Protocol 14: *De Minimis*

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The European Court now requires that an applicant demonstrate a "significant disadvantage" as a requirement for admissibility.

Introduction

Protocol 14 implemented a series of measures to assist the Court to promptly deal with inadmissible cases. One such measure was the creation of a new requirement for admissibility in Article 35(3)(b) of the European Convention on Human Rights, which now requires that an applicant have suffered from a "significant disadvantage", with a number of safeguards. Upon entry into force of Protocol 14, Article 35(3)(b) was amended to provide that the Court shall declare inadmissible any individual application if it considers that the applicant has not suffered a significant disadvantage "unless respect for human rights as defined in the [Convention] 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".

Implementation to Date

The amended Article 35(3)(b) has been in effect for just over 18 months, since 1 June 2010. However, it is not yet fully operational. In implementing the reforms of Protocol 14, States explicitly recognized that "it will take time for the Court's Chambers or Grand Chamber to establish clear case-law principles for the operation of the new criterion". As a result, for the first two years, the new "significant disadvantage" criterion could only be applied by Chambers and the Grand Chamber. Starting from 1 June 2012, other formations – Single Judges and Committees – will be able to rule cases inadmissible on this criterion. To date, approximately 27 decisions have examined the question of whether an applicant suffered a "significant disadvantage" and the case should therefore be inadmissible. Of these cases, 15 were ruled inadmissible based on the new criterion.

Main principles: The Court has established that the criterion applies where, notwithstanding a potential violation of a right from a purely legal point of view, the level of severity attained does not warrant consideration by an international court. The level of severity shall be assessed in the light of the financial impact of the matter in dispute and the importance of the case for the applicant. In cases concerning the length of proceedings, the financial loss or the amount of the initial claim involved cannot be taken as a sole indication of a 'significant disadvantage'. The severity of a violation should be assessed, taking account of the applicant's subjective perceptions and what is objectively at stake in a particular case.

Inadmissible categories: Cases have been held inadmissible for lack of significant disadvantage where they involve small sums of money (for example, enforcement for sums such as euro 1, 12, 25 or 90) or formal steps with no practical impact (for example, the failure to publicly pronounce an appeal decision).

Individual consideration: The Court has generally looked at the circumstances of each case and made balanced judgments. For example, it dismissed three cases against the Czech Republic where some parties' submissions to the Constitutional Court were not provided to the applicant, but where those submissions were not relied on by the Constitutional Court. However, the Court admitted a similar case where the Constitutional Court had relied on the submissions in question. Cases involving sums such as 99 euro or 228 euro were inadmissible where the applicant had been partly at fault for the delays or where there was no evidence of the impact of a 228 euro fine on the applicant's situation. Other cases were admissible where the sums were large compared with average income or where they involved important underlying rights.

Admissible cases: Fair trial cases have been held to involve a significant disadvantage, and therefore be admissible, where they involve sums into the thousands of euros, or where the judgment led to other consequences such as dismissal from employment. Where the calculation of the sum involved was tied to the merits of the case (a pension claim), the case was also considered admissible. Cases were also admissible where they touched on rights such as the ability to challenge pre-trial detention.

Admissible because domestic courts did not "duly consider": Two cases have been identified where the Court ruled that the case was admissible because of a failure by the national courts to "duly consider" the matter: where arguments regarding the failure to give reasons for an administrative conviction or the nature of delay for division of property meant that the question of whether the case had been "duly considered" was intrinsically linked with the merits. In a further case, the Court did not examine the sum in question but held the case admissible because of the delay (over 15 years).

Proposal for Reform

Germany has proposed the deletion of the last safeguard clause: "provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal". Its rationale is that even in a case where the applicant's concerns have not been given due consideration on the national level, the applicant will not need to be granted relief by the Court where his case is negligible in its significance. The argument is that the concept of not suffering a significant disadvantage leaves adequate room for maneuver; beyond that threshold, there is no need for the Court to be seized of cases of negligible significance.

The NGO coalition, fronted by Amnesty International, opposes the creation of this new admissibility criterion, where national courts have already considered European Convention rights. They oppose the proposal to amend Article 35(3)(b) because the "duly considered" safeguard clause is a clear illustration of the principle of subsidiarity and because the fundamental value of the safeguard clause is to avoid a denial of justice.

The Budapest NGOs suggest that Germany's proposed amendment of Article 35(3)(b) is premature, given that Protocol 14 has just been introduced and the Court has issued numerous decisions on what is not significant enough to be a violation. In addition, it appears that this safeguard has been used in a limited number of cases to date.

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