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

Concrete lessons to be learned from the first proceedings under Protocol No. 16 – The Court's experience

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1. Introductory remarks

Protocol 16 provides for a novel kind of mechanism. The first key feature is that it places the domestic apex courts in the driving seat by allowing them to directly engage the Strasbourg Court and address specific questions to it. The second key feature is that this is an advisory instrument which accords a special kind of task for this Court. In such a novel context, it is inevitable that the application of the instrument entails a ***learning process*** for all those concerned, especially the primary protagonists on both sides. In this perspective, five years is still a rather short time. Various experiences and lessons have, nonetheless, emerged by now. It is my task to try to identify some of those from the Court's perspective.

The core elements of this instrument are the following:

- To provide non-binding **advisory guidance** to
- an **apex court at its request** in
- a **pending** case regarding
- the **interpretation** of one or more provisions of the Convention.

2. Some general observations on the requests submitted so far

Eight requests have been submitted so far. One has been rejected by the Panel as inadmissible and one is currently pending. Six advisory opinions have been delivered. The questions posed cover a variety of subjects and issues. In this respect, there are no common features.

What one can say, though, is that most of the requests appear to have arisen from a context of issues that in one way or another were sensitive or controversial at the domestic level. The most recent opinion, requested by the SC of Finland, was an exception in this respect, as the questions posed were specific to a concrete case and not rooted in any topical issues of wider dimensions. In five cases, however, one can discern a background involving societal or political sensitivities of some kind.

Another observation worth noting is that in four cases, the request was a follow-up to prior judgments of the Court in which violations of the Convention had been found. What this tells us is perhaps not surprising, but it is one manifestation of the fact that developments in the case-law often generate further questions, which may give rise to difficulties in implementation, create uncertainties, or otherwise require clarification in new or subsequent sets of circumstances. The possibility for the domestic apex court to take the initiative and to seek advisory guidance in a timely manner may be a particularly useful option in such situations. Otherwise, the need for further clarification would be left to only depend on new individual applications being lodged and decided upon at some future time.

3. Some reflections on the type and context of advisory requests

Even when there is no concrete link with a specific prior judgment of the Court, the advisory mechanism will always operate in the context of the Court's existing case-law. Relevant questions will arise from that background, where something that the domestic court needs to know is unclear. Various scenarios may be envisaged:

- Firstly, the advisory mechanism may be most useful in situations where the question raised is likely to be relevant for a larger number of cases rather than just a particular pending case – i.e. when the issue has precedential significance.

    - The first request on which an opinion was provided, submitted by the French Court of Cassation was of this nature (relating to the legal situation of children born by way of surrogacy).

- Secondly, an advisory opinion before the conclusion of the domestic proceedings may be useful in circumstances where, given the nature of the issue to be decided, a possible *subsequent* finding of a violation would risk having particularly problematic legal consequences.

    - The recent request from the Supreme Court of Finland can be seen as an example of this, as it concerned proceedings to change an individual's legal family status, a subsequent reversal of which could be complicated in terms of possible consequences.

- Thirdly, an advisory opinion may be helpful in situations where an issue of general or recurring importance has already given rise to conflicting findings or positions taken at the domestic level.

    - The request submitted by the French Council of State, concerning the regulation of hunting rights, may be seen as an example of such a situation.

4. Some practical fundamentals of the advisory process

The key parameters of a meaningful and productive judicial dialogue through the advisory process lie both in the quality of the questions and the quality of the answers. Both are closely interlinked: pertinent and useful answers can only be provided if the questions are sufficiently clear and specific both in terms of what the resolution of the case requires, and the relevant Convention issues on which that resolution depends.

I will first direct focus on the ***request side*** of the process.

It is a fundamental requirement that the question must concern a matter of Convention law that is "**necessary for the adjudication** of the case" by the domestic court. Indeed, the interruption of pending proceedings for the purpose of obtaining an advisory opinion can only be justified if there is

a **genuine need** for such a procedure. This matter will have to be assessed at both ends of the advisory process.

In the Panel decision by which the request was not admitted (P16-2020-001), the reasoning given was as follows:

> "On account of their *nature, degree of novelty and/or complexity or otherwise*, [the questions] do not concern an issue on which the requesting court would *need the Court's guidance* by way of an advisory opinion to be able to ensure respect for Convention rights when determining the case before it".

Apart from the formulation of the questions to be submitted, it is essential to bear in mind that in these proceedings, the requesting court will be the ***main, and crucial, source of relevant legal and factual information*** for this Court on all the relevant elements of the domestic proceedings and the applicable domestic law.

Consequently, I would highlight the following points:

- **The requesting court** is responsible for
    - identifying and formulating admissible, sufficiently specific and precise questions;
    - explaining the link between the questions and the issues to be resolved in the domestic proceedings;
    - placing the Court in the most informed position possible regarding
        - the relevant aspects of the domestic proceedings
        - the relevant aspects of the domestic legal framework, including the constitutional one where relevant;
        - the relevant context and possible wider implications of the issue;
    - separating the issues incumbent on the domestic court to determine from the Convention issues on which the Court's guidance is needed.
- In addition, the requesting court is invited to provide "if possible and appropriate, a statement of [its] own views on the question, including any analysis it may itself have made of the question" [R 92 2.1 (e)].

Moving on to the ***response side*** of the process, the Court's role and responsibility is to give answers to specific questions concerning unsettled points of Convention law, based on the request submitted and the information provided to it.

The Court has already determined that the ***admissibility of the questions*** may not only be assessed by the Panel at the initial stage but may also be reassessed by the Grand Chamber at the subsequent stage of the proceedings, where necessary. This again accentuates the need for the domestic court to exercise care when reflecting on and formulating the request, so that no time risks being lost unnecessarily.

The Court has also held that it may ***reformulate the questions*** posed if this is determined necessary based on its examination of the request and the legal and factual context before it. This may be helpful with a view to enabling the Court to provide an appropriate advisory response in the circumstances before it.

As the advisory mechanism operates while domestic proceedings remain pending, ***time is of the essence***. It is therefore important that the Court should manage to process the requests as quickly as

possible, without compromising the quality of its response. The admissible requests are always matters to be decided by the Grand Chamber, and they are assigned priority treatment. Urgent processing may be granted upon request. We have no examples so far of the latter, urgent scenario.

The Court has made considerable efforts to design and improve its ***internal working methods*** to enable a speedy work process. This should normally involve only one round of deliberation by the Grand Chamber. Whether this can be achieved depends in a large measure on the complexity and quality of the request and the questions submitted.

In optimal circumstances, the opinion should be delivered within half a year; this is the goal. In the first, as well as the most recent case, this timeframe was met. In the four other cases, the time taken was longer, for various reasons. Thus, in the second French case, the Court awaited the completion of the domestic QPC procedure which became pending after the submission of the advisory opinion request. One of the requests had to be processed during the first wave of the Covid-19 crisis. Thus, some of the delays arose from external reasons. In a couple of cases, the process was complicated by the nature and context of the issues raised.

In the meantime, further internal work has been done with a view to streamlining the work process. When an advisory request arrives, it will immediately enter a special track of prompt internal processing.

Another key aspect of the current approach concerns the style of reasoning to be adopted. This must be adapted to the nature of this particular "product", i.e. a non-binding advisory opinion. Thus, the style of reasoning should be more concise than is typical in the context of GC judgments in contentious proceedings. The opinion should remain as strictly focussed on the questions raised as possible. – A simple illustration: the most recent Advisory Opinion was 16 pages long. This is much less than any typical GC judgment.

5. What about the answers?

A ***bottom-line question*** in this context will be this: Have the opinions delivered so far served their purpose and been useful for the requesting courts? Have they provided added value? This is not easy for us to know, at this end. In some cases, one can suppose that the answers which the Court was able to give were indeed helpful. On some occasions, it is less clear to what extent the answers were actually capable of providing added value. For instance, in the advisory opinion issued to the French Council of State, the actual answer did not contain more than a nutshell summary of the well-established general principles in matters of alleged discrimination. The level of abstraction remained very high. Whether the analysis in the reasoning could provide relevant added value to the requesting court is another matter. This I am not in a position to know.

Inevitably, the ***value that may be derived*** from an advisory opinion will to a large extent depend on the legal and factual context of the request and the questions posed. One difficulty is that it may not always be possible to determine the pertinence and quality of the questions before conducting a thorough analysis of the issues that arise.

Another inescapable fact is that a single opinion can settle something but not exhaust an issue. The answer to one question may give rise to further, new questions. We have already seen this in the context of surrogacy. The advisory instrument is one tool in the process of clarification and evolution regarding the interpretation of the Convention.

6. What about judicial dialogue?

Protocol 16 has been called "the judicial dialogue protocol". This is correct in the sense that the initiative is taken by the requesting domestic court, whereas the role of our Court is to respond, the subsequent conclusions remaining for the domestic court to determine. The notion of dialogue, however, entails more than a question and an answer. It should comprise an exchange of views and ideas. In this sense, the requesting courts are indeed invited to give their views on the questions raised. So far, however, we haven't seen much of this in the requests submitted. This is perhaps understandable, as it may be delicate for the domestic court to make known its views at that stage of pending proceedings. In any event, the Court would certainly always welcome an analysis of the questions raised by the domestic court, as well as the implications of possible answers. After all, the prime novelty of the advisory mechanism is that the domestic apex courts are not merely at the receiving end of the Court's interpretations but can directly engage with it.