ILPA Submission to the Joint Committee on Human Rights call for evidence: Protocol 15 to the European Convention on Human Rights

1. The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government consultative and advisory groups.

2. The Convention is an essential tool in the struggle to secure respect for the rights of migrants and refugees and to secure a non-racist, non-sexist, just and equitable system of immigration, asylum and nationality law practice. Further, the supervision of the European Court of Human Rights has provided a guarantee of rights for migrants in admission, detention and expulsion cases, as the Court's judgments and the application of interim measures under Rule 39 of the Rules of Court to arrest expulsion where rights arise under article 3 (prohibition of torture and inhuman or degrading treatment or punishment) and article 8 (right to respect for family and private life) make clear.

3. We confine our submissions to three brief points.

4. First, the addition to the Preamble of the Convention of a reference to the principle of subsidiarity and the judicial doctrine of margin of appreciation. We welcome the emphasis on the safeguarding of human rights by national authorities; it is these authorities who necessarily have the task of securing the rights at a national level before the supervisory role of European Court comes into play. However we would emphasise two matters. To apply subsidiarity in practice national authorities including legislatures and executives must secure rights within their respective States and not simply rely on national judiciaries to enforce rights as and when a breach occurs. Legislation must be designed to comply with obligations under the Convention as must government policies. In this way rights are secured in advance and are embedded in a way that secures continuing democratic consent to their furtherance. The principle of subsidiarity should not obscure the task of the European Court of Human Rights in applying the doctrine of "margin of appreciation" in a careful and structured way. For example, European judicial supervision should be more intense where a national measure said to violate rights has not been the subject of judicial scrutiny by senior courts at national level. The principle of subsidiarity must

not be used unduly to strengthen national governments at the expense of national judiciaries .

5. Second, the reduction of the time limit for applications to the Court from six to four months will impact upon migrants who rely on the supervisory jurisdiction of the Court for protection against expulsion from the UK in violation of their rights. Many such persons lack access to legal aid in practice and particularly since 1 April 2013 and the coming into force of paragraph 19(5)-(8) of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 some may have no entitlement to legal aid. Many face language and other cultural barriers to ready access to legal services, and may be in immigration detention or destitute and homeless. For such a person it may take time to secure advice and assistance to help make an application to the Court. Such a person may not even discover that such an application is possible until many months after the final decision was taken. The reduction in time for bringing applications is liable to restrict access to the Court's supervisory jurisdiction and protection for migrants and weakens the protection afforded to individuals by the Convention. It is unwelcome.

6. Third, we object to the removal from Article 35, paragraph 3, sub-paragraph b of the Convention of the words "and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal". When Article 35 of the Convention was recently amended by Protocol 14 (Article 12), a new and high test was introduced whereby an application could be declared inadmissible where the applicant had not suffered a 'significant disadvantage' *unless* respect for human rights required an examination of the application on the merits *and* provided no case be rejected on this basis where not duly considered by a domestic tribunal. The filter of having to show a significant disadvantage represents a substantial hurdle for applicants. This was recognised in Protocol 14 as it was tempered in part by the provision that it did not apply where national judicial authorities had not played their part in the task of judicial supervision. The removal of this safeguard strengthens the relative position of national executives against all forms of judicial control and supervision of rights. The principle of subsidiarity places the national authorities in the front line of securing rights. Where the supervision of the Court is regulated by demanding admissibility criteria that do not respect the role of *national* judicial authorities, the role of the latter is devalued and the level of European supervision weakened. This development is unwelcome.

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