

TAKING A CASE TO STRASBOURG-THEORY AND PRACTICE

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INTRODUCTION

The European Court of Human Rights should (if it ever was) no longer be looked on as a remote and, to most practitioners, an irrelevant institution. If your case is unsuccessful in the national courts, then Strasbourg may have to be looked at.

This is particularly so for those in the asylum or immigration field who may have no further domestic remedy left. With the advent of fast track procedures and statutory review available domestic remedies are fewer and less accessible and effective than ever.

In the asylum or immigration field over the years the Strasbourg Court has found violations of the ECHR against the United Kingdom in a number of areas.

Important cases include *East African Asians v. UK* (1981) 3 EHRR 76 (Articles 8 and 14); *Abdulaziz, Cabales and Balkandali v. UK* (1985) 7 EHRR 471 (Articles 8 and 14); *Soering v. UK* (1989) 11 EHRR 439 (Article 3); *Chahal v. UK* (Articles 3, 5 and 13); *D v. UK* (1997) 24 EHRR 423 (Article 3); *Hilal v. UK* (2001) 33 EHRR 2(Article 3).

In other cases no violations have been found but important legal principles have been established. For example in *Vilvarajah v UK* (1991) 14 EHRR 248 the Strasbourg Court set out the general approach to the appraisal of risk in the context of removals. First, it examines the issue in light of all available information, including information obtained of its own motion. Secondly, while its assessment is based primarily on the facts as know and ought to be known by the state, it also takes into account subsequent information. Thirdly, ill-treatment must attain a minimum level of severity if it is to trigger the application of Article 3. A mere possibility of ill-treatment is not sufficient. The Court also held that the availability of judicial review did in principle amount to an effective remedy under Article 13 even although judicial review was not an appeal on the merits of an asylum or immigration decision.

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 (hereafter prefixed with "R"). "Art." means Article.

In summary the relevant Convention institutions are:-

- the Registry which is charged with administrative and organisational matters (Art. 25 ; R.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 Rules of Court (Art. 26 ; R.20) ;
- the Grand Chamber of the Court of seventeen judges (Art.27(3) ; R. 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 ; R.25-27) ;
- Committees (Art. 26; R.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 merit 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 Arts 30 or 43. Committees can only deal with admissibility and to hold an application to be inadmissible that decision must be unanimous (R.53(4)) and if it is it will be final (Art.28 ; R.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 Art. 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.

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 EHRR 253); adequate housing (*X v. Germany* (1956) 1 YB 202); a job or minimum wage (*X v. Denmark* (1975) 3 DR 153) or a driving licence (*X v. Germany* (1977) DR 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 EHRR 853 at para. 34).

There is no obligation to exhaust a remedy if it is ineffective or uncertain (**Aksoy v. Turkey** (1996) 23 EHRR 553 at para. 52), or offers no realistic prospect of success (**TW v. Malta** (1999) 29 EHRR 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 SLT 59.

Similarly a Declaration of Incompatibility under section 4 of the Human Rights Act 1998 cannot be regarded as an effective remedy as the Government is not bound to act on a Declaration and such discretionary remedies are not sufficient to be treated as a relevant alternative remedy (**Agee v. UK** (1976) 7 DR 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 EHRR 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*.

STRASBOURG IS NOT A COURT OF APPEAL

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 EHRR 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 EHRR 417 at para. 34).

The former Commission was prepared to do this for example in **Hatami v. Sweden** (App. No 59/1998/962/1177), 9 October 1998, where the Commission formed its own view on whether Mr Hatami had been tortured in Iran. His asylum claim had been rejected on credibility grounds by the Swedish authorities.

His case is a scenario all too familiar to asylum lawyers. As it is an example of the Strasbourg organs going against domestic findings it is worth setting out the case at some length.

The applicant's asylum request was transmitted to the National Immigration Board for examination. In this connection he was requested to submit a full report about his situation, which he did on 1 July 1993.

The report stated, *inter alia*, that the applicant had joined the Mujahedin Khalgh organisation as a sympathiser around 1985. After two years he had become responsible for a group of four members who distributed leaflets and wrote slogans. On 6 February 1990 he was arrested in the street in his home town while being in possession of a leaflet relating to the Mujahedin. He was taken to prison and interrogated. He remained in prison for two years and was tortured on several occasions. After his release he continued his activities but since another member of his group had been arrested and had revealed that the applicant was in charge of the group he fled to Kurdistan and subsequently to Bandar Abbas. With the assistance of a smuggler he continued to Dubai, where he left at 12.35 a.m. on flight KLM 539 to Amsterdam, arriving at 7.40 a.m. At 3.45 p.m. on the same day he left Amsterdam for Stockholm on flight KLM 197 arriving in Stockholm on 13 June 1993 at 7.45 p.m.

The National Immigration Board interviewed the applicant on 30 December 1993 and drew up a report. He subsequently submitted certain corrections to the report and a medical certificate dated 14 January 1994 drawn up by the Assistant Chief Surgeon of the Refugee-Medical Centre at the University Hospital in Linköping.

On 13 July 1994 the National Immigration Board rejected the applicant's asylum request on the grounds that it doubted the credibility of the information which he provided about his political activities and disbelieved his assertion that, for political reasons, he risked being persecuted if returned to his home country.

The applicant appealed against the National Immigration Board's decision to the Aliens Appeals Board (*Utlänningsnämnden*) maintaining his request for asylum.

On several occasions during the period from November 1994 to April 1995 the applicant was examined by the Centre for Torture and Trauma Victims at the Karolinska Hospital ("the Karolinska Centre"). It was observed that he had a number of scars on his face, throat, arms, back, right leg, hip and genitals. According to a final medical report of 3 April 1995, the various medical assessments refuted the hypothesis that the wounds had been caused by accident or had been self-inflicted. While these assessments left open the question whether the wounds had been caused by assault or torture, the psychiatric and psychological assessment indicated that the applicant had experienced torture and had, as a result, suffered from severe psychological and psychiatric problems. The Karolinska Centre was of the opinion that it would be

wrong, from a medical point of view, to expel the applicant to Iran since he could not be expected to receive the necessary care there.

Having interviewed the applicant on 8 May 1996 the Aliens Appeals Board rejected the applicant's appeal on 1 July 1996 and ordered his expulsion. Its decision stated, again in terms all too familiar to UK readers that:

"The Board notes that [the applicant] did not have a passport, nor any other travel document, when he arrived in Sweden. If an asylum-seeker destroys or in any other way leaves behind the passport which has been used for the journey here, the normal conclusion is that the applicant is withholding information that would be of the utmost importance for the evaluation of the asylum application. The trustworthiness of other information that the applicant provides can then be reduced. The Board is of the opinion that if the applicant has provided a coherent story that is in itself acceptable and which may be supported further by other information in the case, the fact that the applicant has lost the passport cannot result in a conclusion that the story lacks truth. There is also reason to note that even if what is stated regarding the passport can raise certain doubts, these doubts should not, in view of the principles for evaluation of information applicable in asylum matters, form the verdict if the applicant in all other respects appears to be credible and his story probable.

From the documents in the case of [the applicant], it can be noted that he applied for a visa for Sweden at the Embassy of Sweden in Teheran on 13 January 1993. From the visa application appears that he has a passport, dated 11 November 1992 and valid until 11 November 1995. [The applicant] states that he received the passport through his contact person and that it was not legally authorised. He has also stated that he did not know that he was not allowed to travel when he applied for a visa. [The applicant] has stated that after being released from prison he was ordered to report to the police and subject to surveillance by the authorities, and it is therefore the opinion of the Board that it is not credible that he should have applied for a visa with a false passport; because of the rigorous checks when leaving Iran it is unlikely that [the applicant] would take such a risk, trying to leave Iran with a false passport. According to the evaluation by the Board, [the applicant] has applied for a visa with a legal passport, which indicates that he was not subjected to any special interest by the authorities. The Board also questions that [the applicant] should have visited a foreign embassy in Teheran, which is guarded by Iranian police, if he had been wanted.

The Board finds that [the applicant's] information about the reason why he was arrested and then imprisoned for two years and subjected to torture, is vague and less probable.

The Board also finds, as stated by the National Immigration Board, that there is reason to question [the applicant's] information about his political activity and that

after the stated imprisonment he should have been able to continue his political activities despite the fact that he was under surveillance by the authorities.

The statements, etc. from the Karolinska Centre that have been provided in the case show that [the applicant] has healed scars on his face, throat, arms, body, right hip and outer genitalia. According to the Board, this does not support the conclusion that [the applicant's] scars and wounds are a result of actions based on his stated anti-government activities in Iran.

In a total evaluation of what [the applicant] has stated and other facts that have been produced in the case, the Board considers that he cannot be regarded as a refugee according to chapter 3 section 2 of the Aliens Act (1989:529).

There is no other reason of a humanitarian or other nature, to grant [the applicant] a residence permit.”

The Commission did not support the reasoning of the national authorities. It placed more weight on the medical evidence which tended to support the claims made by Mr Hatami. The Commission was not satisfied in light of the strong medical evidence that the Swedish authorities had established the facts correctly. The Commission placed less weight on the credibility issues surrounding the passport and visa which had formed the basis for the reasoning of the Swedish authorities. In light of this decision the Swedish Government decided to drop their opposition to the application and a friendly settlement was achieved in which Mr Hatami was granted the right to remain in Sweden.

The emphasis on good medical evidence pointing towards the claims being true is consistent with other international human rights organs such as the United Nations Human Rights Committee in considering claims under Article 3 of the United Nations Convention Against Torture 1984 (“CAT”) which is similar to Article 3 ECHR.

In the case law of that Committee doubts about credibility and unexplained inconsistencies do not diminish the existence of substantial grounds (Communication No 13/93 **Matumbo v Switzerland**, 27 March 1994).

The Committee has also emphasised the skills required by decision-makers, including very accurate and specific knowledge of the political and social situation in the country of origin (Communication No 120/1998 **Sadiq Shek Elmi v Australia**, 25 May 1999), as well as the ability to understand and evaluate the psychological aspects of the process (Communication No 101/1997 **Halil Haydin v Sweden**, 16 December 1998).

Even if the facts adduced are not coherent, this should not be fatal to a claim for protection. The Committee has reiterated the rationale of Article 3 CAT, which requires the authorities to be sure that the individual's safety is not endangered.

Accordingly, late submission of claims and lack of corroboration should not be taken as evidence of lack of credibility, and these were common features of the accounts of victims of torture (Communication No 15/1994 **Tahir Houssain Khan v Canada** , 18 November 1994 at para 12.3).

The need for substantial evidence-this time to support the case for the Government-was emphasised in **Hilal v. UK** (2001) 33 EHRR 2, a claim for asylum from the Zanzibar part of Tanzania was rejected by the Home Office and the appellate bodies on grounds of credibility. Both leave to appeal to the IAT and a fresh hearing of the case were rejected even although fresh evidence had been produced to address the alleged defects in credibility.

When the case to Strasbourg, the UK Government the changed tack to allege that Mr Hilal could relocate to a safe haven in mainland Tanzania. The Court held that no safe haven existed and the UK Government had not been able to rebut or shown to be false evidence which suggested that there was no safe haven. The Court found that Article 3 would be violated if Mr Hilal was to be returned to Tanzania.

However in general terms the Court will not second guess the fact finding made by the national organs where the case turns on evidence which is less objective and turns more on the subjective assessment of credibility by an adjudicator. An example of that is **F v. UK** (App. No. 17343/03) the case which will be discussed by Stephen Winter.

THE APPLICATION

Applications must be in writing and requires to be signed by the applicant or their representative and must comply with certain conditions (R.47). Representatives must meet certain conditions to permit them to act (R.36). An application can be done by a 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" (R.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 Art. 41 as this are 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 prior 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 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

This is clearly relevant to asylum cases where expulsion is imminent and there is no domestic remedy left.

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 (R.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 so for example interim measures were applied in ***Chahal v. United Kingdom*** (1996) 23 EHRR 413 at paras. 106-107.

In ***Soering v. UK*** (1989) 11 EHRR 439 measures were granted to an applicant facing extradition to the United States to face the death sentence for murder and in ***D v. United Kingdom*** (1997) 24 EHRR 423 , an applicant in the advanced stages of AIDS , was threatened with removal to St Kitts, where he argued that medical treatment was inadequate . A threat of miscarriage was enough in ***Poku v. United Kingdom*** (App. 26985/95). They have been granted where the risk is

said to arise from the actions of private parties in the state to which removal is proposed: **HLR v. France** (1997) 29 EHRR 29 at 36.

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.

The old case law suggested that the Court would only apply interim measures where the applicant had substantiated a complaint that he or she faced a real and imminent risk of suffering inhuman or degrading treatment or a risk to life on expulsion.

Whilst the typical case will still involve those elements, not all will. For example in **Ocalan v. Turkey**, 4 March 1999, interim measures were requested of the Turkish Government by the Court to take all necessary steps to ensure that Ocalan had a fair trial and access to his defence team.

In the recent Enron extradition case (**Birmingham and others v. Serious Fraud Office** [2006] EWHC Admin 200), the Court declined to grant an interim measure in circumstances where it was alleged that the extradition of the British nationals in question to America to face fraud charges arising from the Enron scandal. The argument in that case was that as they could be tried in the UK on similar charges it was a disproportionate interference with Article 8 to extradite them to America with all the attendant loss of contact with home, family and friends. The House of Lords had refused leave to appeal from the decision of the Administrative Court.

Until recently it was thought that interim measures were not binding as a matter of international law on state parties. This followed from the decision of the Court in **Cruz Varas v. Sweden** (1991) 14 EHRR 1.

The United Kingdom is not known for non-compliance. That probably depends on politics more than anything else and a change in climate could produce a change in attitude.

Of interest is a recent decision of the Court which suggests that interim measures may in fact have “teeth”.

In **Mamatkulov and Abdurasulovic v. Turkey**, 4 February 2005 (Grand Chamber) Turkey extradited the applicants to Uzbekistan to stand trial for alleged terrorist offences. They had lodged applications with the Strasbourg Court relying on Articles 2, 3 and 6.

The Court requested interim measures under Article 39. Turkey did not accede to the request and proceeded to extradite the applicants.

At first instance the Chamber of the Court found that there was no violation of Articles 2 or 3 on the facts and that Article 6 did not apply to extradition cases.

It did find that Article 34 which secured the right of individual petition had been violated because of the failure of Turkey to respect the request for interim measures.

Turkey requested that the case be referred to the Grand Chamber. The Grand Chamber agreed with the decision of the Chamber.

The Court noted that the fact that Turkey had extradited the applicants without complying with the interim measures indicated under Rule 39 of the Rules of Court raised the issue whether, in view of the special nature of Article 3, there had been a violation of Article 34 of the Convention. It reiterated that implicit in the notion of the effective exercise of the right of individual application was the observance of the principle of equality of arms and the provision of sufficient time and proper facilities to applicants in which to prepare their case. In the case before it, the applicants' representatives had been unable, despite their efforts, to contact the applicants, who had thus been deprived of the possibility of having further inquiries carried out to obtain evidence in support of their allegations.

The Court noted that, in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures could not be dissociated from the proceedings to which they related or the decision on the merits they sought to safeguard. It emphasised that the right to individual application was one of the cornerstones of the machinery for protecting the rights and freedoms set out in the Convention.

Under Article 34, applicants were entitled to exercise their right to individual application effectively, which meant that Contracting States should not prevent the Court from carrying out an effective examination of applications. Further, an applicant who complained of a violation of Article 3 was entitled to an effective examination of an allegation that a proposed extradition or expulsion would entail a violation of Article 3. Indications given by the Court under Rule 39 of the Rules of Court were intended to permit it to carry out an effective examination of the application and to ensure that the protection afforded by the Convention was effective. They also subsequently allowed the Committee of Ministers to supervise execution of the final judgment. Interim measures thus enabled the State concerned to discharge its obligation to comply with the final judgment of the Court, as it was legally bound to do by Article 46 (binding force and execution of judgments) of the Convention.

In the case before the Court, compliance with the indications would undoubtedly have helped the applicants to present their application. The fact that they had been unable to take part in the proceedings or to speak to their representatives

had hindered them in contesting the Government's arguments on the factual issues and in obtaining evidence. In view of the duty of all State Parties to the Convention to refrain from any act or omission that might adversely affect the cohesion and effectiveness of the final judgment (see Article 46) and in view of the foregoing, the Court found that the extradition of Mamatkulov and Abdurasulovic, in disregard of the indication that had been given under Rule 39, rendered nugatory the applicants' right to individual application.

The Court concluded that any State Party to the Convention to which interim measures had been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation had to comply with those measures and refrain from any act or omission that might adversely affect the cohesion and effectiveness of the final judgment. Accordingly, by failing to comply with the interim measures indicated by the Court, Turkey was in breach of its obligations under Article 34 of the Convention.

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 (R.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 United Kingdom carried with it sanctions to employ a solicitor and counsel. A grant is now 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(R.49(2)-(3) . The President of the Section can over-rule a decision to send to an application to a Committee and send it to a Chamber instead (R.49 (2) (b)).

Where a case goes before a Chamber it may be struck out or rejected as inadmissible in whole or in part (R.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 respondent 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 (R.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 (R.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 (Art. 37-39 and R.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 is 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 struck from the list. The publicity given to settlements which is a new practice will assist in any negotiations.

Although the Court does not have an active role in arranging settlement, it does not just act as a "rubber stamp". Art. 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 Art. 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 (R.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. United Kingdom* (1979-80) 2 EHRR 25 (arrest and detention of IRA suspects). The series of cases involving the destruction of Kurdish villages by Turkish security forces has also led to the hearing of evidence and site visits by members of the Court.

Where there is a real dispute as to facts, the Court will hear witnesses, expert or otherwise (R.42). It can appoint external experts to assist (R.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 (R.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, 13 June 2000).

HEARING ON THE MERITS

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 Art. 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 (R.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 R.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 (R.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; R.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 Art. 46 to accept any judgment. There is a system for the enforcement of judgments. Art. 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. In the immigration or asylum context it could not in itself lead to a grant of status-that would still be a matter for the UK Government.

The Court 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 Art .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 Art. 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. United Kingdom** (1989) 12 EHRR 36) . In **Young , James and Webster v. United Kingdom** (1982) 5 EHRR 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 Strasbourg courts (**Le Compte v. Belgium** (1982) 5 EHRR 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, Cabales and Balkandali v. United Kingdom** (1985) 7 EHRR 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. United Kingdom** (1983) 5 EHRR 573 ; **McCann v. United Kingdom** (1995) 21 EHRR 97).

In recent cases involving the UK, the UK has often deployed teams of counsel and advisers but has argued that the expenses claimed by a successful applicant are excessive. The UK never discloses what it is paying for legal advice and I

detect a trend in recent decisions to give less weight to the assertions made that the expenses of the successful applicant are excessive.

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 probability that more human rights cases will arise which will require going to Strasbourg. An application may be the only way to provide a client with a remedy.

