ECHR LECTURES PROCEDURAL ISSUES

TEXTBOOK: 90% of coursework. Look to relevant extracts from rapports on the Moodle page. Enough to secure a first.

Case reports (printed Strasbourg judgements) in hallward.

Assessment
Types of questions for tutorials will be the types of questions in the exam. Written tutorial work emailed out, submit in second tutorial. Based on the content for that tutorial.

INSTITUTIONS

Council of Europe: ECHR is a treaty produced by the council of Europe, nothing to do with the EU. It is an international organisation set up in 1949. Two major reasons for this:

1. What was happening in Europe in the 1930s and reaction to fascism in European states. Seen that if this was present at that time they could have prevented some of the undertakings in the earlier decades.
2. What had happened in Europe since 1945, from 1945 onwards, the Soviet Union occupied eastern European states and imposed its communist totalitarian society on those states. That meant that western European countries felt threatened ideologically by this extension of the soviet union, the council of Europe was set out to set out their values

Values:

1. Protection of human rights
2. Promotion of democracy
3. Rule of law

Started off with a few European states, massively expanded in the 1990s due to the collapse of the Soviet Union, so eastern European states wanted to be seen as respecting these western ideological values. That means that today there are 47 member states of the COE. Larger than the EU. Not allowed to join unless the state follows and agrees to the ECHR.
COE members require ratification of the convention

The Convention
The idea of there being a legal document like the ECHR is a year older- in 1948- than the COE, civic society groups came together in the Hague and had a congress in the Hague. At the end of this, this society issued a proclamation, promoting the idea of a charter of human rights. It also demanded that there should be a court to adjudicate on that charter.
A year later, the first thing that the COE did was think about drafting a convention. This drafting process to a year to be agreed by the MS. Finally agreed **November 1950**. **Where did the COE get the rights that are found in the convention?**

1. UN Universal declarations of Human Rights in 1948, this was not legally binding. COE took a number of these rights as a basis for the convention.
2. The constitutional histories of the MS of the COE.

SYSTEM OF ENFORCEMENT UNDER THE ECHR

Three eras and forms of enforcement systems. Refer to the handout. The original system was set up in 1950 and operated until 1988. Enormously complicated because the states were very cautious about creating a European enforcement system. This was a unique development of signing over sovereignty. By the early 1990s, the states were coming to the view that this system was not sufficiently efficient and could not cope with the increasingly number with complaints, partially due to the influx of MS joining.

Protocol 11 was the first reform to the system of enforcement. (amendment to a treaty) it came into effect in 1998. Much simpler, just one European court of human rights. Implemented a single court system. Early 2000s, court's president stated that even this system couldn't cope

Early 2000s, considered another reform, 2004, protocol 14 was drafted, which came into effect in 2010.

<u>The court</u>
Current provisions in section 2 (article 19.)
Clean copy of the convention given in the exam, may annotate in textbook)

Article 19- provides that there shall be a ECHR. Provides legal basis
Article 20- specifies number of judges- equal to the state parties (47) judges at strabourg.
Article 21- criteria for appointment of judges
Two criteria under article 21(1)

- Personal characteristics of that judge. They must be 'high moral character'. The convention does not define what this means, left vague to be assessed on individual cases. Something in personal background that makes them unsuitable, this can be caught, on moral grounds.
- Legal qualifications of that judge. There are 2 types of qualifications set out
    - You are qualified for appointment at a high judicial office (not specified, depends on what is required to be a high judge in the country that that person is a member of)
    - Juris consul of recognised competence. Not defined. Many judges were senior academics. Leading HR practitioner that are not eligible to be a judge.

21(2) makes clear that once appointed, they must act in their individual capacity. This means that they do not represent their nation state.
21(3) whilst serving as a judge, cannot do anything incompatible with being a Strasbourg judge.

<u>How are these judges chosen? Article 22</u>

Former president critical of media representation of judges, as they were elected by democratic politicians.
Two stage process:

1. Role of each MS. Under article 22, **each MS must produce a shortlist of three people that meet the criteria under article 21**. Weakness of this is that the convention does not regulate how the MS choose their shortlist. Nothing laid down in the treaty.

   From the early 2000s, parliamentary assembly has been encouraging states to have open selection processes, many MS have voluntarily adopted transparent selection processes (British government does this). Not every state does this. The fact that some states would not write this into the convention shows that they are not fully committed to the Strasbourg ideal.

2. **Selection undertaken of the PA.** this is a body of 450 members, drawn from national parliaments. Each parliament appoints members to sit in this PA, the amount of representatives that a MS gets depends on its population. It sees itself as representing the people of that MS. They elect which of the three to nominate.
   Democratic mandate of European judge.
   How does it go about choosing? Set up a committee to undertake the first stage, which interviews each of the nominees and makes recommendations to the PA and ranks the candidates based on those interviews.

Article 23 provides for terms and conditions of these judges

23(1) length of service as a single 9-year term of office. This length has varied across the eras, original system allowed 9 years and re-election. P11 reduced this to a 6-year renewable term. This was criticised as this undermined the independence of the judges. P14 changed this to one period of 9 years.

23(2) introduces a compulsory retirement age, under the original court this didn't exist. This age is now 70. This proposal was criticised, states response was that the single court meant that it was a full time job and people over the age of 70 did not have the stamina to cope. This is problematic for the court as it means that people are more likely to get replaced mid-term.

23(4) judges can be dismissed by a majority vote of their fellow judges. This has never happened.

Gender and under-representation

Problematic. Early 2000s, PA became concerned about the under-representation of female judges in Strasbourg. COE has a general policy that for all offices, if under 40% of that office are of one gender, this means that that gender is underrepresented, this was the case for the judges
PA developed the policy that it would not accept all male shortlists. This issue came to its head in 2008 with Malta

Malta

Held open and transparent selection process, Maltese system produced all male shortlist. The view was that it was open and transparent and selected upon merit, these all being men. PA refused to consider this. Led to deadlock and was referred to the court, for an advisory opinion on whether the assembly could have all male shortlists.
Advisory Opinion: PA could not have a blanket ban on all male shortlists, noted that in article 21 of the convention there was no mention of gender as a criterion of appointment. so PA changed policy, would not normally accept but MS could argue themselves to be an exception.

Current gender balance? Approximately 15/47 female judges.

PROCESSING OF INDIVIDUAL COMPLAINTS

Two different categories of complaints (applicants)

1. **Article 33- inter-state complaints.** These are complaints made by one MS another MS alleging a breach of a convention right. If you are a MS of the convention, you can bring this against any of the 46 MS. Enormously wide jurisdiction. Does not have to be any convention between complainant and respondent. No national needs to be involved in a prison to allow turkey to complain about overcrowding in British prisons. This is to

prevent growth of HR issues. Watchdog and international scrutiny fall back mechanism to prevent the type of crises happening in the 1930s.

Wide jurisdiction: practice of states, only have been 3 inter-state cases that has reached a court judgement on their merits. (Ireland v UK [1970s] art 3), (Cyprus v Turkey [2001] art 2) and (Georgia v Russian [2014], art 5).

Significant number of pending interstate cases, 2 more Georgia v Russia complaints and 5 pending by Ukraine v Russia. Small numbers but showing international disputes. Indicates that it tends to be a situation where there is potentially armed conflict that leads to an interstate case being brought. If they start suing each other, undermines harmony. Diplomacy discourages article 33 cases. Tends to only happen where there is no good pre-existing relationship. Enormously complicated issues and there is a burden on the Strasbourg court to deal with these issues.

Decided under the P11 system. The interstate case will start off before a chamber of the court (composed of 7 judges). Every case so far has been sent to the GC of the court composed of 17 judges, under article 30.

2. **Most cases are brought by individual applicants, governed by article 34**.
It defines who can bring this- any person can bring an individual applicant. Court took a broad approach of this to include both actual and legal

- Legal persons are eligible to bring a complaint. Do not have to be a human being, but a corporate with legal recognition
- Decides on article by article basis whether a non-legal person can assert a legal right. Found that legal person cannot suffer torture but can suffer a breach of freedom of expression due to the media being in the private corporate sector.
- Non-governmental organisations can bring these complaints. (NGOs or groups of individuals)
- A**ll have to show that they are direct victims of the breach of the right**. This has posed problems for NGOs to show that they are directly affected. Cases are not brought generally brought by NGOs for not meeting the victim test. Only if they find an individual who has suffered and brings the complaint on their behalf. (Stonewall v UK)

PROCESSES UNDER ARTICLE 14.

Came into effect in 2010. 3 different ways under which the court can process individual applications

1. **Comes into the court. it is supported by its registry** (650 staff, half of whom are lawyers) senior lawyer here will look at the applications, **if they think it is clearly INAD, they will send it to a single judge formation. P14 created this entity.**
Comprised of a judge of the court, (art 24) alongside a legal rapporteur (another lawyer from the court's registry.)
It is the judge that makes the decision here. In reality the rapporteur does all of the hard work, looks at the paperwork and comes up with the view, and the judge signs it off. This is a purely paper process.

   Last year single just determined 33,288 applications to be inadmissible. Enormously efficient.

2. **If the registry does not think it is clearly INAD, their lawyer will pass it onto a judge rapporteur. This judge rapporteur will then decide whether to refer to a committee of three judges of the court**. well-founded/

repetitive, (are not inadmissible but are not raising a new legal issue) so there is no new point of law. the committee of three operate on a purely paper process.

Last year dealt with 545 cases. Judge rapporteur might not think it is straightforward-

3. P11 system. Judge rapporteur can send to a chamber of 7 judges. Novel and complex cases get sent to judges. Chambers can either decide this on the paperwork or oral hearings.

Three ways to deal with cases.

What is Admissibility? – Article 35.

35(1) contains two general AD criteria that apply to both inter-state and individual applicant cases:

1. **All domestic remedies have to be exhausted before you bring your case to Strasbourg**. S has been enormously strict in applying this, requires them to go as high as possible in the relevant system to have exhausted the remedy.
   Why? One a matter of **principle** (the Strasbourg court regularly states that it is a subsidiary form of remedy. The primary responsibility of protecting and respecting rights lays with the MS, if states have broken convention rights, they should firstly get the opportunity to remedy them) and the other a matter of **practicality** (over 800 million people in territories in MS, if they each had direct system, could not practically operate)

2. **Time Limit. 35(1) maximum of 6 months** from the decision of the highest court to get your complaint into Strasbourg. This is increasingly strict in applying this, the complainant has to have provided all of the relevant documentation to back up their complaint within that relevant time.

Further requirements applying to individual applicants under article 34:

- 35(2) **must not be anonymous**. This does not mean pseudonyms, but the court must know who you are.
  Struck out if they are substantially the same as an earlier application. Cannot repeat claims
- 35(3) **struck out if they are incompatible with the provisions of the convention**. Individual applicant is asserting a right not protected by the convention. (e.g. holiday pay)
  If they are manifestly ill-founded. That goes, that amount of evidence that has to be brought forward by the applicant at the application stage.
  Deemed to be an abuse of the right to individual application, struck out. if applicants make up fraudulent claims. Or being abusive towards the court institutions
- 35(3)(b) **added in by P14, allows the court to strike out individual applications where the applicant has not suffered a significant disadvantage**. This allows the court to strike out trivial complaints.
  Court gave a new judgement on what examples this:

Ionescu v Romania 26/6/2010

I bought a coach ticket from Romania to Spain, paid just under £100 and promised a reclining seat. Coach company did not provide a reclining seat. Heard at two levels in the Romanian courts, then brought this against Romania in Strasbourg claiming that he had not had a free trial
Court: trivial case, less than a £100, heard in two instances. Technical breach of article 6 but not a serious case.

Significant number of these criteria, especially for individual applicants, over 90% of IA get declared to be inadmissible for not meeting the article 35 criteria.

What Happens Next?

Court Considers on the Merits

Simple, committee on the paperwork. Complex, by chamber. This is a fact finding measure on the documents of the national remedies. Whilst the court is examining the substance of the case, it will also try and secure a friendly settlement.

Friendly Settlements – article 39

A process going on at the same time as the committee or chamber is examining the merits of the case. in reality, court staff engage. Entirely confidential, court's registry staff trying to find an agreement between the two parties. If there is a friendly settlement, then the court will not make a judgement and there will be no finding against the state. This is for the MS' track record. Settlement might also be appealing to the applicant to guarantee an outcome, a court outcome might not be certain.
Interest of the court also, as this means that the court does not have to give a judgement.

If parties cannot agree, then the committee or chamber will give a judgement on the case. if the individual complainant has asked for just satisfaction and court finds a breach, it can award this under article 41.

Just Satisfaction- article 41

Wording is obscure, interpreted to allow the court to make 3 types of financial award when the applicant asks for it.

1. Pecuniary compensation (damages) based on pecuniary loss
2. Non-pecuniary compensation covers non-financial losses. It is particularly relevant under article 3.
3. Legal costs, if you win, costs of lawyers in Strasbourg and domestic proceedings covered.

Always a dispute between the claimant who claims X amount under the headings, and the defendant who disputes those amount stating that they are too much, court applies equitable principle and expresses its view on the award, often between the two amounts argued. Opaque process. Strasbourg court is not keen on this principle of just satisfaction, calculating levels of damages is not its primary purpose. Damages are not vast lumps of money. Not about getting rich but vindicating rights.
Exceptional cases- largest amount 1.8 billion euros (Russian 2014, illegality about major oil company that had lost that figure in valuable assets as a result of the Russian government's actions) Russia has not yet paid this.

Normally the end of the matter, after chamber has given judgement, rare possibility to ask the case to be reconsidered by the GC of 17 judges.

Referral to the Grand Chamber, article 43

Applicant or respondent state can request review. Rarely accepts. If the GC allows this, it will rehear the whole of the case in an oral hearing. The GC will give its final judgement.
Last year there were 11 judgements given by the GC. Most caselaw is on these types of judgements.

Supervision of Execution, article 46

Who makes sure that states comply with a judgement and/or pay the damages?
Court has no enforcement powers.
Instead, under article 46, it is the COM in the COE who have the role of supervising the execution of court judgements.
COM are foreign ministers of all of the 47 MS of the COE. Prime ministers and foreign ministers are members of this. In practice, most of the work is done by ambassadors of that MS. This is a purely political body. They are there to look after their national interests. This means that the enforcement process is overseen in a political and self-

interest environment. Ultimately up to the MS how to put pressure on other states to comply with court judgements.
Most states do comply, but often it takes years of pressure to persuade them to do so. (Prisoners Voting Rights took 12 years to come up with suitable solutions to that issue)

2019 saw a new development in the enforcement process, seen in 46(4) of the convention which was added in by P14. This allows COM, if they have not been able to get a state to comply with a court judgement, to refer the matter back to the court to rule whether the MS has complied with earlier judgements.

Azerbaijan

2019, court gave a judgement under 46(4) concerning Azerbaijan, which broke convention by detaining a politician in breach of their rights. In 2014 the court decision was given COM sought to enforce by stating that they needed to release, A did not for several years. COM invoked this provision and referred back to the court. another judgment has been released, COM currently debating further sanctions of enforcement despite victim being released.

Challenges Facing the Court

- Interlaken Declaration (February 2010) President believed that not all of the MS were really committed to the convention, asked to hold a conference to consider their role and duties under the convention Swiss government organised conferenced in 2010, all MS publicly declared that they were committed.
- Izmir Declaration (April 2011)
- Brighton Declaration (April 2012)- led to Brighton declaration. Very different to the earlier one. Conservative government wanted to restrict the powers of the European court. this was not very successful, but it did produce:
- Protocols 15 (reduce powers of court, text of convention rules have not been changed, but the Preamble would be amended, adding references to the principle of subsidiarity and the doctrine of the margin of appreciation) discussed later. Not changing convention, much difference?
    - Also changed the age limit of judges, so that they are under 65 when their name is put before the PA. once appointed, at say age 64, can serve then until they are 73.
    - **Another change is to reduce the time period that IA can bring their applicants, to four months.**

All 47 states have to ratify this protocol for it to come into effect, Bosnia and Italy have not yet signed it, so it is not yet legally applicable.

- and 16: optional protocol. Allows states to sign up to allow their highest national courts to seek an advisory opinion from the Strasbourg court. they do not have to sign up to this protocol for it to be effective. UK made clear that it wont. Only requires 10 states for it to come into effect for it to come into effect for signatories, gave first advisory opinion to a French court

Problem has been the backlog of cases, in 2010, roughly 160,000 pending cases. P14 massively reduced this, December 2019, down to 59,000. Last year still grew by 3000 as opposed to in 2018. 31 January, President stated that in this judicial year, the major problem today is that there are about 20,000 cases waiting for chamber determination. That is a major problem for the court- how will it cope with this.

Court (Workload) Statistics 2019

Pending applications at the end of December 2019: 59,000 (3K more than December 2018)

Mainly from:
Russia 25% (pending applications)