Kirchner S. Recent and forthcoming changes to the Procedure before the European Court of Human Rights: An Attorney's view from the Perspective of the Right to Access to Justice

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RECENT AND FORTHCOMING CHANGES TO THE PROCEDURE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: AN ATTORNEY'S VIEW FROM THE PERSPECTIVE OF THE RIGHT TO ACCESS TO JUSTICE

1. Introduction

Effective 1 January 2014, the procedure for individual complaints under Article 34 of the European Convention on Human Rights (ECHR)[1] before the European Court of Human Rights (ECtHR) has been changed in two aspects which are of importance for applicants or their attorneys. Other recent changes to the Rules of Court involve the rules regarding judges,[2] the composition[3] and constitution[4] of Chambers and the election of the registrar[5] or the president of the Court[6] but also

[1] European Treaty Series No. 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[2] Rules 27A, 28 and 29 Rules of Court of the European Court of Human Rights (Rules of Court). The current version of the Rules of Court of the European Court of Human Rights is available online at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. This document is updated as the Rules of Court are changed.

[3] Rule 24 Rules of Court.

[4] Rule 26 Rules of Court.

[5] Rules 15 and 16 of the Rules of Court, concerning the election of the registrar and deputy registrar respectively, have been amended on 14 April 2014.

[6] Rule 8 of the Rules of Court, entitled "Election of the President and Vice-Presidents of the Court and the Presidents and Vice-Presidents of the Sections" has been amended in 2013 and again on 14 April 2014.

interim measures[1] and the procedure before a Chamber,[2] including the relinquishment of jurisdiction by a Chamber in favor of the Grand Chamber.[3] This text is only concerned with procedural changes in 2013 and the first half of 2014[4] which have a direct impact on the submission of an application to the European Court of Human Rights.

2. Rule 47 of the Rules of Court of the European Court of Human Rights

Central to this issue is Rule 47 of the Rules of Court which provides a summary of the application requirements.

a) No interruption of six months deadline by submission of an application without detailed reasons

The most important deadline for applicants is the six months deadline for applications after the last decision of a domestic court.[5] One of the admissibility requirements for individual complaint procedures at the ECtHR[6] is that all domestic remedies must have been exhausted.[7] The last domestic court decision does not have to be a decision on the merits but might for example be a negative admissibility decision by a national Supreme Court. In recent years there has been, and continues to be, a tendency to make it more difficult for applicants to cross the admissibility hurdle. In June 2013, a new Protocol No. 15 amending the

[1] Rule 39 Rules of Court.

[2] Rule 54 Rules of Court.

[3] Rule 72 Rules of Court.

[4] "The amendments adopted on 14 January and 6 February 2013 entered into force on 1 May 2013. The amendments adopted on 6 May 2013 entered into force on 1 July 2013 and 1 January 2014. The amendments adopted on 14 April and 23 June 2014 entered into force on 1 July 2014." Rules of Court, Footnote 1 to Rule 111.

[5] Article 35 (1) ECHR.

[6] See Article 35 ECHR.

[7] Article 35 (1) ECHR.

Convention for the Protection of Human Rights and Fundamental Freedoms[1] (P15) has been created (but has not yet entered into force) which will tighten this deadline in Article 35 ECHR from six to four months.[2] It used to be that it was sufficient to submit an application with those six months and provide detailed reasons later within a time frame set by the Court. The six months deadline now is no longer interrupted when the application arrives in Strasbourg without the required reasons. The rule outlined by the Court in *Ringeisen v. Austria*[3] more than forty years ago no longer applies. All requirements of Rule 47 of the Rules of Court now have to be fulfilled within the six months time limit.

b) Obligatory use of application forms provided by the Court

To facilitate the application the Court provides an application form. Initially this form was only available in English and French, although the application could be written in any of the official languages of any of the states which are parties to the ECtHR, usually - but not necessarily - in the national language of the respondent state. Now it is obligatory to use to the Court completed application forms[4] It is laudable that the application form is available online in 35 languages.[5] The choice of languages, while reflecting the major languages spoken in the states which have ratified the ECHR, does not include all languages which have some official status in the 47 states. While Catalan as a regional language in Spain is included, all other languages are national languages. The application form is not available in any language of national minorities or indigenous peoples and not even in Gaelic,

[1] Council of Europe Treaty Series No. 213,http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm. On P15 see also Council of Europe, Protocol No. 15 amending the Convention for the Protection of Human Rights

and Fundamental Freedoms (CETS No. 213) Explanatory Report, http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf.

[2] Article 4 P15.

[3] European Court of Human Rights, Ringeisen v. Austria, Application no. 2614/65, Judgment of 16 July 1971, para 90.

[4]

[5] Links to the application forms in different languages can be found athttp://www.echr.coe.int/Pages/home.aspx?p=applicants/ol&c=.

which has an official status both in the Republic of Ireland and in the European Union (but not with the Council of Europe, which has English and French as its official languages). While the basic formal requirements can be met more easily by many potential applicants thanks to these translations, this is not the case for those who speak non-national languages (with the aforementioned exception of Catalan).

c) Page Limits

Crossing the hurdle of admissibility, though, is becoming more difficult. One reason for this is that applicants and their attorneys are not required to restrict themselves in the description of the reasons for the application and all related information to the application form which is provided for by the court and an attachment of no more than twenty pages.[1] While some applicants attorneys might be well advised to write more concisely, there will always be cases in which it will be impossible to describe the case within this page limit. Even if the overwhelming majority of applications will not require more than the pages now allowed under Rule 47 para. 2 (b) 2nd sentence Rules of Court, it cannot be excluded that there will be cases in which this requirement will make it impossible to present the fact of the case in their full complexity, thus leading to a risk of denial of justice for some applicants. It has to be noted, however, that Rule 47 para. 1 sentence 1 Rules of Court opens the door to the possibility that the application form does not have to be used in the first place.[2] The phrase "unless the Court decides otherwise"[3] indicates that there is a possibility to request the Court to permit an application to be submitted in an other way, *i.e.* with an application in the form of a 'traditional' legal brief, in cases in which the new normal form of application under Rule 47 would be impossible. At this time, it is unclear under which conditions the Court would allow a deviation from Rule 47 para. 1 sentence 1, 1st half-sentence of the Rules of Court. How useful this possibility is remains to be seen because in case

[1] Rule 47 para. 2 (a), (b) and para. 1 (e) Rules of Court.

[2] Rule 47 para. 1 sentence 1, 2nd half-sentence Rules of Court.

[3] Ibid.

the Court would not allow an other form of application, the would-be applicant would have to apply in the manner required by Rule 47. Given that Rule 47 para. 1 sentence 1, 2nd half-sentence does not describe any procedure for such requests, the six months time limit for the application under Article 35 para. 1 ECHR would not be interrupted. While the Court at times acts very quickly in urgent cases, it does not appear realistic to have a decision by the Court on something that could be seen as a matter of convenience within the time at the disposal of the applicant to actually make the application. This will only become less likely once the deadline will be reduced from six to four months.

3. Critique

Already under Article 35 (3) (b) ECHR, the Court has been able to weed out applications which concerned cases in which "the applicant not suffered a significant disadvantage".[1] Article 5 P15 will remove the requirement that the matter has been considered by a domestic court.[2] In other words, applications which would otherwise be admissible and which concern actual human rights violations might in the future not be dealt with by any court because the damage suffered was not deemed great enough. While the Court has to establish reasonably objective criteria to make use of this provision, it has to be noted that this norm already has created a kind of *carte blanche* for what might be perceived as small human rights violations. But there is no guarantee that the 'broken windows' theory does not also apply to institutions such as human rights guarantees. Once small human rights violations go unpunished public officials might feel encouraged to ignore human rights in other cases as well. Given the high degree of respect enjoyed by the European Court of Human Rights, Article 35 para. 3 (b)

[1] Article 35 (3) (b) ECHR.

[2] Council of Europe, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) Explanatory Report, http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf, para. 23.

ECHR[1] already is an attempt to reduce the workload of the Court which can trigger future indifference to human rights violations.

The new changes to the formal requirements for bringing an application to the European Court of Human Rights are also meant to ease the workload of the Court which has to deal with a huge backlog of cases. These new requirements lead to a professionalization of procedures before the ECtHR because it is now more likely that potential applicants will require an attorney in order to bring a case to Strasbourg. Yet, only few states which have ratified the ECHR have provisions in their national laws which provide for legal aid in case a potential applicant wants to know from a lawyer whether it even makes sense to bring a case before the ECHR. While the changes to the procedure in Strasbourg are not insignificant for attorneys, it must not be overlooked that it has become more difficult for applicants who are not represented by an attorney (and who might not speak either English or French) to access the Court. Yet, access to justice is an important human right. While this right has received more attention in recent years from academia[2] and courts,[3] legal practitioners should be particularly concerned. While the ECtHR's workload has to be dealt with, it should be dealt with by strengthening the Court instead of by weakening victims of human rights violations. By making it more difficult for applicants to bring their case before the ECtHR some cases which are abusive or obviously unfounded will be sorted out but there is also a risk that legitimate grievances will not be dealt with. However, there had already been ways to deal with unfounded or abusive applications prior to the changes which entered into force at the beginning of this year. From the perspective of the right to access

[1] On the practice of the ECtHR with regard to Art. 35 para. 3 (b) ECHR see European Court of Human Rights, Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on, 1st ed., Council of Europe, Strasbourg (2012).

[2] See for example Antônio Augusto Cançado Trindade, The Access of Individuals to International Justice, 1st ed., Oxford University Press, Oxford (2011); Edita Gruodytė / Stefan Kirchner, Pro bono work vs. Legal Aid: approaches to ensuring access to justice and the social responsibility of the attorney, in: 5 Baltic Journal of Law and Politics (2012), pp. 43-64.

[3] The importance of the right of access to justice has been reiterated by the European Court of Justice in DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, Case C-279/00, Judgment of 22 December 2010, para. 3.

to justice, these changes are unfortunate. For potential applicants and attorneys this will require a higher degree of specialization. At the end of the day, while there might not be a huge growth in cases which make it to the merits stage in individual complaint proceedings under Article 34 ECHR, all European Human Rights law is likely to become more professionalized. This is a good thing if the right to access to justice is safeguarded as well. One way to do so is for lawmakers to both professionals and law faculties would be well advised to adjust to this new reality.

4. The Jurisconsult

It has to be noted, though, that the Court also has taken measures to strengthen its abilities and that it has done so in a creative manner. Currently the Court consists of one judge per state party[1] and it appears unlikely that states will agree on increasing the number of judges; neither does a truly substantial increase in the Court's budget (doubling or even tripling the amount of money allocated for and the number of legal staff members would be a start) appear likely anytime soon. In a more recent meeting of the plenary court on 23 June 2014, a new rule was inserted into the Rules of Court which could facilitate the work of the judges even more. The new Rule 18B states that "[f]or the purposes of ensuring the quality and consistency of its case-law, the Court shall be assisted by a Jurisconsult. He or she shall be a member of the Registry. The Jurisconsult shall provide opinions and information, in particular to the judicial formations and the members of the Court."[2] The fact that the jurisconsult shall be a member of the Court's Registry shows that the jurisconsult's position will not be as prominent as that of an Attorney General at the European Court of Justice. The creation of the role of the jurisconsult follows the creation of non-judicial rapporteurs in 2006 in Rule 18A of the Rules of Court, which was amended in early 2013 and now allows that "[w]hen sitting in a single-judge formation, the Court shall be assisted by non-judicial

[1] Article 20 ECHR.

[2] Rule 18B Rules of Court.

rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry."[1]

This role is somewhat similar to the role played by a *Referendar* at courts in German-speaking countries or a judge's clerk in the United States. While these roles are temporary, Rule 18A of the ECtHR's Rules of Court allows for a certain degree of professionalization and specialization among the staff of the Registry. While the decisions still have to be made by the judges, Rules 18A and 18B allow for a more effective use of the expertise of the legal staff already working at the Registry. These rules will also serve to make the Court's Registry a more attractive employer for lawyers from the states which have ratified the ECHR.

5. Outlook

States have the primary responsibility for enforcing the ECHR. Article 1 of Protocol No. 15 to the ECHR foresees the addition of the following paragraph to the preamble of the ECHR to highlight this responsibility which "[a]ffirm[s] that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention". [2]

The Council of Europe attempts to reduce the workload of the Court by strengthening implementation of the Convention in domestic courts. The Declarations of Interlaken,[3] İzmir[4]and Brighton[1] are strong reminders of this

[1] Rule 18A para. 1 Rules of Court.

[2] Article 1 P15.

[3] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/interlaken_declaration_en.pdf.

[4] High Level Conference on the Future of the European Court of Human Rights, İzmir Declaration, 27 April 2011,https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2074588&SecMode=1&DocId=1733590&Usage=2.

approach.[2] Doing so will require all attorneys, even if they are not normally concerned with human rights law, to be at least aware of the rights which are protected by the Convention and the protocols thereto. The cases which have been dealt with by the European Court of Human Rights have affected a wide range of issues and every attorney can find him- or herself in a situation in which domestic institutions might be in violation of the rights of his or her client under the Convention. Rights under the ECHR are set to become more and more relevant as arguments in domestic proceedings.

[1] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, http://hub.coe.int/20120419-brighton-declaration.

[2] European Court of Human Rights, Extract - Annual Report 2013 of the European Court of Human Rights: Case-law information, training and outreach, http://www.echr.coe.int/Documents/Case_law_info_training_outreach_2013_ENG.pdf, p. 1.