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Candidates for the European Court of Human Rights

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mrs Marie-Louise BEMELMANS-VIDEC, Netherlands, Group of the European People's Party

Summary

Among the criteria for examining candidatures to the European Court of Human Rights the Assembly has emphasised the need to have candidates of the required level to exercise the function of judge, in accordance with Article 21 of the European Convention on Human Rights, as well as the need for gender balance.

Under the current wording of the Resolution 1366 (2004) on Candidates for the European Court of Human Rights, as modified by Resolution 1426 (2005), the Assembly has no choice but to reject single-sex lists if that sex is over-represented in the Court. Automatic rejection of such a list may, in exceptional circumstances, reduce the Assembly's ability to choose between three candidates who satisfy all the other selection criteria.

The Assembly should therefore amend paragraph 3.ii. of Resolution 1366 (2004) as modified by Resolution 1426 (2005).

A. Draft resolution

1. The Parliamentary Assembly has drawn up and adopted a procedure for examining candidatures to the European Court of Human Rights, for which it has laid down precise criteria.

2. Difficulties have, however, been encountered because of the strict application of the criterion set out in paragraph 3.ii. of Resolution 1366 (2004) on Candidates for the European Court of Human Rights as amended by Resolution 1426 (2005), to the detriment of the other criteria required in terms of the qualifications of the candidates.

3. The current wording of the paragraph rules out the consideration of lists of candidates of the same sex if that sex is over-represented in the Court, regardless of the other criteria.

4. The Assembly therefore resolves to amend paragraph 3.ii. of Resolution 1366 (2004) as amended by Resolution 1426 (2005) as follows:

“The Assembly decides not to consider lists of candidates where:

(...)

ii. the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong, ***or in exceptional circumstances considered as such by the Ad hoc Sub-Committee on the Election of Judges to the European Court of Human Rights and by the Committee on Legal Affairs and Human Rights, both by a two-thirds majority.***”

B. Explanatory memorandum by Mrs Marie-Louise Bemelmans-Vidéc, Rapporteur

I. Introduction

1. In January 2004, the Assembly adopted Resolution 1366 (2004) and Recommendation 1649 (2004). In these new texts, it confirmed the need to retain the selection procedure it established in 1996. It also emphasised the need to have candidates of the required level to exercise the function of judge in accordance with Article 21 of the European Convention on Human Rights, as well as the need for gender balance.

2. In March 2005, Resolution 1366 (2004) was amended by Resolution 1426 (2005), under which single-sex lists of candidates may be considered by the Assembly if the sex is under-represented in the Court (under 40 % of judges).

3. Under the current wording of the Resolution, the Ad Hoc Sub-Committee on the Election of Judges to the European Court of Human Rights has no choice but to recommend the rejection of single-sex lists if that sex is over-represented.

4. On 5 October 2006, I and several other members presented a motion for a resolution (Doc 11067) to enable the existing rule to be waived in exceptional circumstances. At its meeting on 6 October 2006, the Committee on Legal Affairs and Human Rights (AS/Jur) endorsed this motion, in which we proposed adding a clause to paragraph 3.ii. of Resolution 1366 (2004) as amended by Resolution 1426 (2005). The Committee also appointed me rapporteur in the event of the matter being referred to it for report.

5. Having considered the matter, the Bureau of the Assembly asked the Committee on Rules of Procedure and Immunities (AS/Pro) to provide it with an opinion on this subject.

6. In its opinion, of 25 January 2007, the AS/Pro indicated that *“given that, in Resolution 1366 (2004) as modified, the Assembly clearly defined the procedure for examining candidatures to the European Court of Human Rights and the criteria which the lists of candidates must meet, the procedure cannot be changed without an official amendment to the Resolution. The Assembly itself must therefore decide on any change to the procedure, on the basis of a new report and a new draft Resolution, which would have to be submitted to it for adoption”* (see document AS/Pro (2007) 02 rev).

7. At its meeting on 26 January 2007, after having considered the AS/Pro’s opinion, the Bureau decided to instruct the Committee on Legal Affairs and Human Rights to prepare a report on the basis of the above-mentioned motion for a resolution (Doc 11067).

8. On the same day, the matter was referred to our Committee for report.

II. Amending Resolution 1366 (2004) to take account of exceptional circumstances

9. In its reply to Recommendation 1649 (2004), the Committee of Ministers indicated that *“circumstances may exceptionally arise in which, as a result of the correct application of the other five criteria [enumerated in paragraph 19 of the Recommendation], a Contracting Party may find itself obliged to submit a list containing candidates of only one sex in derogation from that rule.... In this context, the Committee draws attention to the danger that such an obligation could under certain circumstances give rise to difficulties in satisfying the requirements of Article 21 of the Convention”* (Doc 10506, emphasis added).

10. The Committee of Ministers therefore invited the Assembly *“to consider the possibility of modifying its own rules in order to allow exceptional derogation from the rule where the authorities of the Contracting Party concerned present convincing arguments to the Committee of Ministers and the Assembly to the effect that, in order to respect the requirements concerning the individual qualifications of candidates, it could not do otherwise than to submit a single-sex list”* (again, emphasis added).

11. In view of the difficulties which may be encountered in examining a list one aspect of which leaves no procedural choice but to recommend its rejection, whereas that aspect might exceptionally

be justified, taking account of compliance with the other criteria for the selection of judges laid down by the Assembly, consideration should be given to providing for an exception to the rule.

12. If taken to the extreme, complying with one of the criteria laid down by the Assembly in its procedure for the selection of judges may have the contrary effect of preventing compliance with the other selection criteria.

13. In this connection, attention should be drawn to paragraph 49 of the explanatory report on Protocol No 14 to the European Convention on Human Rights, according to which *“it was decided not to amend the first paragraph of Article 22 to prescribe that the lists of three candidates nominated by the High Contracting Parties should contain candidates of both sexes, since that might have interfered with the primary consideration to be given to the merits of potential candidates. However, Parties should do everything possible to ensure that their lists contain both male and female candidates”*.

14. When a state has done everything possible to include members of the under-represented sex in the list of candidates – but without success because of the requirement to satisfy the other criteria concerning the choice of the best qualified candidates – and is able to prove this with objective and reasonable explanations, the Assembly should reserve the right, under strictly defined conditions and in truly exceptional circumstances, to accept the list.

15. Automatic rejection of such lists would mean reducing the Assembly’s ability to choose between three candidates who satisfied the other selection criteria. Any automatic requirement to include a female or a male candidate on a list, even if none of the potential female or male candidates satisfied the relevant criterion, would have the effect of reducing the Assembly’s choice and would be contrary to the *spirit* of the rules requiring gender balance on the list¹.

16. In exceptional circumstances justifying corresponding action, the decision by the sub-committee to accept a list of the kind in question should be approved by a two-thirds majority of the members present.

III. Proposal

17. The Assembly should therefore amend paragraph 3.ii. of Resolution 1366 (2004) as modified by Resolution 1426 (2005) as follows:

“The Assembly decides not to consider lists of candidates where:

(...)

ii. the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong, *or in exceptional circumstances considered as such by the Ad hoc Sub-Committee on the Election of Judges to the European Court of Human Rights and agreed to by a two-thirds majority.*”

¹ Of the six judges elected by the Assembly in 2005-2006 on the specific recommendations of the AS/Jur Sub-Committee on the Election of Judges to the ECHR, three were women.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 11067, Reference No 3308 of 26 January 2007

Draft resolution adopted unanimously by the Committee on 12 March 2007

Members of the Committee: Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György Frunda, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya **Atanasova**, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise Bemelmans-Videc (alternate: Mr Pieter **Omtzigt**), Mr Erol Aslan **Cebeci**, Mrs Pia **Christmas-Møller**, Mrs Ingrida **Circene**, Mrs Lydie Err, Mr Valeriy Fedorov, Mr Aniello Formisano (alternate: Mr Andrea **Manzella**), Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mr Holger Haibach, Mrs Gultakin **Hajiyeva**, Mrs Karin Hakl, Mr Nick Harvey, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Željko **Ivanji**, Mr Sergei Ivanov, Mrs Kateřina **Jacques**, Mr Antti Kaikkonen, Mr Karol Karski, Mr Hans Kaufmann (alternate: Mr Andreas **Gross**), Mr András Kelemen, Mrs Kateřina Konečná, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mr Eduard **Kukan**, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Humfrey **Malins**, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew **McIntosh**, Mr Murat Mercan, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr João Bosco **Mota Amaral**, Mr Philippe **Nachbar**, Mrs Nino Nakashidzé, Mr Tomislav Nikolić, Mrs Carina Ohlsson, Ms Ann Ormonde, Mr Claudio Podeschi, Mr Ivan Popescu, Mrs Maria Postoico, Mrs Marietta **de Pourbaix-Lundin**, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen Rustamyan, Mrs Rodica Mihaela Stănoiu, Mr Christoph Strässer, Mr Mihai Tudose (alternate: Mrs Florentina **Toma**), Mr Øyvind Vaksdal, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis, Mrs Renate **Wohlwend**, Mr Marco Zacchera, Mr Krzysztof **Zaremba**, Mr Vladimir Zhirinovskiy, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann