

An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case-law

Alastair Mowbray, Professor of Public Law, University of Nottingham : I wish to express my thanks to Daniel Church of Information Services, University of Nottingham, for undertaking a preliminary literature search and for the helpful comments of the Editor and the anonymous reviewer. Naturally, I am responsible for the content of this article.

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Abstract

The article begins with a consideration of the views of commentators, from both inside and outside the Strasbourg system, as to the nature of precedent within the jurisprudence of the Court. The approach of the original Court is then examined. This is compared with the contemporary case-law of the full-time Court and three justifications for overruling established rulings are identified in the modern jurisprudence. Institutional features of the overruling process, including the roles of third-parties and Court directed changes, are addressed. Conclusions are drawn as to the present Court's reluctance to expressly acknowledge that it is overruling established case-law and its failure to always provide adequate justifications of the social or scientific developments underpinning its revised jurisprudence.

The phenomenon of the European Court of Human Rights¹ overruling its earlier case-law is an important, but relatively neglected, aspect of the Court's jurisprudence. Hence this article seeks to analyse a number of features of the Court's departure from previous interpretations of the European Convention on Human Rights². We shall consider the Court's view of precedent, the nature of the Court's departures from previous case-law, the justifications the

¹ Hereafter the Court.

² Hereafter the Convention or ECHR.

Court articulates for overruling earlier interpretations, who advocates a change in the established case-law and who benefits from the new interpretations.

The Court's attitude towards precedent

In the mid-1980s an official within the Registry of the original, part-time, Court expressed the personal view that:

“With regard to the precedent value of the judgments in later cases before the Court itself, it is clear from the reasons advanced by the Court and the frequent references therein to previous judgments that the Court in its practice adheres to a limited doctrine of *stare decisis*, even though it is not an absolute doctrine; as appears from, e.g., Rule 50 of the new Rules of Court³, the Court does not exclude the possibility of deviating from an earlier case-law. However, according to this Rule, a reversal of an earlier case-law should be made by the Plenary Court and not by a Chamber.”⁴

As further support for his analysis of the significance of precedent during the formative years Sundberg cited the opinion of the Court's Registrar, Marc-Andre Eissen, that the Court had shown “a manifest will not to depart lightly from its previous judgment[s] to which the Court frequently refers.”⁵ Subsequently, at the end of the following decade, writing extra-judicially the (then) President of the Court, Luzius Wildhaber, noted the misconceptions that English and Continental European lawyers can possess about the doctrine of precedent in the other's legal system(s).

“Continental European observers often stress that the English system is too rigid. They may overlook that there are important exceptions to the rule of *stare decisis*; that common law judges tend to reason prudently upwards from the facts of a case, whereas Continental judges are inclined to reason sweepingly downwards from abstract

³ Rule 50 of the Rules of Court issued in 1983 provided: “Where a case pending before a Chamber raises one or more serious questions affecting the interpretation of the Convention, the Chamber may, at any time during the proceedings, relinquish jurisdiction in favour of the plenary Court. The relinquishment of jurisdiction shall be obligatory where the resolution of such question or questions might have a result inconsistent with a judgement previously delivered by a Chamber or the plenary Court. Reasons need not be given for the decision to relinquish.”

⁴ F.G.E. Sundberg, “The European Experience of Human Rights Proceedings: The Precedent Value of the European Court's Decisions”, (1986) *Akron Law Review* 629 at p.631.

⁵ *Ibid.* at footnote 6.

principles... English observers, by contrast, may be misled by Continental European writers and courts who assert dogmatically that they acknowledge no doctrine of precedent; that only a series of court decisions can acquire binding force, presumably because it must form customary law; and that the courts are no legislators, nor should they be. Again, such a view is lopsided. It overlooks that, as a matter of fact, Continental European courts normally and regularly observe precedents, their own as well as those of superior courts.”⁶

Against the backdrop of this mutual misunderstanding he disclosed that:

“Discussions inside the European Court of Human Rights relatively often reveal disagreements as to whether an earlier precedent should be followed. This is not surprising in an international court with so many different legal orders and traditions.”⁷

However, in his opinion:

“...I would suggest that precedents are followed regularly, but not invariably, that “for the sake of attaining uniformity, consistency and certainty”, precedents should normally be observed, where “they are not plainly unreasonable and inconvenient” (*Mirehouse v Rennell*⁸), that one “big” case- like *Marckx*⁹, *Klass*¹⁰, *Sunday Times*¹¹, *Golder*¹², *Soering*¹³, *Loizidou*¹⁴, *Akdivar*¹⁵, or *United Communist Party of Turkey*¹⁶-may constitute just as valid a precedent as a line of lesser cases; that precedents should normally be followed even before the existence of actual customary law can be demonstrated; and that sound judicial caution requires that the underlying rationale of a case should not be defined so as to be too far detached from the specific facts.”¹⁷

⁶ L. Wildhaber, “Precedent in the European Court of Human Rights” in P. Mahoney and H. Petzold eds., *Protecting Human Rights: The European Perspective*, (Carl Heymanns Verlag, Köln, 2000) at p.1530.

⁷ *Ibid.* at p.1531.

⁸ Parke J., 1 Cl. & F. 527 at p. 546 (1833).

⁹ *Marckx v Belgium*, A.31 (1979)/ (1979-80) 2 E.H.R.R. 330.

¹⁰ *Klass v Germany*, A.28 (1978)/ (1979-80) 2 E.H.R.R. 214.

¹¹ *Sunday Times and others v UK*, A.30 (1979)/(1979-80) 2 E.H.R.R. 245.

¹² *Golder v UK*, A.18 (1975)/ (1979-80) 1 E.H.R.R. 524.

¹³ *Soering v UK*, A.161. (1989)/ (1989) 11 E.H.R.R. 439.

¹⁴ *Loizidou v Turkey (Preliminary Objections)*, A.310 (1996)/ (1997) 23 E.H.R.R. 513.

¹⁵ *Akdivar and others v Turkey*, Judgment of September 16, 1996/ (1997) 23 E.H.R.R. 143.

¹⁶ *United Communist Party of Turkey and others v Turkey*, Judgment of January 30, 1998/ (1998) 26 E.H.R.R. 121.

¹⁷ fn. 6 above, at p.1532.

At about the same time, Professor David Feldman examined the application of the principle of *stare decisis* in the jurisprudence of the Court and concluded that:

“Decisions of the Court represent authoritative interpretations of the ECHR under social and moral conditions and the state of scientific knowledge current at the time of the decision. They are usually followed, because that is, “in the interests of legal certainty and the orderly development of the Convention case-law.”¹⁸ Nevertheless, the Court may subsequently decide that its earlier interpretation was simply erroneous, or may have other “cogent reasons” for changing its interpretation, including the need to “ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions”.¹⁹ ...There is no real distinction drawn by the Court between *ratio decidendi* and *obiter dictum* in its previous pronouncements. All statements are regarded as sources of enlightenment as to the meaning of the ECHR.²⁰

Professor Feldman considered that the Court’s role as “a tribunal of public international law”²¹ committed to interpreting a human rights treaty in a dynamic manner²² were crucial elements underlying the Court’s attitude towards the doctrine of precedent.

More recently, in a comparative study of the use of precedent by the International Court of Justice and the Court, Michael Balcerzak endorsed the view that:

“It remains perfectly clear that the doctrine of *stare decisis* does not apply in the ECHR system, and it follows that the doctrine of binding precedent (*precedent de jure*) must be rejected. However, the Court deliberately develops its case-law along the doctrine of non-binding precedent, being guided by convincing reasons, such as the principle of legal safety and orderly development of case-law.”²³

¹⁸ *Cossey v UK*, A.184 (1990) 13 EHRR 622, para 35; *Sheffield and Horsham v UK* (1998) 27 EHRR 163, refusing to depart from its earlier decision in *Rees v UK* 106 (1986), 9 EHRR 56 on the applicability of Art 8 to the legal recognition of post-operative transsexuals.

¹⁹ *Cossey v UK*, A.184 at para. 35.

²⁰ D. Feldman, “Precedent and the European Court of Human Rights”, Appendix C of *Bail and the Human Rights Act 1998*, Law Commission Consultation Paper No 157 (1999) at pp.114-115.

²¹ *Ibid.* at p. 112.

²² Also on this topic see, A. Mowbray, “The Creativity of the European Court of Human Rights”, 5(1) *Human Rights Law Review* 57 (2005).

²³ M. Balcerzak, “The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights”, 27 *Polish Yearbook of International Law* 131 at p. 139 (2004-05).

Adopting the analysis of Bronaugh²⁴ he characterised the Court's use of precedent as a doctrine of "persuasive precedent" or "precedents *de facto*" whereby earlier judgments are recognised as having precedential significance in later cases.

Hence, there is a broad consensus amongst commentators, working both within and outside the Strasbourg institutions, that significant rulings by the Court on the interpretation and application of the Convention are generally followed in subsequent cases. Turning to the contemporary jurisprudence of the full-time Court, established under Protocol 11²⁵, on the topic it has stated:

"74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the *Cossey [v.UK]* judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68)."²⁶

Another Grand Chamber in the later case of *Mamatkulov and Askarov v Turkey*²⁷ used almost identical wording to re-state the Court's approach to precedent. Likewise during 2007 a differently constituted Grand Chamber repeated the key phraseology of the above quotation

²⁴ R. Bronaugh, "Persuasive Precedent", in L. Goldstein (ed.) *Precedent in Law* (OUP, Oxford, 1991) at pp. 217-247.

²⁵ See, A. Mowbray, "The Composition and Operation of the New European Court of Human Rights" [1999] P.L. 219.

²⁶ *Christine Goodwin v UK*, Judgment of July 11, 2002/ (2002) 35 E.H.R.R. 18.

²⁷ Judgment of February 4, 2005 at para. 121/ (2005) 41 E.H.R.R. 25.

in *Vilho Eskelinen and Others v Finland*²⁸. Consequently, we can discern that today the Court mandates the need for “good reason” where it decides not to follow previous case-law.

Before we examine the modern jurisprudence to discover what different types of grounds have been found to justify overruling previous case-law we should note that the original Court was extremely reluctant to expressly overrule established interpretations of the Convention. Judge Martens, with the research help of the Court’s Registrar, stated in his Separate Opinion in *Brozicek v Italy*²⁹:

“As far as I am aware, there are no examples of explicit overruling in the Court’s case-law. That does not mean, of course, that the Court would hold that it lacks power to overrule its own precedents; it did so implicitly in paragraph 78 of its above mentioned *De Wilde, Ooms and Versyp [v Belgium]* judgment [A.12 (1971)] where it in fact retracted what it had said in paragraph 24 of its *Neumeister [v Austria]* judgment A.8 (1968).”³⁰

In *De Wilde et al*, often referred to as the “Vagrancy” cases, the Court when elaborating upon the institutional and procedural requirements of a “court’s” scrutiny of the legality of a person’s detention ruled that:

“78. ...The forms of procedure required by the Convention need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place. Thus, in the *Neumeister* case, the Court considered that the competent courts remained “courts” in spite of the lack of “equality of arms” between the prosecution and an individual who requested provisional release (*ibidem*); nevertheless, the same might not be true in a different context and, for example, in another situation which is also governed by Article 5(4).”³¹

²⁸ Judgment of April 19, 2007 at para. 56.

²⁹ A.167 (1989)/ (1990) 12 E.H.R.R. 371.

³⁰ *Ibid.* Separate Opinion footnote 4.

³¹ A.12 (1971)/ (1979-80) 1 E.H.R.R. 373.

Thereby, requiring a more elaborate judicial procedure (including allowing detainees to require an adjournment to facilitate the presentation of their case) to be made available to detainees, without clearly stating that *Neumeister* was wrong.

Another dramatic example of the original Court implicitly overruling established case-law occurred in *Huber v Switzerland*³² concerning the compatibility of the multifarious roles of Swiss' district attorneys with the need for independence and impartiality in the judicial authority examining the lawfulness of the arrest and detention of criminal suspects under Article 5(3) of the Convention. Huber had been questioned by a particular district attorney in connection with an investigation into prostitution. After the questioning the district attorney ordered that Huber be detained. She was released eight days later. Subsequently, the same district attorney instituted proceedings against Huber alleging that she had provided false evidence during questioning and had been an accessory to a criminal offence. Eventually, Huber complained to the European Commission of Human Rights³³ contending that Article 5(3) had been breached as the district attorney's roles of investigator, authoriser of detention and prosecutor undermined the necessary guarantee of independence required of the judicial officer by that provision. Despite the Court having previously found no breach of Article 5(3) when applied to another district attorney in *Schiesser v Switzerland*³⁴, the Commission, by twelve votes to two, expressed the opinion that there had been a breach in Huber's case. The Commission and the Swiss Government referred the case to the Court. Before the latter body the Commission's Delegate:

“...invited the Court to depart from the *Schiesser* judgment... In the Delegate's view, the Court's case-law has moved towards the principle that prosecution and judicial

³² A.188 (1990).

³³ Hereafter the Commission.

³⁴ A.34 (1979)/ (1979-80) 2 E.H.R.R. 417.

functions must be completely separated; such separation was, he considered, necessary at this stage in the development of the protection of human rights in Europe.”³⁵

By twenty-one votes to one, the plenary Court held that:

“42. In several judgments which post-date the *Schiesser* judgment and which concern Netherlands legislation on the arrest and detention of military personnel (the *de Jong, Baljet and van den Brink* judgment A.77 (1984)...) the Court found that the auditeur-militair, who had ordered the detention of the applicants, could also be called upon to assume, in the same case, the role of prosecuting authority after referral of the case to the Military Court. It concluded from this that he could not be “independent of the parties” at that preliminary stage precisely because he was “liable” to become one of the parties at the next stage in the procedure.

43. The Court sees no ground for reaching a different conclusion in this case as regards criminal justice under the ordinary law. Clearly the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but his impartiality is open to doubt...if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority.

Since that was the situation in the present case, there has been a breach of Article 5(3).”³⁶

President Wildhaber described this judgment as the Court “indirectly” overruling *Schiesser* whilst noting that the Court “refused to speak of an “overruling””.³⁷ So even when the Court was effectively pronouncing a complete reversal of its previous interpretation of a Convention provision the judges sought to mask this by not expressly acknowledging that they were overruling their earlier case-law.

One year later the plenary Court adopted the same strategy when it implicitly overruled its previous acceptance of the Belgian *avocat general*, a member of the *procureur general*’s department, having the last word on whether an appeal should be allowed by the Court of Cassation and then participating (without having a vote) in the deliberations of that court. In *Borgers v Belgium*³⁸, the applicant, a lawyer convicted of forgery, complained that

³⁵ fn. 32 above, at para. 38.

³⁶ *ibid.*

³⁷ fn. 6 above, at p. 1533.

³⁸ A. 214A (1991)/ (1993) 15 E.H.R.R. 92.

he had not been able to reply to the avocat general's submissions to the Court of Cassation determining Borger's appeal and the avocat general had attended the court's deliberations with the result that there had been a breach of his right to a fair trial guaranteed by Article 6(1). The Commission, by fourteen votes to one, considered that there had been a breach. Before the Court, the Commission's Delegate, "invited the Court to reconsider the view taken in its judgment in *Delcourt v Belgium*^{39,40}, where no breach of Article 6(1) had been found in respect of the roles undertaken by the avocat general. The plenary Court, by eighteen votes to four, endorsed the *Delcourt* findings as to the independence and impartiality of the Court of Cassation and the procureur general's department. However, the plenary Court held that it was also necessary to examine whether the proceedings before the Court of Cassation respected the principle of the equality of arms which, "has undergone a considerable evolution in the Court's case-law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.." ⁴¹ The Court then criticised Borger's inability to respond once the avocat general had submitted, to the Court of Cassation, that the former's appeal should be dismissed.

"28. Further and above all, the inequality was increased even more by the avocat general's participation in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in case often indissociable from substantive matters, if it is in addition intended, as the Government also affirmed, to contribute towards maintaining the consistency of the case-law. Even if such assistance was so limited in the present case, it could reasonably be thought that the deliberations afforded the avocat general an additional opportunity to promote, without fear of contradiction by the applicant, his submissions to the effect that the appeal should be dismissed.

³⁹ A.11 (1970)/ (1979-80) 1 E.H.R.R. 355.

⁴⁰ fn. 38 above, para. 22.

⁴¹ *ibid.* para. 24.

29. In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6(1).⁴²

So, again, the Court did not explicitly acknowledge that it was overruling an earlier judgment. By contrast, Judge Martens began his Dissenting Opinion by observing, “[i]n its judgment the Court has overruled the *Delcourt* decision.”⁴³ He was highly critical of the majority’s approach towards the unanimous judgment in *Delcourt* and “[m]oreover, the Court has failed to do what a court that overrules an important judgment should do: it failed to state its reasons for doing so clearly and convincingly.”⁴⁴ Later, we shall examine whether the contemporary Court is more open regarding its reversal of established case-law.

The justifications advanced by the Court for overruling previous judgments

The existence of “uncertainty” in the existing case-law has been invoked several times by the full-time Court to justify a new interpretation of the Convention. For example, in *Pellegrin v France*⁴⁵, the Grand Chamber was faced with the question whether litigation between civil servants and their employer fell within the “civil rights and obligations” limb of Article 6(1)? The Court noted that its previous case-law had established that generally disputes concerning the recruitment, careers and termination of employment of civil servants fell outside Article 6(1). But, a number of judgments had limited that principle of exclusion.

“60. The Court considers that, as it stands, the above case-law contains a margin of uncertainty for Contracting States as to the scope of their obligations under Article 6(1) in disputes raised by employees in the public sector over their conditions of service. ...

⁴² *ibid.*

⁴³ *ibid.* Dissenting Opinion of Judge Martens para.1.

⁴⁴ *ibid.*

⁴⁵ Judgement of December 8, 1999/ (2001) 31 E.H.R.R. 26.

61. The Court therefore wishes to put an end to the uncertainty which surrounds application of the guarantees of Article 6(1) to disputes between States and their servants.”⁴⁶

Consequently, the Court articulated an autonomous interpretation of the term “civil service” based on a functional criterion.

“66. The Court therefore rules that the only disputes excluded from the scope of Article 6(1) of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities...”⁴⁷

Applying this new approach the Court, by thirteen votes to four, determined that the applicant, a management consultant who had been employed by the French Ministry of Development to advise the government of Equatorial Guinea on its budget, came within the excluded class. However, the four dissenters disagreed with the majority’s stance:

“Introduction of the criterion of participation in the exercise of powers conferred by public law does not avoid the risk of arbitrariness and creates a new zone of uncertainty.”⁴⁸

Prophetically, the dissenters also identified the weakness in the majority’s approach which denied a “civil servant” the full protection of Article 6(1) even where under domestic law such a person had the right to lodge a complaint against his/her employer before an independent tribunal.

Eight years later another Grand Chamber, with Judge Tulkens having the majority on her side on this occasion, overruled *Pellegrin*. The applicants in *Vilho Eskelinen and Others v Finland*⁴⁹, were several police officers and an administrator working for the police who had their local wage supplements removed when their police district was re-organised. The

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.* Joint Dissenting Opinion of Judges Tulkens, Fischbach, Casadevall and Thomassen at para. 4.

⁴⁹ fn. 28 above.

applicants unsuccessfully challenged the loss of their supplements before the domestic courts. Eventually, the applicants complained to Strasbourg alleging breaches of Article 6(1) by the Finnish courts, including excessive delays. A majority of twelve Judges concluded that the *Pellegrin* functional criterion approach could produce “anomalous results”⁵⁰, as in this case where the police officer applicants would not be protected by Article 6(1) but the administrator would be. Nor had it been easy to determine its application in subsequent cases.

“55. The Court can only conclude that the functional criterion, as applied in practice, has not simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant is a party or brought about a greater degree of certainty in this area as intended (see, *mutatis mutandis*, *Perez v. France* [GC], no. 47287/99, § 55, ECHR 2004-I.).

56. It is against this background and for these reasons that the Court finds that the functional criterion adopted in the case of *Pellegrin* must be further developed. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, *mutatis mutandis*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.)”⁵¹

The new test for determining if particular civil servants could claim the protection of Article 6(1) should be:

“...in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in the *Pellegrin* judgment, a “special bond of trust and loyalty” between the civil

⁵⁰ *ibid.* at para. 51.

⁵¹ *ibid.*

servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, first, that a civil-servant applicant does not have a right of access to a court under national law and, second, that the exclusion of the rights under Article 6 for the civil servant is justified.”⁵²

Applying this new methodology the Court held that as all the applicants had a right of access to a court under Finnish law to determine their employment disputes so Article 6(1) was applicable to them. By fourteen votes to three the Grand Chamber then found that the domestic first instance proceedings had exceeded the reasonable time guarantee under that Article.

The current President of the Court joined by his predecessor and three other judges issued a dissenting opinion which criticised the analysis of the majority and its approach to precedent.

“6. In any event, we fail to see what theoretical or practical necessity required the Court to abandon the *Pellegrin* case-law in the present case. It has been applied by the Court for seven years without any real problem and, as could have been expected and desired, it has extended rather than restricted the application of the guarantees secured under Article 6 § 1. The categories of agents excluded from these guarantees, such as the police service in its entirety, are limited when compared with public service employees as a whole... Legal certainty has certainly improved if we compare the situation with that which obtained prior to the *Pellegrin* judgment. As to the argument based on the existence of access to a domestic court, we are not convinced by it. As Article 53 of the Convention rightly points out, nothing prevents a High Contracting Party from recognising in its law freedoms or guarantees which go further than those set forth in the Convention; in addition, as legal systems vary from one State to another, the reasoning in the instant judgment is likely to have the effect of making the applicability of Article 6 § 1 to disputes between the State and its agents dependent on there existing access to a court with jurisdiction to decide them within the domestic legal system. To sum up, instead of the “autonomous interpretation” (by the Court) that the latter considered it important to establish for the purposes of Article 6 § 1 (see the *Pellegrin*

⁵² *ibid.* at para. 62.

judgment, § 63), the instant judgment encourages a dependent and variable, not to say uncertain, interpretation, in other words an arbitrary one. In our opinion, this is an inappropriate step back.

7. In conclusion, the Court has overturned its well-established case-law. Admittedly, it is entitled to do so (even if the case-law in question is relatively recent). In general, however, the Court takes this step where there are new developments and where a new need arises. This is not the case here. Abandoning a solid precedent in such conditions creates legal uncertainty and, in our opinion, will make it difficult for the States to identify the extent of their obligations.”⁵³

Consequently, resolving uncertainty in the case-law was invoked by the majority in *Pellegrin* to support adopting a new functional test. To which the dissenters replied that the new test would create further uncertainty. Then a few years later another Grand Chamber majority concluded that the *Pellegrin* test had not created certainty and therefore it should be replaced by a different set of criteria. But several senior members of the Court retorted that this abandonment of a “solid precedent” was not justified and would itself create legal uncertainty! Hence the claim of reducing legal uncertainty is a highly malleable tool in the hands of both judges who wish to overrule existing case-law and those who support the retention of established precedent.

A Grand Chamber judgment where all the judges were united in concluding that the existing case-law presented, “a number of drawbacks, particularly in terms of legal certainty”⁵⁴ was *Perez v France*⁵⁵. The complaint concerned civil-party proceedings through which a private person could join criminal proceedings against another person with the object of securing compensation from the alleged offender.. The applicant contended that the French courts had violated Article 6(1) when they discontinued her civil-party proceedings against her children, concerning an alleged assault by them against her. The basic issue for the Court

⁵³ *ibid.* Joint Dissenting Opinion of Judges Costa, Wildhaber, Turmen, Borrego Borrego and Jociene.

⁵⁴ fn. 55 below, para. 54.

⁵⁵ Judgment of February 12, 2004/ (2005) 40 E.H.R.R. 39.

was to determine which types of civil-party proceedings came within the civil rights limb of Article 6(1). Given the defects in the earlier case-law and the fact that several other States had similar civil-party proceedings in their domestic legal orders, the Court decided to adopt a new approach to applying Article 6(1) to such proceedings. Generally, civil-party proceedings would be protected except where the individual was seeking to bring an *actio popularis*. Perez's civil-party proceedings fell within Article 6(1), however the Court found no breach of her right to a fair trial. So, again, we discover uncertainty in the established case-law as the basis for the Court developing a new interpretation of the Convention. Where the judges are unanimous in reaching this assessment of the state of the existing jurisprudence the strength of the justification for providing a new approach is clearly greater than where the Court is divided as in *Pellegrin* and *Vilho*.

A second justification invoked by the full-time Court has been the need to alter precedent in order to respond to increasing numbers of applications. In *Kudla v Poland*⁵⁶ the Grand Chamber was faced with one of the many complainants alleging unreasonable delays in the determination of criminal (and civil) cases by national courts in several member States.⁵⁷ Kudla contended that the protracted criminal proceedings against him violated both his right to the determination of the criminal charge(s) within a reasonable time (under Article 6(1)) and a breach of Article 13, right to an effective domestic remedy, as the Polish legal system failed to provide such a remedy to enable him to challenge the delays in the criminal proceedings. The Grand Chamber noted that previously the Court had declined to examine Article 13 complaints in cases where it had found a breach of the Article 6(1) reasonable time guaranteed. However:

⁵⁶ Judgment of October 26, 2000/ (2002) 35 E.H.R.R. 11.

⁵⁷ For example, another Grand Chamber had found delays in the Italian civil courts system constituted a "practice" in breach of Article 6(1) in *Bottazzi v Italy*, Judgment of July 28, 1999. .

“148. In the Court’s view, the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6(1).

The growing frequency with which violations in this regard are being found has recently led the Court to draw attention to “the important danger” that exists for the rule of law within national legal orders when “excessive delays in the administration of justice” occur “in respect of which litigants have no domestic remedy”...

149. Against this background, the Court does now perceive the need to examine the applicant’s complaint under Article 13 taken separately, in addition to its earlier finding of a violation of Article 6(1) for failure to try him within a reasonable time.”⁵⁸

The Grand Chamber adopted this new interpretation of Article 13, requiring States to establish effective domestic remedies to deal with complaints of unreasonable delay in court proceedings, because the previous approach was forcing applicants to bring their Article 6(1) unreasonable delay complaints to Strasbourg rather than having them resolved domestically. The Grand Chamber believed that the earlier approach threatened the long-term efficient functioning of the Convention’s protection system. Judge Casadevall did not think “that it was necessary for the Court to depart from precedent”⁵⁹ in altering its interpretation of Article 13. Indeed, he was scathing of the majority’s reasoning, “based on the continuing accumulation of length-of-proceedings cases before the Court, is of no legal interest.”⁶⁰

Whilst *Kudla* is the most dramatic example of the full-time Court overruling previous case-law in order to try and reduce the torrent of applications overwhelming the Court⁶¹, there are suggestions in the dicta of other judgments that workload pressures on the Court have an influence on its jurisprudence. For example, Judge Martens referred to the “rather

⁵⁸ fn. 56 above.

⁵⁹ *ibid.* Partly Dissenting Opinion of Judge Casadevall at para. 1.

⁶⁰ *ibid.* at para. 3.

⁶¹ On 31 December 2007 the Court had 103,850 applications pending : *European Court of Human Rights Annual Report 2007*, p. 133. For an examination of the institutional changes being contemplated see A. Mowbray, “Faltering Steps on the Path to Reform of the Strasbourg Enforcement System”, 7(3) *Human Rights Law Review* 609 (2007).

alarming increase in the Court’s case-load”⁶² as the “decisive practical argument”⁶³ in favour of the original Court overruling its established approach towards examining preliminary objections to the admissibility of applications. Whilst later, Judge Ferrari Bravo began his Concurring Opinion in *Pellegrin*⁶⁴ by observing that:

“I voted in favour of the *Pellegrin* judgment, since I believe it is important for the Court, in the light of the avalanche of applications concerning the economic treatment of public servants, to lay down precise criteria to guide its case-law on Article 6 § 1 of the Convention.”⁶⁵

A third justification expounded by the Court when overruling previous case-law has been the application of the living instrument doctrine to ensure that the Convention is interpreted in a manner that reflects contemporary standards. We have seen this justification utilised by the original Court in *Borgers*⁶⁶ where “the increased sensitivity of the public to the fair administration of justice”⁶⁷ was cited by the majority as the basis for reversing its previous assessment of the legality of the privileges/roles of the *avocat general vis-a-vis* appellants/defendants. Similarly, the full-time Court was unanimous in adopting a new broader approach to the classification of acts of mal-treatment as constituting “torture”, under Article 3, due to rising human rights standards in *Selmouni v France*⁶⁸. The applicant, a Dutch/Moroccan national, complained *inter alia* that abusive treatment during police

⁶² fn. 30 above, at para. 4.

⁶³ *ibid.*

⁶⁴ fn 45 above.

⁶⁵ *ibid.*

⁶⁶ fn. 38 above.

⁶⁷ fn. 41 above.

⁶⁸ Judgment of July 28, 1999/ (2000) 29 E.H.R.R. 403.

questioning amounted to torture. The Commission considered that the abuse was sufficiently serious to be so classified. However, before the Court the French government contended that applying existing case-law the abuse did not attain the gravity of torture. This was disputed by the Dutch government. The Grand Chamber held that:

“...having regard to the fact that the Convention is a “living instrument instrument which must be interpreted in the light of present-day conditions”...the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”⁶⁹

Therefore, the Court concluded that Selmouni had been tortured. It should be noted that the Court provided little factual support for its assertion of rising human rights standards (desirable as that may be) other than the coming into force, in 1987, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This omission replicates the failure of the majority in *Borgers* to substantiate their analogous claim according to Judge Martens in that case:

“The point made by the Court suggests that since the *Delcourt* judgment there have been “societal changes” in this respect which warrant overruling. Thus it echoes a similar observation made during the hearing before the Court by counsel for the applicant. Counsel provided no specific grounds for his suggestion that since the *Delcourt* judgment there had been an evolution in this respect. Neither does the Court. It merely refers to its case-law; but there one will look in vain for a factual basis for the alleged “increased sensitivity of the public”.

Yet, general allegations such as this require a proper basis in fact.”⁷⁰

Legal developments in States outside the Council of Europe have been used by the Court to support evolutive interpretations of the Convention that diverge from previous case-

⁶⁹ *ibid.* at para. 101.

⁷⁰ fn. 43 above at para 3.2.

law. A classic example was *Christine Goodwin*⁷¹, where the unanimous Grand Chamber departed from a long line of previous judgments finding that the UK's partial recognition of the new identity of post-operative transsexuals did not breach their Article 8 right to respect for their private lives. To justify its stricter interpretation of the State's obligations under that Article the Court observed, "[t]he latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition."⁷² That document disclosed legal recognition of gender re-assignment in Singapore, Canada, South Africa, Israel, Australia, New Zealand and many states in the USA.

A controversial departure from earlier case-law that was partially justified on the basis of international jurisprudence was the Court's ruling in *Mamatkulov and Askarov*⁷³ that member States were bound to comply with interim measures indicated to them by the Court. Although the original Court had determined that the Commission had no authority to issue such binding measures in *Cruz Varas and Others v Sweden*⁷⁴ and that judgment had been applied by the full-time Court in *Conka v Belgium*⁷⁵, the majority of the Grand Chamber (14 votes to 3) declined to follow those cases.

"The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever

⁷¹ fn 26 above.

⁷² *ibid.* at para 84.

⁷³ fn. 27 above.

⁷⁴ Judgment of March 20, 1991/ (1992) 14 E.H.R.R. 1.

⁷⁵ Decision of March 13, 2001.

the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending...”⁷⁶

Therefore, the majority concluded that Turkey had breached Article 34 of the Convention (hindering the applicants’ effective exercise of their right to lodge a complaint with the Court) by failing to obey the Court’s interim measure not to extradite the applicants while the Court was considering their applications. In a joint dissent Judges Caflisch, Turmen and Kovler observed that the “precedent” established in *Cruz Varas* had been applied by the full-time Court to its own powers in *Conka* and “[w]e do not think that there has been any change since *Conka* which would justify the Court on a re-examination of its case-law reaching a diametrically opposite conclusion.”⁷⁷ As to the relevance of the jurisprudence from other international bodies the dissenters considered that they concerned treaties where States had empowered the issuing of binding interim measures by the relevant authorities. Hence, there is substance in the dissenters’ criticism that the majority in *Mamatkulov* had exercised a “legislative function” in according the Court the power to issue binding interim measures.

Developments in the domestic legal perceptions of a respondent State have also been utilised by the Court as a basis for overruling precedent. A leading example is *Stafford v UK*⁷⁸, concerning the compatibility of the established mandatory life sentence regime with Article 5 (right to liberty) of the Convention. The original Court had held in *Wynne v UK*⁷⁹ that regime, including the crucial powers exercised by the Home Secretary, met the requirements of Article 5. In *Stafford* the Grand Chamber considered that the evolutive approach encompassed both international and domestic advances.

⁷⁶ fn. 73 above, at para. 124.

⁷⁷ *ibid.* Joint Partly Dissenting Opinion of Judges Caflisch, Turmen and Kovler at para. 6.

⁷⁸ Judgment of May 28, 2002/ (2002) 35 E.H.R.R. 32.

⁷⁹ Judgment of July 18, 1994/ (1995) 19 E.H.R.R. 333.

“Similar considerations apply as regards the changing conditions and any emerging consensus discernable within the domestic legal order of the respondent Contracting State. Although there is no material distinction on the facts between this case and *Wynne*, having regard to the significant developments in the domestic sphere, the Court proposes to reassess “in the light of present-day conditions” what is now the appropriate interpretation and application of the Convention..”⁸⁰

This stance enabled the Grand Chamber to conclude that there had been breaches of Article 5(1)(a) and 5(4) in respect of the last eighteen months of the applicant’s detention as the Home Secretary’s refusal to release him had not been justified by Safford’s original murder conviction nor had a judicial body with adequate powers and procedures reviewed the lawfulness of his continued imprisonment. Speaking later President Wildhaber described this process as “judicial osmosis” whereby “developments in the domestic legal system influenced Strasbourg to change its case-law, which in turn results in the consolidation of the evolution at national level”.⁸¹

A more divisive reliance on domestic legal developments was asserted by the Grand Chamber majority (of twelve judges) in *Z. and others v United Kingdom*⁸² when finding no breach of the applicants’ right of access to a court (under Article 6(1)). The House of Lords had ruled that the applicants’ claims against a local authority for alleged negligence/breach of a statutory duty, in failing to protect them against serious abuse by their parents, should be struck out as disclosing no cause of action.⁸³ Before the Grand Chamber the applicants contended, following *Osman v United Kingdom*⁸⁴, that such an exclusionary rule constituted a breach of their right of access to a court. The majority held that:

⁸⁰ fn. 78 above at para. 69.

⁸¹ L.Wildhaber, Speech to mark the opening of the judicial year, Strasbourg, 23 January 2003.

⁸² Judgment of May 10, 2001/ 34 E.H.R.R. 3.

⁸³ *X and others v Bedfordshire County Council* [1995] All E R 353.

⁸⁴ Judgment of October 28, 1998/ 29 E.H.R.R. 245.

The Court considers that its reasoning in *Osman* was based on an understanding of the law of negligence (see, in particular, *Osman*, cited above, pp. 3166-67, §§ 138-39) which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords. The Court is satisfied that the law of negligence as developed in the domestic courts since the case of *Caparo Industries plc [v Dickman [1990] 2 AC 605]* and as recently analysed in the case of *Barrett [v London Borough of Enfield [1999] 3 WLR 79]* includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to a court of the kind contemplated in *Ashingdane [v United Kingdom (1985) A. 93]*.⁸⁵

Whereas Judge Thomassen, joined by Judges Casadevall and Klover, rejected the view that there had been any important developments in the common law:

The majority's reasons for not following the decisions in *Osman* are not, to my mind, convincing. There seem to have been no striking or significant changes in the law of negligence since that case and all relevant matters concerning the content of domestic law had been brought to the attention of the Court by the parties in *Osman*. I am of the opinion that the conclusion under Article 6 in this case must be the same.⁸⁶

Hence assessing the existence and extent of potentially subtle evolutions in domestic private law regimes may be problematic for a supra-national human rights tribunal.

Most recently a unanimous Grand Chamber utilised a combination of developments in international and national law, together with the practice of member States to justify overruling, or as the Court described it "reconsidered", the long-established exclusion of the right of trade unions to collectively bargain with employers as a component of the right to form and join trade unions under Article 11.⁸⁷ In *Demir and Baykara v Turkey*⁸⁸, a trade union representing local authority employees had its legal existence denied and its collective

⁸⁵ fn. 82 above at para. 100.

⁸⁶ *ibid.* Partly Dissenting Opinion of Judge Thomassen Joined by Judges Casadevall and Klover.

⁸⁷ See *e.g. Schmidt and Dahlstrom v Sweden* A.21 (1976)/ 1 E.H.R.R. 632.

⁸⁸ Judgment of November 12, 2008.

agreement with a council invalidated by the Court of Cassation. Taking account of, *inter alia*, the European Union's Charter of Fundamental Rights, changes to the Turkish constitution and legislation post-dating this application and the practice of the "vast majority" of European States, the Grand Chamber ruled that trade unions' right to collectively bargain had:

...become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their systems so as, if appropriate, to grant special status to representative trade unions.⁸⁹

However, whilst agreeing that Article 11 had been breached, Judge Zagrebelsky stated that:

I have the feeling that the Court's departure from precedent represents a correction of its previous case-law rather than an adaptation of case-law to a real change, at European or domestic level, in the legislative framework (as was the case, for example, in its *Stafford v UK* judgment) or in the relevant social and cultural ethos (as, for example, in *Christine Goodwin v UK*).⁹⁰

The potentially significant extension of the scope of Article 11 being articulated by the Grand Chamber may explain why so many different bases for applying the evolutive approach were invoked by the Court.

We have now discovered that the full-time Court has utilised a number of different justifications for overruling established case-law. These include the need to resolve uncertainty in the jurisprudence, which we have seen is a double-edged tool that can be used by both judges who wish to alter precedent and those who wish to affirm existing case-law. However, the justification invoked most frequently by the Court is the duty to ensure that the Convention is interpreted in an evolutionary manner that reflects contemporary standards in accordance with the living instrument doctrine. As our above analysis discloses a variety of sources of developments have been taken cognisance of by the Court encompassing public

⁸⁹ *Ibid.* at para. 154.

⁹⁰ *Ibid.* Separate Opinion of Judge Zagrebelsky at para. 2.

expectations (*Selmouni*), international developments (*Christine Goodwin*) and evolving domestic understandings (*Stafford*) when departing from previous case-law. Although the full-time Court has deployed a range of justifications for overruling earlier judgments it has followed the circumspect approach of its predecessor in avoiding expressly stating that it is so doing. Instead, the Court either does not clearly declare that it is overruling a previous judgment (as happened in *Mamatkulov* regarding *Conka*) or the Court uses euphemistic language (e.g. the existing case-law is being “further developed” in *Vilho*). It has been left to dissenting judges to decry the majority using starker epithets, vividly demonstrated by the five dissenters in *Vilho* who criticised the Court for having “overturned its well-established case-law.”⁹¹

Institutional features of the overruling process

Under the original Strasbourg control system the Commission had a strategic role in seeking to persuade the Court to reconsider its established case-law. We have examined above how the Commission’s Delegates in *Huber*⁹² and *Borgers*⁹³ successfully contended that the Court ought to depart from established precedents. Obviously, with the abolition of the Commission under the Protocol 11 reforms there is no longer the opportunity for such a quasi-judicial contribution from another Strasbourg body. However, Protocol 14 does empower the Council of Europe’s Commissioner for Human Rights to submit written comments and take part in hearings before Chambers and the Grand Chamber of the Court.⁹⁴ Given the current

⁹¹ fn. 53 above. Also in *E.B. v France* (2008) 47 E.H.R.R. 21, Judge Costa (joined by Judges Turmen, Ugrekhelidze and Jociene) expressed the view that the majority’s judgment “overturns” *Frette v France* (2004) 38 E.H.R.R. 21. Identical terminology was used by Judge Loucaides in his separate dissent. Whereas the majority claimed different factors influenced the decisions of the domestic authorities regarding the applicants’ requests for permission to adopt in the two cases.

⁹² fn. 35 above.

⁹³ fn. 40 above.

⁹⁴ Article 13 of Protocol 14 (Strasbourg, May 13, 2004).

Commissioner's regular published viewpoints on different aspects of human rights protection⁹⁵ it is entirely conceivable that he could assume an analogous role to that of the former Commission in providing an independent source of argument to the Court as to when it should overrule earlier jurisprudence. But, Russia's continuing refusal to ratify Protocol 14 means that this institutional development cannot be legally implemented.

Currently it is primarily up to the parties to an application or the Court itself to raise the issue as to whether a precedent should be overruled. Campaigning organisations may be able to play a secondary role in advocating change in the jurisprudence by seeking the Court's permission to submit third-party comments⁹⁶ on the matter in a relevant case. We have seen this technique successfully deployed by Liberty in *Christine Goodwin*⁹⁷. *Kudla*⁹⁸ is a classic example of a case where the applicant successfully persuaded the Court to overrule its previous case-law. By contrast in *Perez*⁹⁹ it was the respondent State that convinced the Court of the need to change its jurisprudence. As we have learnt from President Wildhaber¹⁰⁰ members of the Court may quite frequently disagree with each other in their private deliberations over whether a precedent should be followed. *Vilho*¹⁰¹ is an example where such disagreements could not be resolved internally within the Court and erupted dramatically in the divergent majority and dissenting judgments. The majority took it

⁹⁵ For example, Thomas Hammarberg, "The protection against torture must be strengthened", (February 18, 2008); available from www.coe.int/t/commissioner/Viewpoints

⁹⁶ Under Article 36 of the ECHR.

⁹⁷ fn. 71 above.

⁹⁸ fn. 56 above.

⁹⁹ fn. 55 above.

¹⁰⁰ fn. 7 above.

¹⁰¹ fn. 28 above.

upon themselves to overrule the *Pellegrin*¹⁰² approach to interpreting Article 6(1) in civil service cases with neither the applicants nor the respondent State seeking to challenge the validity of the earlier judgment.

Turning to the issue of who has benefitted from the Court overruling established case-law there is an inevitable degree of subjectivity in such an assessment of the effects of particular judgments. Nevertheless, we can offer our own analysis. Applicants can be said to have gained from *Kudla*¹⁰³ as States were obliged to establish effective domestic remedies to deal with complaints of unreasonable delays in criminal and civil proceedings. Transsexuals, especially those living in the UK, benefitted from *Christine Goodwin*¹⁰⁴ due to the obligation on States to provide full legal recognition of their new identities. Mandatory life prisoners secured greater judicial scrutiny over their continued detention from *Stafford*¹⁰⁵. Applicants to the Court had their positions strengthened through *Mamatkulov*¹⁰⁶ ruling that States were required to observe interim measures indicated by the Court. Public sector employees had their ability to invoke the civil aspects of Article 6(1) in litigation against their employer enhanced by *Vilho*¹⁰⁷ and trade unions', together with their members, bargaining rights were extended in *Demir and Baykara*¹⁰⁸. Finally, victims of serious abuse by State personnel benefitted from the Court's broader approach to classifying such mal-treatment as torture

¹⁰² fn. 45 above.

¹⁰³ fn. 56 above.

¹⁰⁴ fn 26 above.

¹⁰⁵ fn. 78 above.

¹⁰⁶ fn. 27 above.

¹⁰⁷ fn. 28 above.

¹⁰⁸ fn. 88 above.

announced in *Selmouni*¹⁰⁹. States probably gained most from *Pellegrin*¹¹⁰ as it exempted a significant category of civil servants from the ability to invoke the civil limb aspects of Article 6(1) against their employer. However, both States and applicants are likely to have gained from the clarification articulated in *Perez*¹¹¹ regarding when civil-party proceedings fall within Article 6(1). The Court itself benefitted from *Kudla*¹¹² as the provision of effective domestic remedies to deal with complaints of unreasonable delays in national courts offered the potential to somewhat reduce this burdensome source of complaints to Strasbourg. Though applications concerning the adequacy of such domestic remedies are now having to be determined by the Court.¹¹³ The Court also gained from *Mamatkulov*¹¹⁴ in the sense that its interlocutory powers were enhanced. Overall, we can, therefore, conclude that applicants and other persons in analogous situations have gained most from the Court's willingness to overrule earlier jurisprudence.

Conclusions

We have learnt that the full-time Court has followed the practice of the original Court in avoiding expressly overruling earlier case-law. Nevertheless, we have discovered a number of cases where the full-time Court has impliedly overruled precedent with profound effects on the jurisprudence; examples include *Kudla*¹¹⁵, *Christine Goodwin*¹¹⁶, *Stafford*¹¹⁷,

¹⁰⁹ fn. 68 above.

¹¹⁰ fn. 45 above.

¹¹¹ fn. 55 above.

¹¹² fn. 56 above.

¹¹³ See for example *Forgione v Italy*, Judgment of July 8, 2008.

¹¹⁴ fn. 27 above.

¹¹⁵ fn. 56 above.

¹¹⁶ fn. 26 above.

*Mamatkulov*¹¹⁸ and *Vilho*¹¹⁹. Three separate grounds of justification for overruling have been detected in the case law; uncertainty in the existing jurisprudence¹²⁰, rapidly increasing numbers of complaints to the Court concerning a specific right/freedom guaranteed by the Convention¹²¹ and the application of the living instrument doctrine to the interpretation of the Convention¹²². The latter ground has been the one most frequently invoked by the contemporary Court. This is in harmony with Professor Feldman's incisive analysis of precedent within the original Court which emphasised that judgments are authoritative in accordance with the scientific understanding and social mores at the time of delivery, but subsequent developments in science or ethics may require corresponding new interpretations of the Convention.¹²³

Our study has disclosed that applicants have been the prime beneficiaries of the Court overruling its previous case-law. Therefore, we should welcome the Court's willingness to update its interpretations to match contemporary circumstances and requirements. Indeed, a failure of the Court to review the efficacy of its jurisprudence would result in the ossification of the case-law. Given the protracted nature of the State dominated reform process via amending Protocols¹²⁴, the Court has become the main engine of development regarding the

¹¹⁷ fn. 78 above.

¹¹⁸ fn. 27 above.

¹¹⁹ fn. 28 above.

¹²⁰ For example, *Perez* fn. 55 above.

¹²¹ For example, *Kudla* fn. 56 above.

¹²² For example, *Selmouni* fn. 68 above.

¹²³ See fn. 20 above.

¹²⁴ For example, Protocol No 12, which provides for the general prohibition of discrimination, was opened for signature in November 2000 but by July 2008 it had only been ratified by 17 States and others (including France, Sweden and the UK) had not even signed it.

substantive rights and freedoms guaranteed by the Convention. Hence, the Court ought to be more transparent in openly acknowledging when it is revising and altering its existing case-law. At present it is often left to the dissenting judges to expressly describe the Court's judgment as constituting an overruling of precedent.¹²⁵ In addition the Court should ensure that it provides adequate justification in respect of the changed social conditions/values or scientific knowledge that underpins an overruling judgment, as we have noted that has not always been the practice of the Court.¹²⁶ Today the Court has sufficient maturity to enable it to frankly address the topic of the overruling of previous case-law as discussed in our study.

¹²⁵ For example, see fn. 53 above.

¹²⁶ For example in *Selmouni* fn.68 above.