



## The European Court's new 'pilot judgment' procedure and the potential effects of Protocol 14

*Dina Vedernikova, Lawyer, INTERIGHTS Europe Programme<sup>1</sup>*

**T**he pilot judgment procedure is relatively new for the European Court of Human Rights (the Court). It was envisaged, along with other measures, by the Steering Committee for Human Rights of the Council of Europe in its report of 9 April 2003 'Guaranteeing the Long Term Effectiveness of the Control System of the European Convention on Human Rights', to reduce the significant workload which repetitive cases represent for the Court. The Committee proposed that where a case exposes a "structural or general shortcoming in the law or the practice of the State which may lead to a large number of complaints before the Court concerning the same State party", the Court should deliver a "pilot judgment" which would "determine the point of law involved from the angle of the Convention in a way which would give sufficient guiding elements to allow for the determination of the merits of subsequent complaints concerning the same point of law."

A year later, on 12 May 2004, when approving 'Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention'

(hereafter 'Protocol 14'), the Committee of Ministers (the CoM) also adopted a Resolution, Res (2004) 3, which invited the Court to identify in its judgments those cases which revealed the existence of structural or systemic problems in the country concerned, especially if those problems were, or could become, the source of a large number of similar applications, in order to assist that country in finding an appropriate solution to the problem as a whole and the CoM in securing the implementation of the judgment concerned.

The first pilot judgment was delivered by the Court in *Broniowski v Poland* (No. 31443/96, 22/06/04), which found that the Polish authorities had failed to respect the property rights of nearly 80,000 nationals who had been repatriated from eastern territories after the Second World War (see further the article below by Eleonora Davidyan). The Court concluded that the facts of the case disclosed the existence within the Polish legal order of a shortcoming, as a consequence of which a whole class of individuals had been, or were still, denied the peaceful enjoyment of their possessions. It also found that the deficiencies in national law and practice identified in the applicant's individual case might give rise to numerous subsequent well-founded applications.

The next pilot judgment was given in *Xenides-Arestis v Turkey* (No. 46347/99, 22/12/05), where the Court found violations of Art. 8 (respect for private and family life) and Art. 1 of Protocol 1 (protection of property) in respect of persons (mainly Greek Cypriots) who have been denied access to their homes located in northern Cyprus since the Turkish military occupation of 1974. The Court noted that 1,400 similar cases were pending before it.

The most recent example of the Court's application of this procedure is its judgment in *Hutten-Czapska v Poland* (No. 35014/97, 19/06/06), where Poland was found in violation of Art. 1 of Protocol 1 due to the malfunctioning of Polish housing legislation which imposed on individual landlords restrictions on increases in rent for their dwellings, making it impossible for them to receive

rent reasonably commensurate with the general costs of property maintenance. It was established that such a defective rent control scheme might potentially affect 100,000 landlords and from 600,000 to 900,000 tenants.

In all these above-mentioned judgments the Court adjourned its consideration of current and future applications which raise the same issues as were decided in these cases.

Although Protocol 14 does not contain an express concept of the pilot judgment procedure, it is considered to be in line with the reforms introduced by this Protocol and there are indications of the Court's willingness and ability to apply it more extensively in the future. Furthermore, the Court was urged to do so. As indicated in the report of the Group of Wise Persons<sup>2</sup> to the CoM of 10 November 2006: "the Group encourages the Court to make the fullest possible use of the 'pilot judgment' procedure."

One of the most pressing questions that arises with the introduction of this new mechanism is how to effectively implement such judgments. Unlike the Court's common practice, in the above cases it did require, albeit in very general terms, the Governments to take general measures in addition to compensation awarded to the applicants. In *Broniowski v Poland*, the Court stated that "the respondent State must, through appropriate legal measures and administrative practice, secure the implementation of the property right in question in respect of the remaining [...] claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Art. 1 of Protocol No. 1".

The concluding parts of the *Xenides-Arestis v Turkey* and *Hutten-Czapska v Poland* judgments contain similar wording, requiring the corresponding States to introduce certain corresponding measures. In the former, the Court also laid down a three-month time limit for such compliance.

Some may argue that this new practice of the Court giving fairly detailed indications of the general measures to be taken, runs the risk of contradicting the principle that States should be

free to choose the means of executing judgments and also lacks a clear legal basis. Obviously, by applying the pilot judgment procedure, the Court is making a step forward in interpreting Art. 46 of the Convention, which until recently had been understood as granting an exclusive right to the state to choose the requisite general measures, subject to supervision by the Committee of Ministers. It may well be the case that in future, as the practice of the pilot judgment procedure develops, it should be laid down in the Rules of the Court.

In accordance with the newly revised 'Rules for the Supervision of the Execution of Judgments' of 10 May 2006 [CM (2006) 90], the CoM will give priority to the supervision of judgments in which the Court has identified a systemic problem (Rule 4, paragraph 1). Undoubtedly, it is an absolutely justified measure, given the great number of persons whose interests are affected by each pilot judgment. It is of paramount importance to provide those applicants whose cases (raising the same problems as decided in the pilot judgment) have been adjourned by the Court, with procedural guarantees as to the State's prompt and diligent compliance with the general measures indicated. Such guarantees could include establishing appropriate time limits for implementing the pilot judgments, and a requirement for the respondent State to produce a comprehensive plan of action and timetable for the corresponding reforms. This will also require comprehensive monitoring by the Council of Europe of the impact of the pilot judgments, as well as of the steps taken by the CoM and by the respondent State towards their implementation.

To conclude, it is difficult to say, at the moment, if the pilot judgment procedure will contribute significantly towards resolving the Court's workload crisis and, more importantly, not at the expense of the individual applicants. Its success very much depends on the overall implementation of the new mechanisms, introduced by Protocol 14 and developed in the relevant CoM Resolutions.

<sup>1</sup> The views expressed in this article do not necessarily reflect those of INTERIGHTS.

2 The Group of Wise Persons was set up by the heads of the Council of Europe member states at the meeting in Warsaw on 16 and 17 May 2005 to consider the long-term effectiveness of the ECHR control mechanism, including the initial effects of Protocol 14. Report of the Group of Wise Persons to the Committee of Ministers (2006) CM(2006)203, para. 140.