The Quality of Justice for Improvement

Despite its long pending judgment, the European Court of Human rights (ECHR) is associated with the latest pillar to seek justice. Ukraine occupies third place by number of applications after Russia and Italy. The decisions of the ECHR again and again point to systematic problems with law enforcement in our country.

We asked partner of the law firm **Hincker and Associates**, **Grégory Thuan Dit Dieudonne,** head of the department of international and European human rights law (Strasbourg, France), former senior case-processing lawyer of the European Court of Human Rights, to share his views on reform of the ECHR, its recent problems and his recent practice.

UJBL: ECHR applications should meet admissibility criteria. What are the key mistakes of applications brought to the ECHR for consideration?

Grégory Thuan Dit Dieudonne: Indeed, according to Article 34 of the Convention, the European Court of Human rights may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights set out in the Convention without the compulsory assistance of a lawyer.

However, the Court cannot deal with every kind of complaint. Its powers are defined by the admissibility criteria set out in the Convention.

Quite often people without any legal background and knowledge of the Court's inadmissibility criteria prepare the application form by themselves. I was the senior case-processing lawyer within the ECHR for 10 years. During this experience I could regularly observe that an important number of applications with serious chances of success were rejected as manifestly ill-founded for the unique reason that they were prepared in an improper manner. This is really regrettable for the applicants who consider the Court as the last chance to restore their rights.

It may occur that the applicants fail to exhaust all the domestic remedies and apply to the Court while the domestic proceedings (appeal, cassation appeal) are still pending before the national courts. In this case the Court declares the applications inadmissible as being premature. Some of the applicants do not comply with the six-month time-limit (they fail to apply to the Court within the 6 months after the final domestic decision). In many cases the applicants also do not realize that the ECHR is not the European "fourth instance court", as it is not a court of appeal or a court which can quash rulings given by the courts in the States Parties to the Convention or retry cases heard by them, nor can it re-examine cases in the same way as a Supreme Court.

It is important to stress that quite often the applicants do not properly sort out the relevant documents and forget to send to the Court the most important ones (court decisions, appeal/cassation review, legal submissions).

Following the above reasons, the Court is overloaded with applications, 90% of which are finally declared inadmissible. In recent years some lawyers have begun referring to the idea of introducing the compulsory representation of the applicants by a lawyer before the ECHR. From my side, I strongly support this idea as I believe that high quality preparation of an application by a lawyer specialized in human rights with strong arguments and case law references is a serious guarantee of its success .

UJBL: More strict requirements for applications were introduced from 1 January 2014. How does this affect your firm's practice?

G.T.D.: Indeed, since 1 January 2014 the Court has introduced more strict formal requirements during the lodging of an application for the sake of the Court's effectiveness and acceleration of the treatment of applications.

A new application form has been available since 1 January 2014. It should be downloaded on the Court's website, completed, printed out and sent by post to the Court with the necessary documents.

These changes influence our daily work while preparing the applications. We must not forget that the failure to provide any of the information or documents required by Rule 47 Paragraph 1 may result in the complaints not being examined by the Court. We have to be very careful in following up that all the fields in the application form are filled in.

We are doing our best to attract the applicants' attention on the necessity to obtain all the information and documents required for a complete application in good time.

The modifications do somehow complicate our work. Before 1 January 2014, a simple letter to the Court's Registry setting out the applicant's details, the facts giving rise to the alleged violations, and the articles of the ECHR was sufficient to interrupt the six month delay. From now on we have to prepare the applications in full in order to satisfy Rule 47 Paragraph 1 requirements to interrupt the six month delay. This takes much more time and puts certain pressure on our daily work.

We must not forget that the applications to the Court may be made only by post, as the receipt of a faxed application does not count as a complete application.

UJBL: What is the role of a professional attorney in the process?

G.T.D.: A qualified specialized lawyer is a serious guarantee of the success of a case. It goes without saying that a professional attorney must have deep knowledge of national legislation — material and procedural. He must also be able to apply it to the circumstances of a specific case.

In my opinion, in the field of human rights, the lawyer is the first "filtering instance" as he can appreciate the case with the view of the potential of a possible application to the ECHR at a later stage after the exhaustion of domestic remedies.

The professional attorney must not forget that in order to satisfy the requirement of the exhaustion of the domestic remedies, it is very important to raise in substance the complaints relied upon in the application, and the explicit references on the case law of the Convention may raise the chances of success of a potential application within the Strasbourg Court. Thus, he must not omit to invoke the relevant case law before the national courts, in particular in the appeal or cassation appeal.

Besides this, the role of an attorney is crucial at the stage of the negotiations in order to reach a friendly settlement between the Government and the applicant. This can happen before the communication of the application to the respondent Government in exceptional cases and more likely after the communication.

We have such experience and our advantage is that we have an office in Strasbourg where the permanent representations of the Member states are also based. We have some experience of negotiations with them.

At the stage of the proceedings before the ECHR, the attorney must know the details of the procedure, (the proceedings are mostly conducted in writing), the deadlines, as well as deep knowledge of recent case law developments.

UJBL: What changes in ECHR practice do you observe?

G.T.D.: On this issue I can note that the Court is becoming stricter in rejecting the applications with serious well-founded complaints. This may in some manner be explained by the fact that upon the arrival of the applications to the Registry, they are often examined by young inexperienced lawyers. We are really disappointed while receiving the standard letters from the Registry stating that this or that application did not satisfy the inadmissibility criteria stated in articles 34-35 of the Convention without any other explanation or details.

Also, the time of the examination of the applications by the Court is becoming more and more longer. In some cases, for instance, we have lodged applications in 2008-2009 and they were not communicated yet or are awaiting judgment.

Besides this, we have lodged several requests based on the Rules 40 and 41 of the Court (priority treatment), in particular in child abduction cases or in cases with serious complaints based on Article 3 of the Convention, but they remained without consideration or were rejected.

UJBL: What kinds of violations are most typical for CEE countries, Russia and Ukraine?

G.T.D.: After the fall of the Communist regimes in 1989, several states from Central and Eastern Europe became members of the Council of Europe and ratified the *European Convention for Human Rights.* This has led to the increasing amount of the applications pending before the Court

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raising the issues typical for these "young democracies". As to Russia and Ukraine, the most typical complaints concern violations of property rights, unfairness of the proceedings, ill-treatments, the conditions of detention in prisons and violations of freedom of expression, in particular, cases concerning whistleblowers).

The repetitive applications against Russia and Ukraine concern in particular the excessive length of proceedings and lengthy non-enforcement of national domestic decisions in favor of the applicants because of the lack of state funds. In some cases those non-enforcements may lead to serious consequences for the applicants. For instance, thousands of people who are victims of the Chernobyl disaster of 1986, cannot afford appropriate medical care due to the non-enforcements of the domestic decisions allocating sums of money for their benefit.

THE REPETITIVE APPLICATIONS AGAINST RUSSIA AND UKRAINE CONCERN IN PARTICULAR THE EXCESSIVE LENGTH OF PROCEEDINGS AND LENGTHY NON-ENFORCEMENT OF NATIONAL DOMESTIC DECISIONS IN FAVOR OF THE APPLICANTS BECAUSE OF THE LACK OF STATE FUNDS. IN SOME CASES THOSE NON-ENFORCEMENTS MAY LEAD TO SERIOUS CONSEQUENCES FOR THE APPLICANTS

This issue led to a pilot judgment against Ukraine ("Yuriy Nikolayevich Ivanov v. Ukraine", 15 October 2009). In this case the Court ordered Ukraine to introduce an effective remedy for what it identified as structural problems in the country's legal system namely, the prolonged non-enforcement of final domestic judgments and the absence of an effective domestic remedy to deal with this situation. Unfortunately, as far as I know, at the present moment Ukraine has not yet adopted the required general measures to tackle the issues of non-enforcement at domestic level.

UJBL: Please tell us about your most challenging case.

G.T.D.: Recently we started cooperating with clients and attorneys from Russia and Ukraine. Taking this opportunity I would like to tell you about a case against Ukraine where our firm was involved in cooperation with our Ukrainian colleagues.

Recently, on 23 January 2014, the ECHR rendered a judgment in the case "East/West Alliance Ltd. v. Ukraine". The application was lodged in 2004 and the circumstances of the case are outstanding because of the importance of the sums at stake.

The applicant, East/West Alliance Ltd., is an Irish company with a representative office in Ukraine. Between 2001 and 2011 the Ukrainian authorities seized, impounded and sold the property belonging to the applicant company at a public auction to third parties, although Ukrainian courts had ruled in favor of the applicant and confirmed the company's ownership over the contested property. The judgments in the applicant's favor have never been enforced and the airplanes have never been returned to the company. After seizing the airplanes the Ukrainian authorities failed to take proper care of the property, resulting in significant damage thereto.

The ECHR found violation of Article 1 of Protocol No.1 and ruled that the seizure of the airplanes in the instant case had been unlawful because it contravened domestic law, as confirmed by Ukrainian courts, in particular, on this aspect the Court has considered that "the authorities' behavior was arbitrary and abusive". The Court also established a breach of Article 13 of the Convention, guaranteeing the right to an effective remedy, because the applicant company had been unsuccessful in trying to restore its property rights for many years. ECHR decided to award the applicant EUR 5 million.

We also have lots of other outstanding cases against different countries won. You can find information about them on our website (there is a Russian version too).[1]

UJBL: It is widely discussed that the Court is overloaded. Some steps towards ECHR reform were undertaken recently. How do you evaluate progress? Do you see other instruments for further improvements?

G.T.D.: The Court is often said to be "a victim of its own success". Indeed, in the last years the Court is collapsing under the overload of new applications. The accumulated backlog of cases before the Court has been a major concern during the Izmir, Interlaken and Brighton conferences in 2010-2012 and has brought the question of the necessity of court reforms.

The adoption of Protocol 14 really is a positive step in this direction. Among others, it provides the single judge formation, modifies the competencies of the committees, and introduces the new criteria of "insignificant disadvantage". Despite this, the Court is overloaded with an inflow of applications and around 90% of cases are manifestly ill-founded or raise issues of well-established case law. In this respect some authors suggest that the court must be able to focus on problems of particular gravity or Europe-wide importance.

Also, to my mind, the quality of justice in member states should be improved. In this respect I would like to quote the former President of the Parliamentary Assembly of the Council of Europe, M. Mignon, in his speech during the Brighton conference. He said: "It is said to be a victim of its success. Yet can we really talk of "success" in these circumstances? Is the Court not rather a victim of deficiencies at the national level?", "it is for the States to apply the Court's case-law and to draw the necessary conclusions from it, possibly by changing their legislation and practice". In this aspect the role of national Parliaments is essential in the effective implementation of the international norms in the field of the human rights.

In my view, it is of vital importance to spread the knowledge on the Convention on the national level, within the civil society by means of translation of the ECHR judgments, the organisation of trainings for judges, police and academic staff regarding the ECHR.

I would add that the Committee of Ministers of the Council of Europe must be more active in overseeing implementation of the court's judgments with the introduction of penalties for states that ignore its rulings.

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[1] http://www.hincker-associes.com