relied upon by the applicant, parties could not validly put before the Court arguments which they had never made before the domestic courts (§ 123).

In *Tsuroyev and Others v. Russia*, no. 8372/07, 8 June 2021, concerning an alleged violation of Article 3 ECHR, the defendant state argued that the applicant had not exhausted domestic remedies because they had not lodged a criminal complaint against the police. The Court dismissed this argument and stressed that there was a positive obligation to investigate alleged ill-treatment of their own motion (§ 69).

3. Substance of the Convention complaint

As regards the Court's interpretation of the requirement to raise a Convention complaint in substance, it should be noted that the Court does not necessarily require the applicant to raise a specific Convention provision. For instance, the Court has held that citing a relevant Strasbourg judgment before the domestic courts, without invoking a specific Convention provision, satisfied this requirement (see, for example, *Tsalkitzis v. Greece (no. 2)*, no. 72624/10, § 35, 19 October 2017).

The Court has moreover accepted that applicants rely on equivalent provisions of domestic law as part of their Convention complaint. For example, the case of *Guberina v. Croatia*, no. 23682/13, 22 March 2016, concerned an applicant who lived with and provided care for his severely disabled child. In order to provide the child with better and more suitable accommodation, the applicant sold the family's third-floor flat, which did not have a lift, and bought a house. However, the government refused to grant him tax relief on the new house on the basis that the prior flat catered to his child's needs. He lodged an unsuccessful appeal before the Constitutional Court, arguing under Article 14 of the Constitution that, given the specific accommodation needs of his family due to his child's disability, he had been discriminated against by unfair application of the relevant tax legislation. During the proceedings before the Court, the respondent argued that the applicant had not exhausted domestic remedies since he had failed to cite the exact provision of the Constitution guaranteeing the right to property in his constitutional complaint. The Court dismissed this preliminary objection: the applicant had expressly relied on Article 14 of the Constitution, guaranteeing protection from discrimination, and complained of discrimination by the allegedly unfair application of the relevant tax legislation. By explicitly raising his discrimination complaint, which was in substance related to his property rights, he thereby provided the Constitutional Court with the opportunity of putting right the violations alleged against them.

At the same time, the applicant's complaint before the national courts should not be overly general. For example, the case of *Unseen ehf. v. Iceland* (dec.), no. 553630/15, 20 March 2018, concerned applicant who was a limited liability company that provided customers with encrypted email, web chat and video conference services. In a hearing held in the absence of the applicant, the District Court ordered that the former transfer to the police all the data in its possession regarding three specific email accounts. The applicants appealed to the Supreme Court, arguing that the District court had failed to divulge a legal basis for its decision to order the requested data and had misapplied the criminal procedural rules. After the Supreme Court dismissed its appeal, the applicant complained to Strasbourg that the decision to exclude it from the hearing violated its right to a fair trial. The Court noted that the company's two main submissions at domestic level concerned the legal basis for the divulging the data and the correct interpretation of the domestic law concerning telecommunications companies. It had there been clear that the applicant had failed to rely on Article 6 explicitly; nor had it framed its complaints in such a way that it could be considered to have sufficiently invoked Article 6 of the Convention before the Supreme Court.

It should be noted here that the level of elaboration required to satisfy the requirement to invoke a Convention right in substance may depend on the specific provision at stake. For example, whereas complaints regarding the length of domestic proceedings do not require much elaboration (see, for example, *Šaćirović and Others v. Serbia*, no. 54001/15 and 3 others, § 12, 20 February 2018), discrimination complaints may be comparatively more complex and hence require more elaboration (see, for example, *Soročinskis v. Latvia* (dec.), no. 21698/08, § 30, 22 May 2018).

In more recent judgments the Court has demanded compelling reasons for not citing Convention arguments explicitly, especially where the Convention has been embedded in the country's constitution or internal legal order. For example, in *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014, the applicants were reservists who had been drafted by the Yugoslav Army in connection with the North Atlantic Treaty Organisation's intervention in Serbia and were thus entitled to a per diem under the relevant law. However, following demobilisation the government refused to honour their obligation to pay reservists the per diem. the Government reached an agreement with reservists residing in certain "underdeveloped" municipalities under the terms of which the reservists concerned were guaranteed payment in monthly instalments. The agreement did not extend to reservists such as the applicants who did not reside in those municipalities. They therefore brought civil claims for payment under the Rules on Travel and Other Expenses in the Yugoslav Army but these were rejected at first instance and on appeal for being out of time. The applicants then lodged an appeal with the Constitutional Court

challenging the application of the statutory limitation period in their cases. Although the Constitutional Court ruled in their favour as regards their complaints of judicial inconsistency in the application of the limitation period, it ruled that publication of its decision in the Official Gazette constituted sufficient redress. In their applications to the European Court the applicants alleged that they had been discriminated against on grounds of residence. Though the Chamber found a violation of Article 14 read in conjunction with Article 1 of Protocol 1, upon referral, the Grand Chamber declared their application inadmissible: it could not but note that, although the applicants mentioned the Agreement in their constitutional appeal, they did not raise their discrimination complaint before the Constitutional Court, either expressly or in substance when they had the possibility of doing so (§§ 21-22, 32).

In *Lee v. the UK* (dec.), no. 18860/19, § 56, 7 December 2021, the Court took a similar approach. In this case, the applicant had argued that he had invoked his Convention rights by relying on domestic laws that were enacted to protect the latter. Here the Court held that although the domestic laws indeed implemented the Convention rights, they only did so in a "very limited way" and consequently did not protect the relevant substantive Convention rights (§ 70). Both the domestic proceedings and the Strasbourg case concerned alleged discrimination based on the applicant's sexual orientation and political opinion. The Court found that the domestic law test for discrimination differed from that of the Convention to the extent that, under national law, protection against discrimination was free-standing and Article 14 was an ancillary provision (§ 72). By only relying on domestic law, the applicant therefore deprived the domestic courts of the opportunity to determine whether Article 14 was applicable (§ 74). The Court highlighted that the facts of the case could likewise fall within the ambit of other Convention rights, which made establishing of whether Article 14 of the Convention was applicable all the more important. The Court concluded that it was "axiomatic that the applicant's Convention rights should also have been invoked expressly before the domestic courts" (§ 77).

By contrast, where the relevant legal test at domestic level was essentially identical to the test that the Court would apply, the applicant was not penalised for failing to raise his Convention rights explicitly. In *S.M.M. v. the United Kingdom*, no. 77450/12, 22 June 2017, for example, the applicant challenged the lawfulness of his continued immigration detention under domestic law principles. These principles were as follows: the Secretary of State must have intended to deport the person and can only use the power to detain for that purpose; the deportee may only be detained for a period that is reasonable in all the circumstances; If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; the Secretary of State should act with the reasonable diligence and expedition to effect removal. The Court held that the principles applied by the United Kingdom courts were almost identical to the test applied by this Court under Article 5 § 1 (f) of the Convention in determining whether or not detention had become "arbitrary". The Court considered that by arguing his detention was in breach of those principles, the applicant was effectively raising all the relevant arguments under Article 5 § 1 (f) before the domestic courts. It thus rejected a government preliminary objection based on non-exhaustion.

Finally, the Court also assesses the quality of the applicant's submissions before the domestic courts. For example, in *Dimitrova and Others v. Bulgaria*, no. 44862/04, 27 January 2011*, t*he applicants were members of three Roma families. An NGO specializing in Roma issues brought a complaint before the Administrative Court on behalf of the applicants after the latter had been evicted from their homes and then rehoused in accommodation they alleged to be substandard. The Administrative Court identified and ordered the association to rectify numerous procedural errors in its application. Namely, it had failed to identify the specific act they were complaining of, the body which had issued the act and the way in which that act had been unlawful. On 23 October 2009, after the association lodged a rectified complaint, the Administrative Court was still of the view that the application had failed to identify a specific administrative act against which judicial review proceedings could be brought. It declared the application inadmissible and the applicants' appeal was unsuccessful. The

Court held that the application brought by the applicants under Articles 2, 3, 6, 8, 13 and 14 was inadmissible for non-exhaustion of domestic remedies. In particular, the application before the domestic courts had initially been chaotic and even after clarification had remained unclear and unstructured. It had raised very diverse legal issues stemming from the provision, or lack of provision, of housing for the applicants. As a result, the domestic courts had been deprived of the opportunity of preventing or putting right the alleged Convention violations through their own legal system (§§ 75-76).

III. Topic 3: The age of subsidiarity and the process-based review

1. The 'Age of Subsidiarity'

The principle of subsidiarity has been entrenched in the Court's case-law dating back to the judgment in *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, which concerned the seizure and subsequent destruction of hundreds of copies of a book deemed to be obscene. The Court referred to subsidiarity here to acknowledge that domestic authorities are in principle better placed than international judges to determine what measures are necessary to secure the Convention rights and freedoms in their countries (§ 48).

The Court continues to reference its subsidiary function in its case-law, two examples are *S.A.S. v. France* [GC], no. 43835/11, § 129, ECHR 2014 (extracts) concerning a ban on wearing religious face coverings, and *Fedotova and Others v. Russia* (cited above) concerning the legal recognition of same-sex couples.

The term 'age of subsidiarity' has been used to define the current evolution of principle.[7] This phase is characterised by increased emphasis on the implementation and protection of Convention rights at the national level. The Court's analysis more often features a process-based review, whereby Strasbourg judges consider the extent to which national authorities have engaged with the Convention principles when reaching their decisions. This has also been referred to as a "procedural review", "procedural approach", or a "procedural turn" of the Court.[8]

2. Process-based review

Under a process-based review, the Court will have regard to the extent to which national authorities have weighed competing interests and considered Convention compliance in their decision-making processes.

2.1 Process-based review of judicial processes

In *MGN Limited v. the United Kingdom*, no. 39401/04, 18 January 2011 the applicant was the publisher of a national daily newspaper which had published articles about a well-known fashion model's drug addiction therapy and was then sued by that model in domestic proceedings. The applicant applied to the Court under Article 10 after having been ordered by domestic courts to pay damages and substantial 'success-fees' to the model. The applicant urged the Court to side with the minority in the domestic judgment in order to find the damages unjustified. The Court stated that strong reasons would be required to substitute its view for the majority's in the domestic judgment and that in this case, the domestic court had provided relevant and sufficient reasons for their decision to award damages to the effect that the Court saw no reason, let alone a strong reason, to substitute its view for that of the national court (§ 155). The Court found that the damages award did not breach Article 10 but that the order of success-fees did.

Axel Springer AG v. Germany [GC], no. 39954/08, 7 February 2012 and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012 both concerned the publication in the media of articles and, in the second case, of photos depicting the private life of well-known people. In *Axel Springer* (cited above), the applicant company was a publisher of a national daily newspaper which

[7] Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 HRLR 487, 491.

[8] See, for example, Gerards J., "Procedural Review by the ECtHR: A Typology", in Gerards J, Brems E, (eds.) Procedural Review in European Fundamental Rights Cases (Cambridge University Press, 2017), 127.; Arnardóttir O.M., "The "procedural turn" under the European Convention on Human Rights and presumptions of Convention compliance" International Journal of Constitutional Law 15(1), 1 January 2017, 9–35.; Popelier P., "The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights" in Popelier P., Mazmanyan A. and Vandenbruwaene W. (eds.), The Role of Constitutional Courts in Multilevel Governance (Intersentia, 2013), 249.

had published articles about X, a well-known television actor, being arrested and convicted for illegal possession of drugs. The German courts granted an injunction to X, prohibiting further publication, holding that the right to protection of X's personality rights prevailed over the public's interest in being informed. The applicant company applied to the Strasbourg Court, alleging a violation of its right to freedom of expression under Article 10 of the Convention. The Court stated that where the domestic authorities have undertaken a balancing exercise between a publisher's freedom of expression and the right to privacy of the person who was the subject of the article, strong reasons would be needed to substitute its view for that of the national courts (§ 87-88). The Court found a violation of Article 10 in this case on account of the fact that the content of the articles could be considered to present a degree of general interest, the actor was sufficiently known to qualify as a public figure and had been arrested in a public setting, the applicant company had confirmed the validity of the information and had made no disparaging comments or unsubstantiated allegations, it had not been shown that publication had caused any serious consequences for the actor, and finally, the sanctions imposed on the applicant company were capable of having a chilling effect. In *Von Hannover v. Germany (no. 2)* (cited above), the Court recognised that where the national authorities have undertaken a balancing exercise in conformity with the Court's case-law, the Court would require strong reasons to substitute its view for that of national courts (§ 107). In this case, the applicants were Princess Caroline von Hannover, daughter of the late Prince Rainier III of Monaco, and her husband Prince Ernst August von Hannover. The case concerned a complaint under Article 8 regarding the publication of photos depicting the applicants' private life. The domestic court had granted an injunction prohibiting the publication of two photos on the grounds that they were being published for entertainment purposes only, but had not granted an injunction for a third photo deemed to relate to a matter of general interest. The Court found that the German courts had carefully balanced the competing interests and had explicitly taken into account the Court's case-law. There had accordingly been no violation of Article 8.

Lillo-Stenberg and Sæther v. Norway, no. 13258/09, 16 January 2014 concerned a complaint by a well-known musician and actress about press invasion of their privacy due to the publication of an article and photographs of their wedding without consent. In domestic proceedings, the Norwegian Supreme Court found against the couple, determining that the wedding has occurred in a place accessible to the public and that the article was neither offensive nor negative. The couple subsequently complained that the Supreme Court judgment breached their right to respect for private life under Article 8 of the Convention. The Court found that the Supreme Court had carefully balanced the competing interests and explicitly took account of relevant ECHR case law, in particular, *Von Hannover (no. 2)* and *Axel Springer AG* (cited above). The Court reiterated that although opinions may differ on the outcome of a judgment, strong reasons would be needed for the Court to substitute its view for that of domestic courts where the balancing exercise has been undertaken in conformity with the criteria in the Court's case law (§ 44).

In *Fernández Martínez v. Spain* [GC], no. 56030/07, ECHR 2014 (extracts) the Court found no violation of Article 8 in a case concerning the refusal to renew the contract of a teacher of Catholic religion and morals after he publicly revealed his position as a married priest. Here the Court observed that the domestic courts had conducted a thorough analysis of all the relevant factors and had weighed the competing interests in detail and in depth (§ 151).

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], no. 931/13, 27 June 2017 concerned an order restraining the mass publication of tax information. The Court recognised that the domestic courts had sought to strike a balance between the freedom of expression and the right to privacy and that in doing so, they had carefully analysed and applied relevant Convention and Court of Justice of the European Union case law (§ 196). The Court considered that the domestic courts had given due consideration to the principles and criteria in the Court's case-law for balancing these competing rights and determined that there had been no violation of the freedom of expression in this case.

Ndidi v. the United Kingdom, no. 41215/14, 14 September 2017 demonstrates that the Court does not see its supervisory function as requiring it to conduct a proportionality assessment afresh when the domestic courts have already done so in accordance with the Court's case-law. This case concerned a deportation order against the applicant due to his involvement in criminal activity. The applicant argued that this was a disproportionate interference with his right to respect for private and family life whereas the respondent State submitted that the domestic courts had engaged in a full and proper assessment of the applicant's deportation. The Court stated that where the domestic courts have carefully examined the facts, applied relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it would not substitute its own assessment of the merits (including, in particular, its own proportionality assessment) for that of the competent national authorities. The Court further noted that the only exception to this rule is where there are strong reasons for doing so (§ 76). Accordingly, no violation of Article 8 was found in this case.

However, where the Court finds that domestic authorities have not conducted a balancing exercise within the framework of the Convention, this does not automatically mean that the Court will find a violation. For example, in *Otite v. the United Kingdom*, no. 18339/19, 27 September 2022, a case which also concerned Article 8 in the context of a deportation order, the Court found it necessary to conduct the required balancing exercise itself as the domestic authorities had not done so by reference to the case-law of the Court (§§ 42 – 45). The Court concluded that the applicant's deportation would not violate Article 8 of the Convention as the strength of his family and private life in the United Kingdom did not outweigh the public interest in his deportation (§ 56).

2.2 Process-based review of legislative processes

It emerges from the case-law that, in determining the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (*Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts) § 108). The quality of the parliamentary review is of particular importance in this respect, including to the operation of the relevant margin of appreciation. The central question is therefore not whether the State could have achieved the legitimate aim through different means, but rather, whether in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (§§ 108-110).

Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005-IX concerned the exclusion of convicted prisoners from voting in parliamentary and local elections. The Court found a violation of Article 3 of Protocol No. 1. In its analysis, the Court reflected that " it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote" and that "the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was generally seen as a matter for Parliament and not for the national courts. The court did not, therefore, undertake any assessment of proportionality of the measure itself" (§ 79-80).

Sukhovetskyy v. Ukraine, no. 13716/02, ECHR 2006-VI concerned the refusal to register the applicant as a candidate in parliamentary elections as he had failed to pay an electoral deposit. The Court referred to previous cases where it had found a violation of Article 3 of Protocol No. 1 and distinguished this case on the basis that the impugned measure in *Sukhovetskyy* had been the subject of considerable parliamentary scrutiny where the Ukrainian parliament sought to balance the competing interests between deterring frivolous candidatures and ensuring universal franchise (§ 65). The Court was satisfied that the electoral deposit system was an acceptable compromise between these competing interests and that the domestic legislature and the judiciary continued to carefully scrutinise the measure in light of modern-day conditions (§ 67.) The Court therefore held that there had been no violation of Article 3 of Protocol No. 1 in this case.

In *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-V, the Court found a violation of Article 8 for a refusal to grant artificial insemination facilities to enable a serving prisoner to father a child, who would otherwise not be able to have a child with his wife in light of his wife's age and his release date. The core issue was whether a fair balance had been struck between the competing public and private interests. The Court found that the policy as structured effectively excluded a weighing of the competing interests, nor was a balancing exercise of proportionality assessment carried out when creating the policy. The absence of such an assessment was seen as falling outside the State's margin of appreciation so that a fair balance had not been struck between the competing public and private interests involved.

In *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I, the applicant and her former partner had stored embryos prior to the applicant undergoing surgery to remove her ovaries. Upon the relationship's dissolution, the applicant's partner withdrew his consent for the embryos to be used. The applicant complained that the domestic law permitting her former partner to withdraw his consent to the storage and use of the embryos prevented her from ever having a child to whom she was genetically related. The Court found no violation of Article 8 in this case, stating that the domestic legislation struck a fair balance between the competing interests and acknowledging that, "it is relevant that the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate" (§ 86). The Court accepted that "it would have been possible for Parliament to regulate the situation differently. However, ... the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article" (§ 91).

Lindheim and Others v. Norway, nos. 13221/08 and 2139/10, 12 June 2012 concerned an amendment to Norwegian rental law that provided a statutory right for lessees underground leases to demand an indefinite extension of their leases. The applicants were landowners who claimed that this amendment breached their rights under Article 1 of Protocol No. 1. In its analysis, the Court acknowledged that it did not appear an assessment was made of whether the statutory amendment struck a fair balance between the interests of the lessors and the lessees. The Court was not satisfied that the respondent State, notwithstanding its wide margin of appreciation in this area, struck a fair balance between the general interest of the community and the property rights of the applicants, who were made to bear a disproportionate burden.

Animal Defenders International v. the United Kingdom, cited above, concerned the complaint by a non-governmental organisation that it had been denied the possibility to advertise on TV and radio due to a ban on political advertising. The Court found that the reviews of the ban by both parliamentary and judicial bodies had been exacting and pertinent, taking into account the European Court's caselaw; the ban only applied to advertising and the applicant NGO had access to alternative media, both broadcast and non-broadcast; and, the lack of European consensus on how to regulate paid political advertising in broadcasting meant that the UK Government had more room for manoeuvre when deciding on such matters as restricting public interest debate. Overall, the Court found that the reasons given to justify the ban were convincing and that the ban was not therefore incompatible with Article 10 of the Convention.

In *Shindler v. the United Kingdom*, no. 19840/09, 7 May 2013, the Court found no violation of Article 3 of Protocol No. 1 where a non-resident citizen was no longer entitled to vote in parliamentary elections after living in Italy for fifteen years. The Court was satisfied that the impugned legislation struck a fair balance between the conflicting interests, recognising "extensive evidence before the Court to demonstrate that Parliament has sought to weigh the competing interests and to assess the proportionality of the fifteen-year rule". Further, the Court acknowledged that legislative debates do not automatically render a measure Convention compliant, but "that that review is taken into

consideration by the Court for the purpose of deciding whether a fair balance has been struck between competing interests" (§ 117).

In *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017, the applicants, gay rights activists, were fined in administrative proceedings for staging a protest against legislation banning the promotion of heterosexuality or non-traditional sexual relations among minors. The Court reiterated that "in order to determine the proportionality of a general measure, it must primarily assess the legislative choices underlying it, regard being had to the quality of the parliamentary and judicial review of the necessity of the measure" (§ 63). The Court's assessment focused on the necessity of the impugned laws (§ 64), concluding that the legal provisions in question did not serve to advance the legitimate aim of protection of morals and were likely to be counter-productive to achieving the declared legitimate aims of the protection of health and the protection of rights of others (§ 83).

L.B. v. Hungary [GC], no. 36345/16, 9 March 2023 concerned the publication of the applicant's identifying data, including home address, on a tax authority website portal for failing to fulfil his tax obligations. The Court declared that the quality of the parliamentary review of the necessity of the measure was of central importance in the proportionality assessment. Here the Court stated that it did not appear Parliament had considered to what extent publication of all the data in question, and in particular the tax debtor's home address, was necessary, and that data protection considerations seems to have featured little, if at all, in the drafting of the law. The Court concluded that the respondent State had not demonstrated that the legislature sought to strike a fair balance between the relevant competing individual and public interests, and that there had been a violation of Article 8.

3. Importance of process-based review in novel or complex issues

Process-based review may be especially important in cases involving novel and complex issues falling within societal and moral democratic discourse.[9]

Lambert and Others v. France [GC], no. 46043/14, ECHR 2015 (extracts) concerned the withdrawal of life-sustaining treatment. The Court considered the relevant legislative framework, as interpreted by the domestic court, and the decision-making process, to have been conducted in a meticulous fashion. The Court also noted that the judicial remedies available to the applicants had allowed for all points of view to be expressed and all aspects to be carefully considered, consequently finding that the domestic authorities had complied with their positive obligations under Article 2 of the Convention.

In *Parrillo v. Italy* (cited above), the applicant wanted to donate embryos, obtained through *in vitro* fertilisation (IVF), to stem-cell research, but this request was refused due to a law prohibiting experiments on human embryos. In its assessment, the Court stated that determining whether the State remained within its margin of appreciation required examining the arguments to which the legislature had regard to in enacting the law. Here the Court acknowledged that the drafting process of the relevant statute had included extensive discussions taking account of different scientific and ethical opinions, including in the sphere of individual freedoms, and had been subject to several referendums. The Court determined that the legislature had considered the different interests at stake, particularly the State's interest in protecting the embryo and that of the persons concerned in exercising their right to individual self-determination in the form of donating their embryos to research. The Court found that the State had remained within its margin of appreciation and found no violation of Article 8 of the Convention.

[9] See Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 HRLR 1 473, 491.

IV. Topic 4: A Court that matters: suggestions from the national judiciary

In January 2021, the Court implemented a new case-processing strategy which put into place a more targeted approach to processing potentially well-founded "impact" cases. The goal of the new strategy is to ensure that the Court's success will be measured not only in numerical terms, namely the number of clearly inadmissible cases processed in a given period, but more importantly by reference to its adjudication of those cases which address core legal issues of relevance for the State in question and for the Convention system in general. In this way the strategy will contribute in a significant way to ensuring that the Court remains a Court which matters (see Annex II).

In 2022, 219 "impact" applications were processed. 111 impact judgments and 21 impact decisions were handed down. The remaining cases were communicated.

From January to November 2023, 65 impact requests have resulted in a judgment, 17 have been declared inadmissible or struck out from the list and 65 have been communicated. 280 impact applications are still pending before the Court, and 235 of them have already been communicated.

Impact cases concern a wide variety of topics.

Cases related to judicial independence have been processed under this strategy. In *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022 the Court found a violation of Article 6 § 1 regarding the applicant company's right to an independent and impartial tribunal established by law due to manifest breaches in the appointment of judges to the Supreme Court's Civil Chamber. *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022 concerned grave irregularities in the appointment of judges to the newly established Supreme Court's Disciplinary Chamber and the suspension of a judge for verifying another judge's independence. The Court found violations of Article 6 § 1, Article 8 and Article 18 taken in conjunction with Article 8 in this case. And in *Żurek v. Poland*, no. 39650/18, 16 June 2022 the Court found a violation of Article 6 § 1 and Article 10 where a judge was sanctioned for publicly criticising legislative reform of the judiciary.

Impact cases have also included cases relating to individuals' citizenship status and/or identity documents. For example, *Hashemi and Others v. Azerbaijan*, nos. 1480/16 and 6 others, 13 January 2022 concerned the refusal of national authorities to recognise the Azerbaijani citizenship of the applicants' children and to issue them identity cards. The applicants had fled Afghanistan and Pakistan during the 2000s and settled in Azerbaijan as refugees. Their children were born in Azerbaijan and at the material time, Azerbaijani law provided for *ius soli*. A violation of Article 8 was found in this case. And in *Y v. France*, no. 76888/17, 31 January 2023, no violation of Article 8 was found where the national authorities refused to insert the term "neutral" or "intersex", instead of "male", on the birth certificate of an intersex person.

Cases prioritised under this strategy have led to new developments in the Court's case law. In *Arnar Helgi Lárusson v. Iceland*, no. 23077/19, 31 May 2022, the Court ruled, for the first time, that a complaint about a lack of accessibility of public buildings by disabled persons fell within the ambit of "private life". The Court examined, under Article 14 in conjunction with Article 8, whether the State had fulfilled its positive obligations in this respect and found no violation. In *C. v. Romania*, no. 47358/20, 30 August 2022 the Court examined, for the first time under Article 8 of the Convention, a complaint specifically about sexual harassment in the workplace. A violation of Article 8 was found in this case.

Climate change cases provide an example of cases prioritised under our impact strategy which were then relinquished to the Grand Chamber. These include *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20) concerning a complaint by a Swiss association and its members, a group of elderly people who are concerned about the consequences of global warming on their living conditions and health; *Carême v. France* (application no. 7189/21) concerning a complaint by an inhabitant and former mayor of the municipality of Grande-Synthe, who submits that France has taken insufficient steps to prevent climate change and that this failure entails a violation

of the right to life and the right to respect for private and family life; and *Duarte Agostinho and Others v. Portugal and 32 Others* (application no. 39371/20) concerning the greenhouse gas emissions from 33 member States, which in the applicants' view contribute to the phenomenon of global warming resulting, among other things, in heatwaves affecting the applicants' living conditions and health. Grand Chamber hearings in each of these cases were held in 2023.

Annex I: List of Cases

Advance Pharma sp. z o.o v. Poland, no. 1469/20, 3 February 2022

Animal Defenders International v. the United Kingdom [GC], no. 48876/08, ECHR 2013 (extracts)

Arnar Helgi Lárusson v. Iceland, no. 23077/19, 31 May 2022

Axel Springer AG v. Germany [GC], no. 39954/08, 7 February 2012

Bayev and Others v. Russia, nos. 67667/09 and 2 others, 20 June 2017

Buchs v. Switzerland no. 9929/12, 27 May 2014

Budimirović v. Serbia (dec.), no. 57744/15, 12 September 2017

C. v. Romania, no. 47358/20, 30 August 2022

Carême v. France (application no. 7189/21)

Castillo Algar v. Spain, 28 October 1998, Reports of Judgments and Decisions 1998-VIII

Dickson v. the United Kingdom [GC], no. 44362/04, ECHR 2007-V

Dimitrova and Others v. Bulgaria, no. 44862/04, 27 January 2011

Duarte Agostinho and Others v. Portugal and 32 Others (application no. 39371/20)

Evans v. the United Kingdom [GC], no. 6339/05, ECHR 2007-I

Fedotova and Others v. Russia [GC], nos. 40792/10 and 2 others, 17 January 2023

Fernández Martínez v. Spain [GC], no. 56030/07, ECHR 2014 (extracts)

Fu Quan, s.r.o. v. the Czech Republic [GC], no. 24827/14, 1 June 2023

Grzęda v. Poland [GC], no. 43572/18, 15 March 2022

Guberina v. Croatia, no. 23682/13, 22 March 2016

Habulinec and Filipovic v. Croatia (dec.), no. 51166/10, 4 June 2013

Halet v. Luxembourg [GC], no. 21884/18, 14 February 2023

Handyside v. the United Kingdom, 7 December 1976, Series A no. 24

Hashemi and Others v. Azerbaijan, nos. 1480/16 and 6 others, 13 January 2022

Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, ECHR 2005-IX

Juszczyszyn v. Poland, no. 35599/20, 6 October 2022

K.O'S. v. Ireland, no. 61836/17, 10 November 2020

L.B. v. Hungary [GC], no. 36345/16, 9 March 2023

Lambert and Others v. France [GC], no. 46043/14, ECHR 2015 (extracts)

Lee v. the UK (dec.), no. 18860/19, § 56, 7 December 2021

Lillo-Stenberg and Sæther v. Norway, no. 13258/09, 16 January 2014

Lindheim and Others v. Norway, nos. 13221/08 and 2139/10, 12 June 2012

Nikolić v. Serbia, no. 15352/11, 19 October 2021

Mehmet Hasan Altan v. Turkey, no. 13237/17, 20 March 2018

MGN Limited v. the United Kingdom, no. 39401/04, 18 January 2011

Ndidi v. the United Kingdom, no. 41215/14, 14 September 2017

Oliari and Others v. Italy, nos. 18766/11 and 36030/11, 21 July 2015

Otite v. the United Kingdom, no. 18339/19, 27 September 2022

Parrillo v. Italy [GC], no. 46470/11, ECHR 2015

Petrova v. Latvia, no. 4605/05, 24 June 2014

S.A.S. v. France [GC], no. 43835/11, ECHR 2014 (extracts)

S.M.M. v. the United Kingdom, no. 77450/12, 22 June 2017

Šaćirović and Others v. Serbia, no. 54001/15 and 3 others, 20 February 2018

Sanchez v. France [GC], no. 45581/15, 15 May 2023

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], no. 931/13, 27 June 2017

Selmouni v. France [GC], no. 25803/94, ECHR 1999-V

Shindler v. the United Kingdom, no. 19840/09, 7 May 2013

Soročinskis v. Latvia (dec.), no. 21698/08, 22 May 2018

Sukhovetskyy v. Ukraine, no. 13716/02, ECHR 2006-VI

Thörn v. Sweden, no. 24547/18, 1 September 2022

Tsalkitzis v. Greece (no. 2), no. 72624/10, 19 October 2017

Tsuroyev and Others v. Russia, no. 8372/07 and 2 others, 8 June 2021

Unseen ehf. v. Iceland (dec.), no. 553630/15, 20 March 2018

Verein Klimaseniorinnen Schweiz and Others v. Switzerland (application no. 53600/20)

Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012

Vučković and Others v. Serbia (preliminary objection) [GC], nos. 17153/11 and 29 others, 25 March 2014

Y v. France, no. 76888/17, 31 January 2023

Yüksel Yalçınkaya v. Türkiye [GC], no. 15669/20, 26 September 2023

Żurek v. Poland, no. 39650/18, 16 June 2022

Annex II: Impact strategy

"A Court that matters/Une Cour qui compte": A strategy for more targeted and effective case-processing (17 March 2021)

The Court's new case-processing strategy consists of putting into place a more targeted approach to processing potentially well-founded "impact" cases, building on and strengthening the priority policy adopted by the Court in 2009 and amended in 2017.[10]

The current priority policy sets out seven categories of cases ranging from the most urgent (category I) to the least important (category VII). Cases falling under categories I-III are dealt with by the Court by way of judgments or decisions mainly taken by the Grand Chamber or Chambers of seven Judges. Repetitive cases and manifestly inadmissible cases under categories V-VII are processed speedily by the Court by way of various filtering mechanisms and new working methods which have been put in place successfully during the Interlaken reform period.

However, there are currently 17,800 potentially well-founded applications under category IV which do not raise core rights and which on average take the Court between 5-6 years to process. Among these category IV cases, a small percentage may raise very important issues of relevance for the State in question and/or the Convention system as a whole and justify more expeditious case-processing. These cases will be identified and marked as "impact" cases under a new category IV-High. To date, approximately 650 cases have been so identified.

"Impact" cases are identified on the basis of flexible guiding criteria as well as a list of examples. The criteria have been defined as follows: the conclusion of the case might lead to a change or clarification of international or domestic legislation or practice; the case touches upon moral or social issues; the case deals with an emerging or otherwise significant human rights issue. If any of these criteria are met, the Court may take into account whether the case has had significant media coverage domestically and/or is politically sensitive.

The new strategy has two principle and interrelated aims.

Firstly, the strategy aims to ensure that priority cases under categories I-III and newly categorised "impact" cases under category IV-High are identified, processed and adjudicated by the Court even more expeditiously. This will be achieved through an enhanced deployment of Court resources and strict internal monitoring.

Secondly, the strategy will ensure a balanced and productive output through increased standardisation and streamlining of the processing of non-impact category IV cases, through exploiting existing working methods and IT tools. Accordingly, and to the extent possible, these cases will be dealt with by the Court as efficiently as possible in Committees of three Judges, continuing with the effective application of the broader-WECL policy and developing further the WECL Fast-Track procedure. The Court will strive to produce briefer and more focused draft judgments in these cases. The Court will continue its efficient filtering of cases which fall in categories V-VII.

The goal of the new strategy is to ensure that the Court's success will be measured not only in numerical terms, namely the number of clearly inadmissible cases processed in a given period, but more importantly by reference to its adjudication of those cases which address core legal issues of relevance for the State in question and for the Convention system in general. In this way the strategy will contribute in a significant way to ensuring that the Court remains a Court which matters ("une Cour qui compte").

[10] https://www.echr.coe.int/documents/d/echr/priority_policy_ENG