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Article 14 Bites At Last

Kevin Boyle, Professor of Law, University of Essex*

Introduction

One of the anomalies of the long and inspiring jurisprudence of the European Convention on Human Rights has been its relative neglect of equality and nondiscrimination as important drivers of effective human rights protection. The Convention in its Preamble declares its source as the Universal Declaration of Human Rights. Yet what was truly revolutionary about that document was the fundamental emphasis it placed on equality in respect of all rights and freedoms. Equality and universality are inseparable dimensions of international human rights. But there was no such statement in the European Convention and its inclusion of the non-discrimination principle in Article 14, perhaps because the drafting of that article has operated so as to subordinate and marginalise equality.[1]

However, over the last few years a new approach is emerging in which concern over systematic discrimination and exclusion is moving in from the margins of the Convention's jurisprudence. The landmark judgments in the *Nachova* cases in particular represent a significant shift in the approach to Article 14 by the European Court of Human Rights (discussed below). The coming into force of Protocol 12, the free-standing equality provision in 2005, should reinforce the new approach.

Mention of Protocol 12 should remind us that the broader human rights mission of the Council of Europe has played a role

in the Court's new responsiveness to discrimination and the plight of minorities. In particular the work of the European Commission on Racism and Intolerance in Europe (ECRI) has identified the restraints that the Court's interpretation of Article 14 has placed on the use of the Convention by victims of racial discrimination and xenophobia. ECRI promoted the idea of a new Protocol on Equality, now Protocol 12, and has campaigned for its ratification by all states. The European Commission has led the most far reaching legislative efforts to eradicate racism in Europe, (Article 13 of the Treaty of Amsterdam followed by the Racial Equality Directive[2]) which has surely influenced the Court.[3] Against this background a crucial role has been played by strategic litigation supported by NGOs in encouraging a new determination by the European Court to confront racial and ethnic discrimination. A leading example is the litigation by the European Roma Rights Centre (ERRC).

Article 14 jurisprudence

The Court's thinking on the meaning and scope of Article 14 was first set out in the "Belgian Linguistics" case in 1968. A crucial step for the potential effectiveness of the Article was the confirmation in that case that Article 14 might be violated even where there was no violation of a substantive right, if there was discrimination involved. The Court gave the well-known example that Article 6 alone does not compel States to institute a system of appeal courts. However there would be a violation read in conjunction with Article 14, if it debarred certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions.[4]

The Court went on to declare that Article 14 should be thought of as if it were an integral part of each right and freedom protected under the Convention. In subsequent cases, however, where the Court found a violation of the substantive article it often ignored the claim under Article 14, examples including *Smith and Grady* and *Lustig-Prean and Beckett.*[5] As Philip Leach has noted, the Court has found that Article 14 did not give rise to a separate issue, although the cases concerned an overtly discriminatory policy.[6] It is arguable that had the Court taken its earlier doctrine more seriously, there might have been less need for the new Protocol 12.

New approaches and the role of individual judges

The rethinking of equality under the Convention is an interesting example of the influence over time of the dissenting or separate opinions of individual judges. Thus, in his separate opinion in *Brannigan and McBride v. UK*, Judge Matscher argued the non-derogable nature of Article 14.[7] In the *Ireland v. UK* judgment, he had argued for the necessity to give broad conceptual scope to the wording of Article 14.[8]

Judge Costa's dissenting opinion over the Court's narrow approach to Article 14 in *Cyprus v. Turkey* provides another example. He noted that the finding of one violation

of the Convention did not release the Court "from the obligation to examine whether there have been others, save in exceptional circumstances where all the various complaints arise out of exactly the same set of facts".[9]

South East Turkey Cases

In the many individual applications brought against Turkey from the mid-1990s over the situation in South-East Turkey the Court found numerous and serious violations, yet it applied its existing policy on Article 14 and routinely held it unnecessary to consider also the claims of the Kurdish applicants to be victims of ethnic discrimination.[10] The Court declared the allegations to be "unsubstantiated", even when the applicants referred to the findings of UN bodies.[11]

Nevertheless, the persistence in pleading Article 14 as a 'fundamental aspect' of the Turkish cases did eventually lead some judges to respond. In one Chamber judgment two judges, Mularoni and Loucaides, found violations of Article 14 in conjunction with Article 8 and Protocol No. 1 on the ground of ethnic origin, arising from the deliberate burning down of the applicant's home by Turkish security forces.[12] Judge Mularoni, in three recent Turkish judgments delivered on the same day by the Second Chamber, called for a separate examination of the applicant's complaint under Article 14 of the Convention on the basis of the sheer number of similar applications resulting in findings of Convention violations.[13] He commented that the majority approach "…is tantamount to considering that the prohibition on discrimination in this type of case is not an important issue".

Nachova v. Bulgaria

Nachova and Others v. Bulgaria[14] has become the landmark decision on discrimination litigation. In earlier and similar cases on the treatment of Roma brought against Bulgaria,[15] the Court failed to take up the Article 14 issue, as in the Turkish cases.[16] Apparently affected by Judge Bonello's dissenting opinion in *Anguelova*, the Chamber in *Nachova* not only found a violation of Article 14, read together with Article 2, but established that there is a procedural obligation under Article 14 to investigate possible racist motives in violent incidents. The Grand Chamber upheld this reasoning but it 'overturned' the Chamber on the question of the reversal of the burden of proof, from applicant to state, with respect to racist motivation. The authorities' failure to carry out an effective investigation did not of itself justify shifting the burden of proof on the issue of discrimination to the government. The Chamber judgment in that respect was not convincing and the principle that the state is obliged to address racist motivation in any investigation remains.[17]

With the new possibilities under Article 14 and expanded ratifications of Protocol 12, there are now more opportunities to tackle systematic discrimination. The breadth of the application of the principle of non-discrimination under Protocol 12 will be wide, extending the jurisdiction of the Court to all rights provided under domestic law and covering any act or omission of the public authorities. The Protocol also incorporates the principle that States may take affirmative action to promote full and effective equality in appropriate circumstances. Lawyers should be ready to identify lack of equality and non-discrimination in every relevant case, and put effort into pleading that dimension. The opportunities that exist for the future to

strengthen the equality jurisdiction of the Convention are good news for minorities in Europe.

* With thanks to Damelya Aitkhozhina (LLM Essex and intern with EHRAC)

[1] For the law on Article 14 see Jacobs & White, *European Convention on Human Rights*, 3rd edition (Oxford University Press 2002), and K.Kitching., (Ed) *Non-Discrimination in International Law. A Handbook for Practitioners.* (Interights London 2005)

[2] Council Directive 2000/43/EC of 29 June 2000

[3] Consider Judge Bonnello's dissenting opinion in *Anguelova v. Bulgaria* 13/06/02

[4] *Belgian Linguistics Case* 23/07/68, Series A. para. 9

[5] *Smith and Grady v. UK* 27/09/99, *Lustig-Prean and Beckett v. United Kingdom* 27/09/99

[6] P.Leach, *Taking a Case to the European Court of Human Rights.* 2nd ed. (Oxford University Press, 2005), p. 346

[7] 26/05/93

[8] *Ireland v. United Kingdom* 18/01/78, Separate opinion para. 2

[9] *Cyprus v. Turkey* 10/05/01

[10] See among others *Akdeniz v. Turkey* 31/05/05, para. 145; *Süheyla Aydin v. Turkey* 24/05/05, para 218; *Çelikbilek v. Turkey* 31/05/05, para. 113; *Süheyla Aydin v. Turkey,* para.215; *Çelikbilek v. Turkey* 31/05/05, para.112

[11] e.g. *Kurt v. Turkey* para. 144

[12] *Hasan Ilhan v. Turkey* 09/11/04

[13] *Togcu v. Turkey* 31/05/05, *Koku v. Turkey* 31/05/05, *Yasin Ate v. Turkey* 31/05/05

[14] 26/02/04, 06/07/05

[15] *Assenov and others v. Bulgaria* 28/10/98; *Velikova v. Bulgaria* 18/05/00*; Anguelova v. Bulgaria* 13/06/02

[16] Leach 2005 p. 346

[17] Since Nachova the Court has found discrimination in *Moldovan and Others v.*