EUROPEAN COURT OF HUMAN RIGHTS AND THE ECHR – How to bring successfully a case to Strasbourg

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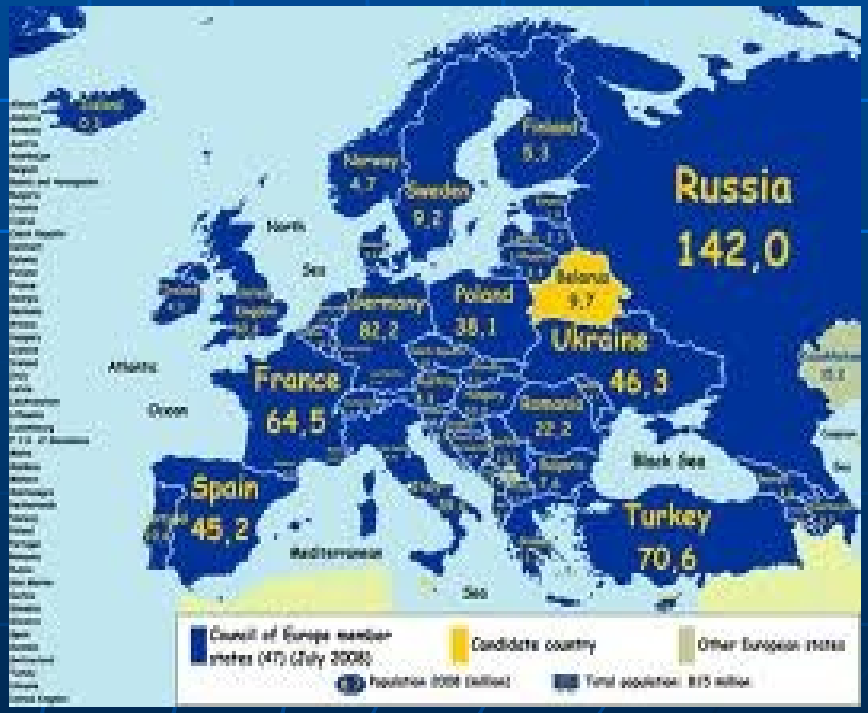
Council of Europe

- 47 Member States
- 800 million citizens



ECtHR

- 47 Judges (1 per State Party)
- Registry (about 650 agents)

ECtHR

- The structure
  - Judges, registry
  - Single Judge, Committee, Chamber, Grande Chamber
- The procedure (written, rarely oral hearings)
- The judgments and decisions

Statistics 2013

- New applications lodged: 65 900
- Applications decided: 93 396
  - Judgments: 3 659
  - Decisions: 89 737
- Pending cases (12/31/2013): 99 900

Top 5: Russia: 16 800 (16,8%) Italy: 14 400 (14,4%)

Ukraine: 13 300 (13,3%)

Serbia: 11 250 (11,3%)

Turkey: 10 950 (11,0%)

= 66,8%

The European Convention on Human Rights (ECHR)

- Adopted on 4 November 1950 (Rome)
- Entered into force in 1953
- 47 States Parties

ECHR

Preamble: « *The Governments Signatory Hereto…*

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the UN on 10 Dec. 1948…

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration…

The 4 cornerstones of the ECHR system

1. Individual right of petition (Art. 34)
2. Binding nature of rights and execution of final judgments under the supervision of the Committee of Ministers
3. Interim measures (Art. 39 of the Rules of Court)
4. 'Dynamic' interpretation of the rights by the Court (interpretation in "present day conditions", ECHR as a "living instrument").

Individual right of petition

Article 34 ECHR: Individual applications:

« The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this rights.

Binding nature of the rights

Article 1 ECHR: Obligation to respect human rights

« The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. »

See for instance: *Banković and Others v. France and Others* (2001), *Behrami v. France and Others* (2007), *Al-Jedda v. UK* (2011) and *Nada v. Switzerland* (2012).

Execution of the final judgments

Article 46 ECHR: Binding force and execution of judgements

1. The High Contracting Parties undertake to abide by the final judgement of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution (...).

The protected rights

- Article 2: Right to life (*Finogenov and Others v. Russia*, 2012)
- Article 3: Prohibition of torture (*El-Masri, 2012)*
- Article 4: Prohibition of slavery and forced labour (ex. *Siliadin v. France*, 2005, *Rantsev v. Cyprus and Russia*, 2010)
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 7: No punishment without law
- Article 8: Right to respect for private and family life

The protected rights (contin.)

- Article 9: Freedom of thought, conscience and religion (*Lautsi v. Italy*, 2011, S.A.S. v. Frane, 2014).
- Article 10: Freedom of expression (*Perinçek v. Switzerland*, 2013, not final)
- Article 11: Freedom of assembly and association
- Article 12: Right to marry
- Article 13: Right to an effective remedy
- Article 14: Prohibition of discrimination
- Several Protocols (right of property, right to education, right to free elections, abolition of death penalty, general discrimination clause: *Sejdić and Finci v. Bosnia-Herzegovina*, 2009).

Bringing a case to Strasbourg!

- New application form!
- New Rule 47 (1 January 2014):
  - Stricter conditions for applying to the ECtHR!
  - Interruption of the 6-month period only by the fulfilment of all conditions set out in Rule 47:
  - duly completed form,
  - copies of all relevant supporting documents, and
  - power of attorney!

Admissibility criteria (Art. 35 ECHR)

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within the period of six months from the date on which the final decision was taken.

(…)

2. The Court shall not deal with any application submitted under Article 35 that

a) is anonymous; or

b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

Article 35 ECHR (contin.)

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

b) The applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

Article 35 ECHR (contin.)

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

A crucial principle: **The 4th-instance Rule!!!**

Risks, opportunities and alternatives?

- Risks?
  - Costs: procedure in Strasbourg is free of charge! (mandatory representation only after the communication of the application to the Government)
  - A badly presented case can lead to the inadmissibility of similar cases (« waiting for the ideal case »).
- Opportunities?
  - Binding judgment (Articles 1 and 46 ECHR), that has to be executed by the State party
  - Just satisfaction (Article 41 ECHR):
  - Attacking structural problems: « pilote judgments »
  - Trying to engage the Grand Chamber
- Alternatives?

Just satisfaction

Article 41 ECHR: If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Three aspects:

- Pecuniary damage (*Yukos v. Russia*, 31 July 2014, not final: EUR 1,866,104,634)
- Non-pecuniary damage
- Costs and expenses (*Yukos v. Russia*, lump sum of EUR 300,000 covering all costs).

“Pilot” judgment: Burdov II

- 7 May 2002: The Court held that there had been violations of Article 6 ECHR and of Article 1 of Protocol No. 1 on account of the authorities’ failure for years to take the necessary measures to comply with internal decisions.
- 22 December 2004: the Committee of Ministers adopted Resolution ResDH(2004)85.
- Between 2003 and 2007: various procedures before national jurisdisctions in favor of applicants.
- 15 January 2009: New judgment of the ECtHR (Burdov II):
  - Violation of Article 13 ECHR
  - Application of the “pilot” judgment procedure !

Burdov II

126. In order to facilitate implementation of its judgments...the Court may adopt a pilot-judgment procedure allowing it to clarify in a judgment the existence of structural problems underlying the violations and to indicate specific measures or actions to be taken by the respondent State to remedy them...

127. Another important aim of the pilot-judgment procedure is to induce the responsdent State to resolve large numbers of individual cases arising from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the Convention...

Burdov II

128. If, however, the the respondent State fails to adopt such measures following a pilot judgment and continues to violate the Convention, the Court will have no choice but to resume examination of all similar applications pending before it and to take them to judgment so as to ensure effective observance of the Convention...

Burdov II (operative paragraphs)

The Court ordered the respondent state:

- to set up, within six months, a domestic remedy or a combination of such remedies which secure adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judicial decisions in line with the Convention principles as established in the Court's case-law, and

- to grant, within one year, adequate and sufficient redress to all persons in the applicant's position in the cases lodged with the Court **before** the delivery of the pilot judgment!

Resolution by Committee of Ministers (CoE) CM/ResDH(2011)2931

Welcoming that this [the new] remedy is already being actively implemented as demonstrated by the numerous examples of judicial practice provided by the Russian authorities and as acknowledged by the Court;

Taking note with interest of a wide set of measures adopted by the Russian authorities, in particular by the federal Supreme Court, by the Supreme Commercial Court, and by the Ministry of Finance and Federal Treasury, in order to guarantee the effectiveness of the new compensation remedy at domestic level (…)

CM/ResDH(2011)2931 (contin.)

Welcoming moreover the comprehensive measures taken with a view to settling similar individual applications lodged **prior** to the pilot judgment, which resulted in the resolution of the issues raised by the great majority of such applications and that the Court subsequently struck out of its list more than 800 applicants...

CM/ResDH(2011)2931 (contin.)

- DECIDES to close the examination of the issue relating to the introduction of an effective domestic remedy in case of non-enforcement or lengthy enforcement of domestic judicial decisions providing for the State's payment obligations...

Trying to engage the Grand Chamber (GC)?

- Advantage: its judgments have enhanced judicial authority!
- Two ways of reaching the GC:
  - Referral (Article 43 ECHR)
  - Relinquishment (Article 30 ECHR: a case that « raises serious question affecting the interpretation of the Convention… »)
- Important tool: « dynamic interpretation » of the ECtHR
- Successful examples: cases concerning conscientious objection to compulsory military service (*Bayatyan v. Armenia*, 2011 (GC), and follow-up cases).

Dynamic interpretation of the ECHR

- **The « dynamic » or « evolutive » interpretation (the « living instrument » approach)**
  - This is a response to the question of the moment relevant for the interpretation:
  - The moment of the conclusion of the ECHR? (Preparatory work is, according to Article 32 VCLT, only a supplementary means of interpretation) or
  - The moment of the judgment?

Dynamic interpretation of the ECHR

- Already in *Tyrer v. the United Kingdom*, 1978, § 31, the Court stated that the ECHR is a « living instrument…which must be interpreted in the light of present-day conditions. »
- Accordingly, the Court, when considering the question whether judicial corporal punishment was consistent with Article 3 ECHR, could not « but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe ».

Dynamic interpretation of the ECHR

- How does the Court measure whether there is a relevant development to be taken into account since the adoption of the ECHR and what contemporary conditions necessitate? Criteria:
  - Is there a common approach of the member States of the Council of Europe towards a certain problem or phenomenon?
  - Or at least an evolving consensus?
  - Is the respondent State completely isolated with its rule?

Bayatyan v. Armenia (GC)

101. … the Court is mindful of the fact that the restrictive interpretation of Article 9 applied by the Commission was a reflection of the ideas prevailing at the material time. It considers, however, that many years have elapsed since the Commission first set out its reasoning excluding the right to conscientious objection from the scope of Article 9 in the cases of *Grandrath v. the Federal Republic of Germany* and *X. v. Austria*. Even though that reasoning was later confirmed by the Commission on several occasions, its last decision to that effect was adopted as long ago as 1995. In the meantime there have been important developments both in the domestic legal systems of Council of Europe member States and internationally.

Bayatyan v. Armenia (GC)

102. The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see, among other authorities, *Tyrer v. the United Kingdom*...). Since it is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Stafford*, cited above, § 68...).

Bayatyan v. Armenia (GC)

103. The Court notes that in the late 1980s and the 1990s there was an obvious trend among European countries, both existing Council of Europe member States and those which joined the organization later, to recognize the right to conscientious objection (...). All in all, nineteen of those States which had not yet recognized the right to conscientious objection introduced such a right into their domestic legal systems around the time when the Commission took its last decisions on the matter. Hence, at the time when the alleged interference with the applicant's rights under Article 9 occurred, namely in 2002-2003, only four other member States, in addition to Armenia, did not provide for the possibility of claiming conscientious objector status...

Alternative to a judgment: Friendly settlement

Article 39 (Friendly settlement):

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocol thereto.

2. Proceedings conducted under par. 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

(...).

Alternatives to the ECtHR?

- For Russia maybe?: **Human Rights Committee of the United Nations (HRC)**

- Which avenue shall be taken? Possible criteria for decision:

  - Is Russia a Party to the alternative instrument?
  - Scope of the right invoked? Did the respondant Government forumulate reservations?
  - Interim measures? Threshold? Binding nature? Does Russia generally comply with them?
  - Lenght of the proceedings before the alternative body?
  - Threshold of admissibility?
  - Binding or only recommendatory nature of the decision? Execution of the decision?

Fair Hearing Issues in Civil Proceedings (a selection)

Article 6 ECHR: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly...

Important: The proceedings have always to be examined as a whole: subsequent proceedings can restore an applicant's right to fair hearing (see, for instance, *Larin v. Russia*, 20 May 2010, § 50).

Right of Access to a Court

- Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal... The right of effective access is an aspect of the « right to a court ». This right is not absolute, but may be subject to limitations. The Court must be satisfied that the limitations applied do not restrict or reduce the access afforded to the individual in such a way or to such an extent that the very essence of that right is impaired. A limitation will not be compatible with Article 6 § 1 unless it pursues a legitimate aim and there is a relationship of proportionality between the means employed and the legitimate aim (for instance *Kreuz v. Poland*, 19 June 2001, §§ 54 and seq.).

Right of Access to a Court (contin.)

- Recent cases against Russia:
  - *Gorfunkel v. Russia*, 19 September 2013: Violation of Article 6 § 1 on account of the quashing of the judgment in the applicant's favour (supervisory review).
  - *Chelikidi v.Russia*, 10 May 2012: the applicant attempted in vain to sue the Ministry of Finance for damage incurred by the allegedly excessive length of the civil proceedings in her dispute with a private company.
  - *Shishkov v. Russia*, 20 May 2014: violation of Article 6 § 1 on account of excessive duty imposed on the applicant to substantiate its claim (he was detained, unrepresented and the period to appeal very short).

Principle of Adversarial Proceedings and Equality of Arms

- These principles require that each party is given a reasonable opportunity to have knowledge of and comment on the observations made or evidence brought by the other party, and to present his case under conditions which do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (see, for instance, *Dombo Beheer BV v. the Netherlands*, 27 October 1993, § 33).
- See for instance *Gryaznov v. Russia*, 12 June 2012, § 52 and seq.: violation of Article 6 § 1 for not having served documents on the applicant!

Right to Be Present at the Trial

- There is **no absolute right to be present at one's own** trial in respect of non-criminal matters, except in respect of a limited category of cases, such as those where the character and lifestyle of the person concerned is directly relevant to the subject matter of the case, or where the decision involves the person's conduct (*Kabwe and Chungu v. United Kingdom*, 2 February 2010).

Right to Be Present at the Trial (contin.)

- *Zelenkov v. Russia*, 18 April 2013: non-notification of the date and time of an appeal hearing (violation Article 6 § 1).
- Cases against Russia where the Court has found violations of the right to a fair hearing on account of the courts refusals to leave to appear in court to imprisoned applicants who had wished to make oral submissions on their civil claims, *inter alia*:
  - *Kovalev v. Russia*, 10 May 2007, § 37
  - *Khuzhin and Others v. Russia*, 23 October, § 53 and seq.
  - *Shilbergs v. Russia*, 17 December 2009, § 107 and seq., *Artyomov v. Russia*, 27 May 2010, § 204 and seq., and *Roman Karasev v. Russia*, 25 November 2010, § 65 seq.
  - *Karpenko v. Russia*, 13 March 2012, § 89 and seq.
  - *Bortkevich v. Russia*, 2 October 2012, § 66 and seq.,
  - Beresnev v. Russia, 18 April 2013, 121 and seq.

Right to Be Present at the Trial (contin.)

- No-violation in *Razvyazkin v. Russia*, 3 July 2012:
  - In the present case, the domestic court did consider another possibility for securing the applicant's personal attendance at the hearing of his civil case by holding an off-site court session at the colony where the applicant was serving his sentence.
  - Moreover, the applicant was duly represented by a lawyer, but refused to abide by the internal regulations of the correctional institutions.

Right to Legal Assistance (Aid)

- Article 6 leaves the States a « free choice of the means » to be used towards the end of a fair hearing.
- No absolute right to legal aid in civil proceedings!
- Free legal aid is not required where the plaintiff's claim has no « reasonable prospects of success » (*Del Sol v. France*, 2002) or where the claim involves an abuse of the law or of the legal aid system.
- Amount of any court fee must be proportionate to the particular circumstances, including the applicant's ability to pay (*Kreuz v. Poland*, 2001).

- Recent cases against Russia: for ex. *Shishkov v. Russia*, 20 February 2014, § 117 and seq., *Larin v. Russia*, 20 May 2010, § 53 and seq., or *Beresnev v. Russia*, 18 April 2013, 123 and seq.

Right to Call Witnesses and to Present Evidence

Article 6 ECHR does not explicitly guarantee the right to have witnesses called or other evidence admitted by a court in civil proceedings. Nevertheless, any restriction imposed on the right of a party to civil proceedings to call witnesses and to adduce other evidence in support of his case must be consistent with the requirements of a fair trial within the meaning of paragraph 1 of that Article, including equality of arms. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see *Wierzbicki v. Poland*, 18 June 2002, § 39).

Right to Call Witnesses and to Present Evidence (contin.)

Khrabrova v. Russia, 2 October 2012, §§ 41 and seq.:

...the refusal to call any of the eyewitnesses upset a fair balance between the parties and amouted to a disproportionate restriction on the applicant's ability to give evidence on the same footing as the opposing party... [therefore], the Court concludes that the applicant was not given a resonable opportunity to present her case under the same conditions as her opponent, which placed her at a substantial disadvantage and rendered the proceedings unfair... violation of Article 6 § 1.

Right to Call Witnesses and to Present Evidence (contin.)

Gryaznov v. Russia, 12 June 2012, § 55 and seq.:

The applicant lodged a civil claim in respect of ill-treatment and asked the courts to question his counsel who had seen the injuries on his face and body. He was the only witness.

Referring to lawyer-client privilege, the domestic courts rejected his request and dismissed his claim.

The Court found that the reference to the laywer-client privilege was misplaced in the circumstances of the case.

Conclusion: violation of Article 6 § 1!

Right to a Reasoned Judgment

- Courts enjoy a considerable discretion as to the structure and content of their judgments.
- It is not necessary to deal with every point raised in the argument (*Van de Hurk v. Netherlands*, 1994, § 64).
- They must nevertheless « indicate with sufficient clarity the grounds on which they base their decision » so as to allow a litigant usefully to exercise any available right of appeal (*Hadjianastassiou v. Greece*, 1992).

Right to a Reasoned Judgment

- Other aims of a reasoned judgment are the interest of a litigant in knowing that his or her arguments have been properly examined, and the interest of the public in a democratic society in knowing the reasons for judicial decisions given in its name (*Tatishvili v. Russia*, 2007).
- The requirements for an appelate judgment are lower: the essential element is that, in a way or another, the appel court shows that it "did in fact address the essential issues" in the appeal, and did not endorse without evaluation the decision of the lower court (*Helle v. Finland*, 1997).

Thank you for your kind attention!