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# Taking A Case To Strasbourg-Aspects Of Practice And Procedure In The European Court Of Human Rights

*Scott Blair, Advocate*

## The New Court Structure

On November 1, 1998 in consequence of the coming into force of Protocol No.11 to the Convention, the new European Court structure was established. The main reform was to replace the previous two tier system of the Commission which was concerned with admissibility and a Court concerned with giving judgment in cases which were declared admissible. The Commission has been abolished and the Court now deals with questions of admissibility. Procedure is to be found in certain Articles of the Convention and in the current Rules of Court (hereinafter referred to as “Rule”).

In summary the relevant Convention institutions are:

- the Registry which is charged with administrative and organisational matters (Art. 25; Rules 15–17);
- the Plenary Court which has administrative and formal procedural duties such as the appointment of the President and Vice-President of the Court and of the Sections and the adoption of the Rules of Court (Art. 26; Rule 20);
- the Grand Chamber of the Court of 17 judges (Art. 27(3); Rule 24);
- Chambers and Sections. The Rules of Court require there to be four Sections and a Chamber consists of seven judges drawn from one of these Sections in a way which is balanced having regard to gender and geography (Art. 27; Rules 25-27);
- Committees (Art. 26; Rule 27) which consist of three judges from the same Section.

For most purposes the applicant will be concerned with a Chamber or a Committee. The former can deal with decisions on admissibility as well as the final merits of an application. It is anticipated that the final decision on the merits of an admissible application will be decided by a Chamber. Unless the context suggests otherwise the word "Court" should be taken to mean a Chamber. Chamber decisions are taken by a majority vote and become final unless there is a reference to the Grand Chamber under Articles 30 or 43. Committees can only deal with admissibility and to hold an application to be inadmissible that decision must be unanimous (Rule 53(4)) and if it is it will be final (Art. 28; Rule 53(3)). Where unanimity cannot be achieved the case is referred to a Chamber. Committee decisions constitute a large proportion of all cases declared inadmissible.
The Grand Chamber deals with cases where a Chamber has relinquished jurisdiction under Art. 30 or where a case has been referred to it under Art. 43 such as an inter-state case or certain individual applications under Article 34.

### *Admissibility Criteria*

In order for a case to be admissible an application must:

(1) be by a person, non-governmental body or group of individuals claiming to be a victim of a violation (Art. 34);
(2) relate to a violation by a Contracting State of the rights in the Convention and protocols (Art. 34);
(3) be made at a time when the State was bound by the Convention;
(4) relate to a jurisdiction or activity for which the State is responsible;
(5) be made within a period of six months after domestic remedies have been exhausted (Art. 35(1));
(6) not be "manifestly ill-founded, or an abuse of the right of application"(Art. 35(1));
(7) raises a matter which has already been examined by it or to a procedure of international investigation or settlement and contains no relevant new information (Art. 35(2)).

Some of these criteria bear further discussion. As for (1) a complaint cannot relate to the actions of private individuals although complaints that the State has failed to take steps to protect an applicant from such actions have been successful. For a recent example of such a finding see *Z v. UK,* May 10, 2001.
As for (2) the Court cannot deal with rights not contained in the Convention. Claims relating to a right to a pension (*X v. Sweden* (1986) 8 E.H.R.R. 253); adequate housing (*X v. Germany* (1956) 1 Y.B. 202); a job or minimum wage (*X v. Denmark* (1975) 3 D.R. 153) or a driving licence (*X v. Germany* (1977) D.R. 112), have all been held inadmissible.
As for (5) the six month time limit is inflexible and runs from the date of any final public decision or the date when the applicant was informed of the decision if not public. If no remedy exists in national law the time runs from the date when the applicant became aware of the violation. If the complaint is based on a continuous state of affairs the limit does not apply.
The requirement to exhaust domestic remedies is applied flexibly. It does however require that when such remedies are used that the substance of any later Convention complaint is put to the relevant domestic body or tribunal (*Cardot v. France* (1991) 13 E.H.R.R. 853 at para. 34). There is no obligation to exhaust a remedy if it is ineffective or uncertain (*Aksoy v. Turkey* (1996) 23 E.H.R.R. 553 at para. 52), or offers no realistic prospect of success (*TW v. Malta* (1999) 29 E.H.R.R. 185 at para. 34). Into the latter category would fall an applicant seeking to challenge a matter of clearly settled law such as the decision of the Judicial Committee of the Privy Council in *Brown v. Stott,* 2001 S.L.T. 59. Similarly the extent to which a Declaration of Incompatibility under section 4 of the Human Rights Act 1998 can be regarded as an effective remedy has to be open to question particularly as the Government is not bound to act on a Declaration and such discretionary remedies are not sufficient (*Agee v. UK* (1976) 7 D.R.164 ). The onus is on the State to show that a remedy was effective in practice and offered reasonable prospects of success. If the State does this then the onus reverts to the applicant to show that it was ineffective (*Akdivar v. Turkey* (1997) 23 E.H.R.R. 143 ).

As for (6) the words "manifestly ill-founded" suggest that only cases which have no merit will be rejected. In practice however many *prima facie* arguable cases are rejected which has led some commentators to conclude that the test which is actually applied is closer to that of a "strong *prima facie*" case. Abuse of the right of application is intended to weed out vexatious cases. Finally (7) is concerned with the Convention equivalent of the familiar doctrine of *res judicata.*

The applicant must also be made aware that the Court does not sit as a court of appeal from decisions of the national courts. The role of the Court is to ensure that States have complied with their obligations under the Convention. The Court will not substitute its own judgment for that of the national court or act as a "fourth instance" appeal. It follows that matters of national law are primarily for the national courts (*Benham v. UK* (1996) 22 E.H.R.R. 293 ) and that the Court will not interfere with the findings of fact made by the national court, unless it can be shown that the national court has drawn an arbitrary conclusion from the evidence before it (*Edwards v. UK* (1993) 15 E.H.R.R. 417 at para. 34).

*The Application*

An applications must be in writing and requires to be signed by the applicant of their representative and must comply with certain conditions (Rule 47). Representatives must meet certain conditions to permit them to act (Rule 36). An application can be done by simple letter. Provided that the relevant facts and complaints are set out this will be sufficient to stop the running of the six month limitation. The application will not generally be registered until the usual application form is completed and any relevant documents lodged. Once this is done it is given a case number and assigned to a Section. The President of the relevant Chamber can direct that an applicant be granted anonymity in "exceptional and duly justified cases" (Rule 47(3)).

The application form must contain, *inter alia,* a succinct statement of the facts, a brief statement of the alleged violations and supporting arguments, a statement that the applicant is within the time-limit and has exhausted any domestic remedy, and an indication of the claims for just satisfaction. The application must be accompanied with all relevant documents, including all relevant national decisions, judicial or otherwise. Copies of documents which also support the admissibility claim must be included. It is not necessary to provide details of the remedies, including compensation, sought under Article 41 as this is not required until a case is declared admissible. However this should not prevent investigation of this aspect of case before then. Indeed as valuable evidence may be lost through the passage of time it is important that such steps are taken as soon as possible.

*Overall Strategy*

The strongest possible application should be made at the earliest possible stage rather than by development of the case in any response to the arguments put forward by the government. It should not be forgotten that a case can be declared inadmissible before the government is called on to reply. It follows that the more convincing a case is made at

this stage the less likely it is to fail in its early stages. As many Convention points as possible should be taken. Consideration of the scope of a case may suggest that rights other than the most obvious right could be engaged. If an alleged violation is raised later then it may fall foul of the six month rule.

*Interim Measures and Urgent Cases*

In urgent cases where the applicant's life is at risk or where there is a substantial risk of serious ill-treatment, the Court may apply interim measures (Rule 39). Applications are relatively rare. The parties are heard on the matter. For the Court to grant interim measures there must be a *prima facie* case, a threat of irreparable harm of a very serious nature and the harm must be imminent and irremediable. Interim measures have usually been sought in cases where the applicant is threatened with expulsion to a country where he faces torture or death. In *Soering v. UK* (1989) 11 E.H.R.R. 439 measures were granted to an applicant facing extradition to the United States to face the death sentence for murder and in *D v. UK* (1997) 24 E.H.R.R. 423, an applicant in the advanced stages of AIDS, was threatened with removal to St Kitts, where he argued that medical treatment was inadequate. Where removal to a State which is a signatory to the Convention is involved then interim measures will generally be refused unless there is clear evidence that the state will not abide by the Convention.
Cases are dealt with in the order which they are lodged with the Court but the Court can expedite cases or prioritise cases. This is a this is a matter for its discretion (Rules 40–41). In *Soering* priority was given and the case was dealt with in 12 months and in *D v. U.K.*, 15 months elapsed.

*Legal Aid*

Legal aid may be granted by the President of the Chamber once a case has been communicated to the respondent Government and only where he considers it necessary for the proper conduct of the case and where the applicant lacks the means to meet all or any part of the expenses (Rules 91–96).Accordingly a grant is only available when it has been established that there is a *prima facie* case under the Convention and is seen as a contribution towards expenses but not as payment to reflect the work undertaken which can often be considerable.
A declaration of means form requires to be completed and the Government can comment on the information provided. Maximum fixed sums based on the levels of legal aid available in member states are grant is available for specified items of expenditure, *e.g.* the submission of observations or attendance at a hearing. The sums awarded are low and do not compare favourably with domestic legal aid rates.
Formerly a grant of legal aid in an application against the U.K. carried with it sanction to employ a solicitor and counsel. However now a grant is restricted to one lawyer, unless the President directs otherwise.

*Admissibility Proceedings*

A Judge Rapporteur makes the initial decision as to whether an application should be examined in Committee where there is a proposal to strike out, be declared as inadmissible or be examined further before a Chamber and has power to obtain further information from the parties to that end (Rule 49(2)–(3). The President of the Section can overrule a decision to send to an application to a Committee and send it to a Chamber instead (Rule 49(2)(b)).
Where a case goes before a Chamber it may be struck out or rejected as inadmissible in whole or in part (Rule 54(3)). This can take place before the respondent State has been contacted but more often the State or applicant is asked to make observations or to provide more information in relation to admissibility. An application will not be declared admissible until the time-limit has expired for receipt of the Governments' observations.
Where an application is communicated to the Government, the Chamber may send the whole application or particular complaints only. Specific questions on aspects of admissibility, fact or law may be posed. The Government gets three months to reply. The reply is given to the applicant who, on average, gets around four to six weeks to reply. No written observations or documents may be filed after the expiry of these time-limits unless the President directs otherwise (Rule 38). Extensions are often granted.
When it has considered the submissions on admissibility and the merits, the Chamber may decide that a case is inadmissible in whole or in part, strike it out, request further information or observations. It may also decide to hold an oral hearing (Rule 54(4)) on admissibility and the merits, or exceptionally on admissibility alone, or declare the application admissible in whole or in part. The format of an oral hearing at this stage is similar to that used on hearings by the Court on the merits save that both the merits and admissibility must be addressed. The format of oral hearings is dealt with later.

*Friendly Settlement*

When a case is declared admissible, the Court invites the parties to make proposals for a friendly settlement within a time limit, usually of two months (Arts 37–39 and Rule 62). In the old system the Commission carried out this role. It would advise the parties of its provisional view of the merits subject to an obligation of confidence. To date the Court has not followed this practice, although the Rules do permit it to take any steps that appear appropriate to help a settlement. The Registrar assists the settlement discussions. Negotiations are confidential and cannot be referred to in later contentious proceedings. Where a settlement has been reached the Court may strike the case from the list. If terms are agreed these are published along with the facts of the case and the case is formally stuck from the list. The publicity given to settlements which is a new practice will assist in any negotiations.
Although the Court doe not have an active role in arranging settlement, it does not just act as a "rubber stamp". Article 37(1) obliges it to continue examination of a case "if respect for human rights so requires". Whether the Court will exercise this power will depend of the materiality and relative novelty of the issues and the proposed terms.
From the point of view of the State friendly settlement is attractive as it can avoid a public finding of a violation, particularly where it has put in train reform of any relevant law or practice. Equally, the procedure can be used to "pay-off" an applicant without any

attempt by the government to deal with the underlying cause of complaint. As for the applicant, it is possible that settlement might be on more favourable terms than might be awarded by the Court if a violation is found particularly as settlement terms are not restricted to what would constitute "just satisfaction" under Article 41. Settlement will also give the applicant a remedy a sooner than waiting for a hearing. Equally some applicants may wish to obtain a public judgment as a matter of principle.

*Establishing the Facts*

Once an application is declared admissible the Court will examine the case and if necessary undertake an investigation (Rule 38). Although a Court may examine witnesses and make site inspections, this is rare, and generally it will be able to establish the facts from the relevant documents. An applicant can ask the Court to hear evidence although there is no obligation on it to do so.

Cases where evidence has been heard have generally involved alleged large scale violations in a state of emergency as in *Ireland v. U.K.,* 2 E.H.R.R. 25 (arrest and detention of IRA suspects). Where there is a real dispute as to facts, the Court will hear witnesses, expert or otherwise (Rule 42). It can appoint external experts to assist (Rule 42(2)). Witnesses cannot be compelled to attend and the Court cannot compel the state to disclose documents. However there is an obligation on the respondent state to afford all necessary facilities to allow the Court to investigate the facts (Rule 38(1)(a)). Where the State fails in this obligation the Court may draw an appropriate inference particularly where the state is likely to have information which could support or refute the allegations (*Timurtas v. Turkey,* No. 23531/94, June 13, 2000).

*Hearings on the Merits Before the Court*

Where a friendly settlement has not been achieved the case proceeds to a hearing before the Court on the merits. Where no oral hearing has taken place before admissibility Rule 59(2) provides that there should be a hearing on the merits where one of the parties so requests. In exceptional cases the Court can decide that an oral hearing is not necessary. Prior to November 1, 1998, when the Commission decided the bulk of cases, admissibility hearings were rare. The new Court has inherited a substantial back-log of cases and it is unlikely that in practice the Court will grant an oral hearing on request an indeed in the majority of cases there is no oral hearing. A hearing is most likely in cases where further clarification of matters of fact or law is needed or where the case is of wider legal or political importance.

The Court will invite the parties to lodge final written submissions in the form of a Memorial. This sets out the facts, the law and the arguments as to why the Convention has been violated. Expenses or compensation claimed under Article 41 should be included in the Memorial or should be submitted to the Court within two months of the admissibility decision or other specified time (Rule 60). The evidence used to support these claims should be as detailed as possible. An affidavit from the applicant on the extent of any losses is often used.

If an oral hearing is granted then the applicant speaks first. Procedure is governed by Rules 63–70. The applicant can appear in person or by a lawyer authorised to practice in any of the states which are parties to the Convention (Rule 36(3)). Proceedings are in English or French or with permission in an official language of one of the State parties. The time given for a submission is short with typically 30 minutes being permitted, with a further opportunity for a brief reply to the other side and to any questions put by the judges. Time limits are strictly adhered to. More time may be allocated in complicated cases but even then it is rare for a hearing to last more than a morning or afternoon. The Court is given a copy of the oral submission in advance of the hearing. The hearing is in public unless there are exceptional circumstances which require a private hearing (Art. 40; Rule 33). Deliberations take place immediately after the hearing but it takes around two to four months before a judgment is issued.

*The Judgment*

A judgment of the Grand Chamber is final. A judgment of a Chamber becomes final when either the parties confirm that they do not wish to refer the case to the Grand Chamber or in any event, after three months. Judgments are published and are binding on States which are obliged by Article 46 to accept any judgment. There is a system for the enforcement of judgments. Article 46(2) provides that the Committee of Ministers shall be responsible for supervision of the execution of judgments which can extend to ensuring that the State amends its law or takes such other steps as are needed to ensure compliance with the Convention in future cases. The Committee of Ministers can hear submissions on any alleged failure to implement a judgment. The Committee publishes interim resolutions to record whether payment of just satisfaction has been made or whether other steps have been taken to ensure Convention compliance.
A judgment cannot quash the decision of the domestic authority. This includes any conviction. It cannot set aside domestic legislation or make an order requiring specific steps to be taken. It can declare the violation and possibly award expenses and compensation as just satisfaction. A judgment imposes a legal obligation on the State to end the breach and to make reparation as far as it is possible to do to amount to "just satisfaction" under Article 41. It is for the State not the Court to determine what steps are needed to remedy any violation. As judgments are open to interpretation, Governments are often criticised for taking insufficient steps to remedy any defect.

*Expenses*

Where the Court finds a violation it may award such reasonable legal costs and expenses as are needed to afford "just satisfaction" under Article 41. Expenses can also be part of a friendly settlement. These fees are assessed on the applicable national scale rates. Any award of legal aid is deducted from the final award. Both parties can make submissions on the level of any award and the Court has been responsive to claims that the fees or hours claimed or the number of representatives involved was excessive (*e.g. Gaskin v. U.K.* (1989) 12 E.H.R.R. 36). In *Young, James and Webster v. U.K.* (1982) 5 E.H.R.R. 201 the Court noted that high litigation costs might limit effective human rights

protection and considered it wrong to high awards. High expenses have almost always been reduced on an equitable basis.
The test applied by the Court is whether the costs and expenses claimed were actually and necessarily incurred to prevent or obtain redress for the wrong and can include the expense of proceedings before both the domestic and Stasbourg courts (*Le Compte v. Belguim* (1982) 5 E.H.R.R. 183). Although it derives assistance from national rates it is not bound by them so it can award a higher rate provided that it is reasonable (*Abdulaziz v. U.K.* (1985) 7 E.H.R.R. 471).
The Court presumes that the applicant will be liable for their advisers expenses and so where a lawyer agrees to act free of charge or on an unenforceable contingency basis it is not open to claim expenses in the event of success (*Dudgeon v. UK* (1983) 5 E.H.R.R. 573; *McCann v. U.K.* (1995) 21 E.H.R.R. 97).

*Conclusion*

Whilst it is to be hoped that in the majority of cases it will prove possible and, in view of the obligation to exhaust domestic remedies, necessary to resolve claims of human rights violations in the domestic courts, practitioners must always keep in view the possibility that any remedy may lie with Strasbourg. Familiarity with the jurisdiction and procedures of that Court must now be something which forms part of the practitioners' general knowledge. The general raising of human rights awareness carries with it an increased likelihood that more human rights cases will arise which will require to go to Strasbourg. Whilst the procedure is complex and slow, an application may be the only way to provide a client with a remedy.