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LEGAL UPDATE

The Applcation of the 'Significant Disadvantage' Criterion by the European Court of Human Rights

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As part of the reforms enacted in Protocol 14, the ECHR has added a requirement that a case in which the applicant has not suffered any significant disadvantage will be inadmissible, subject to specific safeguards. This note provides an overview of the background and early decisions on this criterion, and summaries of the most important decisions (as reported in the ECHR Information Notes) from 2013 to 2015.

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Background

Protocol 14 amended European Convention of Human Rights (ECHR), such that Article 35(3)(b) now requires the European Court of Human Rights (ECtHR) to declare applications inadmissible if the applicant has not suffered a significant disadvantage. Where there is no significant disadvantage, the new provision requires the Court to admit the case anyway if "respect for human rights … requires an examination of the application on the merits" or the matter "has not been duly considered by a domestic tribunal". The Court may raise Article 35(3)(b) itself or in response to an objection by the respondent government.

Early Implementation

The amended Article 35(3)(b) came into effect on 1 June 2010. Protocol 14 required that, for the first two years, only the Chambers and Grand Chamber could apply the new criterion, so they could determine how to interpret and implement it. In the initial stages of the implementation of this new criterion, from June 2010 to November 2012, over 50 decisions have examined whether a case is admissible pursuant to the new Article 35(3)(b), of which over were ruled inadmissible. In assessing whether violation of a right is severe enough to warrant the Court's consideration, even if the right was technically violated, it developed a number of preliminary principles in its early decisions:

Case-specific assessment. The Court assessed the circumstances of the case, taking into account both the applicant's subjective perceptions and what is at objectively at stake. This has involved an evaluation of whether the applicant's conduct shows that he or she did not consider the matter significant, and whether the matter involves important underlying rights. In cases involving financial loss, the Court examined the impact based on the applicant's particular situation, including the economic situation of the country or region where he or she lives.

What amounts to a significant disadvantage? The Court found a significant disadvantage where there was an important question of principle, where a judgment led to dismissal from employment, where there was a significant financial impact, where calculating a financial loss was tied to the merits of the case, and where the case involved the lawfulness of pre-trial detention. The Court has found no significant disadvantage where cases involve only small sums of money or formal steps with no practical impact (such as the failure to publicly pronounce an appeal decision).

Safeguard: Respect for human rights. The Court found several early cases admissible using Article 35(3)(b)'s first "safeguard clause" – that "respect for human rights" requires an examination on the merits by the Court. These include cases where there is a structural deficiency affecting others in the same position as the applicant, or where a decision of principle is needed for a national jurisdiction (such as cases that impact the presumption of innocence and equality of arms). The Court has found claims inadmissible under this clause where the Court or the Committee of Ministers has already addressed the issue as a systemic problem (such as non-enforcement of domestic judgments), or in numerous prior Court judgments (such as cases involving the length of proceedings in Greece).

Safeguard: Consideration by the Domestic courts. The Court also found four early cases admissible on the basis of this second "safeguard clause" because of a failure by the national courts to "duly consider" the matter. These included situations where there was no effective domestic remedy yet enacted, where the chief point raised by the case was whether the applicant's grievance could be duly considered at the domestic level, and where the question of whether the case had been "duly considered" was intrinsically linked with the merits.

The key decision on the significant disadvantage criterion from before 2013 have been collected and analysed in two useful publications:

- The ECHR *Research Report* on "The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on", covering cases up to June 2012.
  Link to full report**, PDF**.
- A short academic review by Antoine Buyse on the ECHR Blog, "Significantly Insignificant? The Life in the Margins of the Admissibility Criterion in Article 35 § 3 (b) ECHR" (recently published in *The Realisation of Human Rights: When Theory Meets Practice (Studies in Honour of Leo Zwaak)*.)
  Link to full paper **on the SSRN website.**

Recent practice

A recent presentation by the Registrar of the ECtHR reported that from November 2012 to September 2014, the "significant disadvantage" clause was applied by Single Judges in 1,350 cases and Committees have used it in 49 cases. During that period, four of these decisions were considered by the Court to be of sufficient significance to be reported in its Information Notes. In the subsequent year, only one additional decision applying the clause was reported in the Information Notes. These cases are summarized below.

Hebat Aslan and Firas Aslan v. Turkey

28 October 2014, ECtHR, App. 15048/09

Admissible: importance to applicants of proceedings opposing continued detention

On 31 December 2009, the applicants, Turkish nationals, were arrested and remanded in custody before being charged with several offenses, including suspicions of taking part in actions committed in the name of the illegal organization the Kurdistan Workers' Party (PKK). The applicants sought to have the decision to keep them in custody set aside, but were dismissed after a hearing on 4 October 2012. Their detention was extended after a succession of additional hearings held between June 2009 and April 2012, and in spite of various appeals. In December 2012, the applicants appealed to the Constitutional Court on account of the prolonged length of their detention and the failure of the authorities to share with them the public prosecutor's opinion on the need for their detention, thus preventing them from commenting on its contents. The Court ruled in their favor and awarded compensation on account of the excessive length of their pre-trial detention and the failure to provide them with the prosecutor's opinion. In their application to the European Court, the applicants complained that their right to adversarial proceedings and to equality of arms had been breached on account of the failure to release to them the public prosecutor's opinion during their appeals.

The Court found that the subject matter and outcome of the appeals had been of crucial importance to the applicants because they sought a court decision on the lawfulness of their detention and, in particular, the termination of that detention if it were found unlawful. The Court contrasted this with previous cases involving alleged breach of the principle of adversarial proceedings under Article 6 in the context of determinations of civil rights or of criminal proceedings that had no impact on the applicant's liberty, where applicants were generally not considered to have suffered a "significant disadvantage" (e.g. *Holub v. the Czech Republic*, 24880/05, ECtHR, 14 December 2010; *Liga Portuguesa de Futebol Profissional v. Portugal*, 49639/09, ECtHR, 3 April 2012). Given the importance of the right to liberty in a democratic society, the Court could not conclude that the applicants had not suffered a "significant disadvantage" in the exercise of their right to participate appropriately in the proceedings concerning the examination of their appeals.

Link to full decision

Link to Information Note 178 (Oct. 2014, PDF)

Galovic v Croatia

5 March 2013, ECtHR, App. 54388/09

Inadmissible: delays in proceedings that actually operated to applicant's advantage

In 1999 the owner of a flat in which the applicant lived obtained a court order for her eviction. That order was upheld on appeal. The applicant then lodged a constitutional appeal which was dismissed just over six years later. In her application to the European Court the applicant complained, inter alia, under Article 6 § 1 of the Convention of the length of the proceedings before the Constitutional Court.

The length of the proceedings had in fact benefited the applicant by postponing the enforcement of her eviction for over six years. In the Court's view, this had compensated for or at least significantly reduced the damage normally entailed by the excessive length of civil proceedings, so the applicant had not suffered a "significant disadvantage" in respect of her right to a hearing within a reasonable time. The issue of the length of civil proceedings in Croatia had already been addressed by the Court on numerous occasions so that respect for human rights did not require an examination of the complaint on its merits.

As to whether the case had been "duly considered by a domestic tribunal", both the action for the applicant's eviction and her counterclaim had been "duly considered" at first and second instance and by the Constitutional Court. In addition, the Court noted that under its case-law on Article 13, the right to an effective remedy in respect of an alleged violation of a Convention right by a last-instance judicial authority was implicitly restricted. Thus, for example, the absence of a remedy in respect of a Constitutional Court's decision would not raise an issue under Article 13. Applying that reasoning mutatis mutandis to Article 35 § 3 (b) the Court considered that when examining whether the "significant disadvantage" admissibility criterion had been satisfied in cases where what was alleged was a violation of the Convention by a last-instance judicial authority, the Court could dispense with the requirement for the case to have been "duly considered by a domestic tribunal". Otherwise it would be prevented from rejecting any claim, however insignificant, relating to alleged violations imputable to a final national instance. That would be neither appropriate nor consistent with the object and purpose of Article 35 § 3 (b). (The Court also declared inadmissible as being manifestly ill-founded the applicant's further complaints under Articles 6 § 1, 8, 13 and 14 of the Convention.)

Link to full decision

Link to Information Note 161 (March 2013, PDF)

Eon v. France

14 March 2013, ECtHR, App. 26118/10

Admissible: conviction of political activist for insulting French President by waving a satirical placard

During a visit by the President of France in 2008, the applicant waved a small placard reading "Casse toi pov'con" ("Get lost, you sad prick") as the President's party was about to pass by. This was an allusion to a much publicised phrase uttered by the President himself. The phrase had given rise to extensive comment and media coverage and had been widely circulated on the Internet and used as a slogan at demonstrations. The applicant was immediately stopped by the police and was later prosecuted by the public prosecutor for insulting the President. He was found guilty and fined thirty euros, a penalty which was suspended. An appeal on points of law by the applicant was dismissed.

Considering the admissibility of the case, the severity of a violation should be assessed taking account of both the applicant's subjective perception and what was objectively at stake in a particular case. The subjective importance of the matter appeared clear to the applicant, who had pursued the proceedings to the end, even after he had been refused legal aid for lack of serious grounds. As to what had been objectively at stake, the case had received widespread media coverage and concerned the issue of whether insulting the head of State should remain a criminal offence, a matter that was regularly debated in Parliament. As to whether respect for human rights as defined in the Convention and the Protocols thereto

required an examination of the application on the merits, the Court noted that the case concerned an issue of some significance, both at national level and in terms of the Convention. The case was therefore admissible.

Link to decision (extracts)

Link to Information Note 161 (March 2013, PDF)

Cecchetti v San Marino

9 April 2013, ECtHR, App. 40174/08

Inadmissible: length-of-proceedings complaint concerning insignificant sum of tax

The applicant was ordered to pay EUR 13.91 in tax in 1994 combined with a penalty of EUR 3.48. He challenged that decision in administrative proceedings in 1994 and in the San Marinese courts beginning in 1998. Those proceedings are apparently still pending.

In 1998, Cacchetti filed an application with the ECtHR. He complained about the length of proceedings concerning the payment of EUR 13.91 in tax and a penalty of EUR 3.48. The Court ruled the application inadmissible as manisfestly ill-founded because it held that the applicant had not suffered a significant disadvantage as a result of the alleged violation.

Although at times even modest pecuniary damage might be significant in the light of the person's specific condition and the economic situation of their country or region of residence, it was beyond doubt that the amount at stake in the present case was of minimal significance to the applicant.

His subjective perception that it was an important question of principle to ask an international court to assess whether proceedings dealing with the determination of an insignificant sum conformed to the reasonable-time requirement was not enough for the Court to conclude that he had suffered a significant disadvantage. Furthermore, given that the Court had on numerous occasions determined issues analogous to those arising in the applicant's case and ascertained in great detail the States' obligations under the Convention in that respect including in cases against the respondent State, there were no compelling reason of public order to warrant an examination on the merits of his case.

Link to full decision

Link to Information Note 162 (April 2013, PDF)

Sylka v. Poland

3 June 2014, ECtHR, App. 19219/07

Inadmissible: no significant disadvantage criterion can apply to violations of freedom of expression

The applicant was stopped in his car by police officers for not wearing a seat belt, and during a dispute which followed he allegedly told the officers that he would not "descend to their level". He was subsequently charged with insulting police officers in the course of their duty, was convicted at first instance and fined. On appeal, however, the conviction was quashed, the criminal proceedings discontinued for a probationary period of one year, but the applicant was ordered to pay EUR 125 to a local fostering service and EUR 25 in costs.

The Court considered that the "no significant disadvantage" criterion was not limited to certain rights, but that its application must take due account of the importance of freedom of expression and be subject to careful scrutiny, including the contribution made to a debate of general interest and whether the case involved the press or other news media. The Court repeated that the seriousness of an alleged violation encompassed the applicant's subjective perception and what was objectively at stake in the case.

In terms of the subjective aspect, this included not only the monetary aspect, but also the general interest of the applicant in pursuing the case, and that the issue at stake here was clearly of subjective importance to the applicant. But in terms of the objective aspect, the appeal decision meant that all information on the proceedings would be removed within 18 months, there was no information of any tangible impact on the applicant, and the financial implications posed no hardship for him. The subject matter also did not give rise to any important matter of principle and it had no wider implications or public interest undertones which might raise real concerns under Article 10 of the Convention. The case was therefore inadmissible as the applicant had not suffered a significant disadvantage as a result of the alleged violation of the Convention.

Link to full decision

Link to Information Note 175 (July 2014, PDF)

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