# Submitting a complaint to the European Court of Human Rights: eleven common misconceptions[1]

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*Compared with many of the domestic systems of procedural law existing in Europe, the procedure of the European Court of Human Rights (ECHR) is quite straightforward and easy to use. Nonetheless, even Strasbourg procedure requires some understanding on the part of practitioners. Just as in domestic proceedings, an error can harm the interests of the applicant and, at worst, result in the loss of the case.*

*Many of the problems which applicants and their counsel encounter in proceedings before the ECHR can be traced back to a limited number of simple misconceptions. The Dutch judge and the Dutch lawyers working in the Registry of the Court explain below how these problems can be avoided.*

## *Misconception 1: The ECHR is an appellate body*

Cases regularly occur in which applicants (or their lawyers) submit an application to the Court alleging that the domestic courts have incorrectly determined the facts of a case or have overlooked essential submissions of the applicant. Often such an application is based on the submission that Article 6 of the European Convention on Human Rights has been violated.

The function of the Court is to ensure observance of the Convention and its protocols. The Court does not have the function of rectifying errors made by domestic judges in applying domestic law. Nor does the Court take the place of domestic courts in assessing the evidence. It is incorrect to view the Court as a court of 'fourth instance' to which all aspects of a case can be

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[1] Slightly updated English translation of: Een klacht indienen bij het EHRM: elf veelvoorkomende misverstanden, in: Advocatenblad 18 februari 2005, p. 110-115.

[2] Professor Myjer is a judge of the European Court of Human Rights; Mr Mol, Mr Kempees and Ms Van Steijn are legal secretaries of the Court (Article 25 of the Convention); and Ms Bockwinkel was at the time a trainee judge seconded to the Court by the Netherlands Ministry of Justice.

referred[3]. Complaints that the domestic courts should have arrived at a different decision (i.e. a decision more favourable to the applicant) are declared inadmissible as being manifestly ill-founded.

It makes no difference if the complaint is couched in terms of a violation of Article 6 of the Convention. This article guarantees only a fair and public hearing of certain well-defined categories of disputes before an independent and impartial tribunal. It does not also guarantee that domestic proceedings will arrive at the correct result.

*Misconception 2: An initial letter is in any event sufficient to comply with the six-month period.*

The Court regularly receives letters submitting a complaint in general terms shortly before the expiry of the period prescribed by Article 35 § 1 of the Convention; sometimes these letters include a statement that the grounds of the complaint will be explained in more detail later. Often a copy of a judgment of a domestic court is enclosed with the letter.

How an application must be lodged is described in detail in a practice direction. This, together with other invaluable information, can be found on the Court's website[4].

Although the Court is indeed prepared to accept a simple letter for the purposes of compliance with the six-month rule, the letter must provide a sufficient description of the complaint: in other words, it must in any event set out the facts on which the application is based and specify the rights which are alleged to have been violated, whether or not with references to articles of the Convention and its protocols.

The Court treats the date of dispatch of the letter containing this information as the date of introduction of the application[5]. For this purpose, the Court is, in principle, prepared to accept the date of the letter itself, unless of course there is an inexplicable difference between the date of the latter and the date of dispatch as evidenced by the postmark. If the letter is undated and the

[3] See the recent case of *Baumann v Austria*, no. 76809/01, § 49, 7 October 2004.
[4] http://www.echr.coe.int/
[5] See as a recent example *Latif et al. v. the United Kingdom* (admissibility decision), no. 72819/01, 29 January 2004.

postmark is illegible, the date of introduction will be the date of receipt at the Registry of the Court.

A faxed application will be accepted provided that the signed original copy, bearing original signatures, is received by post within 5 days thereafter.

The six-month period prescribed by Article 35 (1) of the Convention is an absolute time-limit. No procedure for rectification of default is available.

An initial letter which merely states that an application will be submitted does not qualify as submission of an application, even if the documents from the file of the domestic proceedings are enclosed: it is therefore not sufficient to allege that the domestic proceedings were unfair and then refer to an enclosed file of the proceedings. Nor is it possible to expand the scope of a complaint after the expiry of the six-month period.

It should be noted for the sake of completeness that the six-month period runs from the day on which the applicant (or his counsel) becomes aware or could have become aware of the last domestic judgment. In principle, the period is therefore calculated from the date of the pronouncement, if public; where, however, the domestic law prescribes notification in written form the period is calculated from the date of service or dispatch of the judgment[6]. It is for the applicant to convince the Court that it should use a different date.

*Misconception 3: An application may be submitted within six months of a judgment on application for review or a judgment in a non-admissible appeal*

Cases sometimes occur in which an applicant lodges an appeal or appeal in cassation against a judgment or decision against which no appeal lies and then submits an application to the Court. There are also cases in which an applicant applies for an extraordinary remedy before applying to the Court.

In such cases the Court calculates the period of six months from the decision given at the conclusion of the ordinary proceedings. The applicant is, after all, expected to have exhausted every 'effective remedy'. A remedy which is available to him only in certain exceptional circumstances, a request for

[6] See the recent case of *Sarıbek v. Turkey* (admissibility decision), no. 41055/98, 9 September 2004.

leave to exercise a discretionary power or a remedy not provided by domestic law cannot be deemed to be an effective remedy. A judgment on an application for revision of a final judgment, a judgment given on an appeal lodged by a public authority to safeguard the quality of the case-law or a decision on a petition for a pardon do not therefore interrupt the six-month period[7]. Even the reopening of ordinary proceedings does not suspend the running of the period, unless this is actually followed by a new substantive hearing of the case[8].

*Misconception 4: If a complaint has been made in a letter, it is not necessary to file the application form.*

Rule 47 § 1 of the Rules of Court provides that individual applicants must make use of the form provided by the Registry unless the President of the Section concerned decides otherwise. This provision is strictly enforced.

The Registry sends the form to the applicant after receipt of the first letter. The form can also be found on the Court's website[9].

If the complaint has already been set out fully in a letter, it is not necessary to repeat it verbatim in the form. In such a case it is sufficient merely to refer to the letter in the form.

Forms that are incomplete or unsigned are returned to the applicant. The consequences of any delay that occurs as a result are borne by the applicant.

*Misconception 5: A lawyer who states that he is acting on behalf of his client need not submit a written authority to act*

Rule 45 § 2 of the Rules of Court states that representatives must submit a power of attorney or written authority to act. No distinction is made for this purpose between representatives who are registered as advocate and other representatives.

[7] See the recent case of *Berdzenishvili v. Russia* (admissibility decision), no. 31679/03, 29 January 2004.
[8] See, *inter alia*, *Boček v. the Czech Republic* (admissibility decision), no. 49474/99, 10 October 2000.
[9] See *supra* note 3.

If counsel does not supply a written authority to act, the case cannot be heard by the Court. In such cases the Registry sends a reminder. This causes delay (which can sometimes be costly for the applicant).

The Registry supplies a model form of authority whose use is not mandatory (i.e. unlike the application form) but is nonetheless recommended. This model provides for express acceptance of the authority by the legal representative. This model too can be found on the Court's website[10].

Sometimes an applicant may have authorised a lawyer to act for him, but the lawyer's agreement is not evident from the documents. In such a case the Registry requests the applicant to arrange for his lawyer to acknowledge to the Court that he is acting. Until this has happened, the correspondence is continued with the applicant in person.

*Misconception 6: The applicant has an extra 6 months in which to supplement his complaint by means of the application form, written authority and supporting documents*

After receipt of the applicant's first communication, the Registry sends the applicant a letter enclosing the text of the Convention, the text of Rules 45 and 47 of the Rules of Court (detailing the formalities to be completed in respect of the application), a 'note for the guidance of persons wishing to apply to the Court' (explaining the admissibility criteria applied by the Court) and the application form with notes.

The last paragraph of point 18 of the letter (English version) reads as follows:

> 'If the application form and all relevant documents are not sent before that time-limit (i.e.not later than 6 months after the date of the first communication from the Registry) this will be taken to mean that you no longer wish to pursue the examination of your case and your file will be destroyed.'

The misconception occurs because the applicant (or his or her counsel) reads only this last paragraph. Elsewhere in the letter there is a warning about the consequences of unnecessary delay. The sanction imposed by the Court in this respect is that the date on which the application is filed is taken to be the

[10] See *supra* note 3.

date of the form (or an even later date if the form is not completed correctly) rather than the date of the letter of complaint. This may mean that the application is deemed to be filed after the six-month period.

The note for the guidance of prospective applicants (point 17) states that the Court wishes the form to be filed within six weeks. Although a request to extend this period may be made, the applicant is responsible for – and bears the risk of – ensuring that the Court receives a written document adequately explaining the complaint within six months of the last domestic decision[11].

After the Court has received the application, the applicant can be requested to supplement it, where necessary, with any missing documentary evidence or other information. The Registry may set a time-limit for this purpose. Although failure to comply with this time-limit does not necessarily invalidate the application, it is advisable to submit a reasoned request for an extension before the expiry of the period if it becomes clear that the time-limit cannot be met.

It should be emphasised that the period of a year specified in the last paragraph of the letter of the Registry is definitely not the period available to the applicant. The applicant cannot derive any rights from it. The file is kept for one year after the last communication from the applicant. If the applicant does not communicate within this period the file will be destroyed in order to make space in the Court's already overfull archives for applications that are pursued with greater diligence.

A complainant who contacts the court again after a long period of silence may be required to explain his silence, even if it has lasted for less than a year. The Court may attach consequences to such silence.

*Misconception 7: The entire proceedings can be conducted in Dutch*

Unlike the Court of Justice of the European Communities, the Court of Human Rights in Strasbourg has only two official languages, namely English and French (Rule 34 § 1 of the Rules of Court).

[11] See for example *Latif et al. v. the United Kingdom* (admissibility decision), see *supra* note 3.

The original application and the supporting documents attached to it can be submitted in a language other than English or French provided that the language used is an official language of one of the Contracting Parties (i.e. the States that are party to the Convention)[12] (Rule 34 § 2 of the Rules of Court).

Until recently an applicant was allowed to use such another language until the Court decided on the admissibility of his or her application. However, as preparations are under way to introduce a concentrated procedure without a separate admissibility decision, in anticipation of the entry into force of Protocol No. 14[13], the use of English or French has been made mandatory at an earlier stage in the proceedings, namely from the date on which the complaint is communicated to the respondent government.

The obligation subsequently to use one of the two official languages applies only to pleadings/observations submitted by or on behalf of the applicant. It follows that the applicant need not submit an unsolicited translation of documents from the domestic court file, unless of course these documents are drawn up in a language which is not an official language of one of the Contracting Parties.

If a hearing is held, the applicant should use one of the two official languages (Rule 34 § 2) of the Rules of Court). Hearings are held only very exceptionally and generally take place before the Court rules on admissibility.

The President may be asked to grant leave for the use of a language other than English or French. This is decided on a case-by-case basis. However, even if leave is given, the advocate is expected to have an adequate passive knowledge of English or French (Rule 36 § 5 of the Rules).

*Misconception 8: Rule 39 concerns interlocutory injunction proceedings*

Rule 39 of the Rules of Court, 'Interim measures', reads as follows:

[12] We would, for practical reasons, advise caution in the use of uncommon regional or minority languages, regardless of whether they have the status of official language in a particular area, and generally recommend the use of more widely used languages if possible.

[13] *Protocol No. 14 to the Convention for the protection of human rights and fundamental freedoms* (Strasbourg, 13 May 2004); Council of Europe Treaty Series/ Série des Traités du Conseil de l'Europe no. 194.

> "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
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> …"

This expressly concerns interim measures. Unlike some 'provisional' measures ordered by domestic courts, which in many cases are in effect permanent, they apply only for the term of the proceedings in Strasbourg.

In practice, measures are adopted under Rule 39 only if there is a prima facie case that the applicant will otherwise suffer irreparable damage for which pecuniary compensation after the close of the proceedings will not provide satisfaction. This will be particularly true in the case of expulsions or extraditions to countries that are not party to the Convention, if there is likely to be a violation of Article 2 or 3 of the Convention or of Protocol No. 6.

There is therefore no point in applying, for example, for suspension of the execution of a prison sentence or remand in custody, temporary or permanent closure of a construction project, the issue of a temporary residence permit or an advance on social benefit or compensation.

For the sake of completeness, it should be noted that there is also no point in requesting application of Rule 39 if the complaint is obviously inadmissible for any reason whatever, for example because the effective domestic remedies have not been exhausted.

*Misconception 9: The identity of the applicant can be kept secret from the respondent government*

In principle, the procedure of the Court is public (with the exception of settlement negotiations, Article 38 § 2 of the Convention).

Rule 47 § 3 of the Rules of Court provides, however, for the possibility of concealing the identity of an applicant from the public. The applicant must give reasons when submitting such a request to the President.

Even if the President grants such a request, the identity is not concealed from the respondent government. The application and all documents relating to it are copied in full and sent to the representative of the government concerned.

Article 36 § 1 of the Convention is insufficiently known. It reads as follows:

> 'In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.'

Under Rule 44 § 1 of the Rules of Court, when notice of an application is given to the respondent government and the applicant has the nationality of another State which is party to the Convention, a copy of the application will be transmitted to the government of that other Contracting Party. It is not the practice of the Court to withhold information from that other government.

There have been cases in which an applicant was on the point of being deported (extradited or expelled) from one Contracting Party to another Contracting Party of which he was a national. The Court has never concealed the identity of the applicant from the other State in such cases.

*Misconception 10: It is sufficient to make a request for compensation in the application form*

It is common knowledge that the Court may award 'just satisfaction' (pecuniary compensation) to an injured party (Article 41 of the Convention).

In the procedure followed as standard hitherto (in which a separate decision is made on admissibility) the applicant is required to submit his request for compensation after the admissibility decision. The applicant submits his request either in his observations on the merits of the application or – if he does not submit such observations – in a separate document which he must file within two months of the admissibility decision (Rule 60 § 1 of the Rules of Court).

Under the new concentrated procedure without a separate admissibility decision, which will now become the standard procedure, the applicant will

be required to submit his request for just satisfaction after the complaint has been communicated to the respondent government.

The Registrar notifies the applicant by letter of the possibility of submitting such a request and of the period within which it must be submitted.

The Court disregards a request for just satisfaction which is submitted too early in the proceedings and is not repeated in the correct stage of the proceedings, or which is lodged out of time[14].

The applicant must submit itemised particulars of all claims and costs together with relevant supporting documents (Rule 60 § 2 of the Rules), failing which the Court may reject the claims in whole or in part[15].

*Misconception 11: Appeal against an admissibility decision that goes against the applicant lies to the Grand Chamber*

Article 28 of the Convention explicitly states that the decision of a committee of three judges is 'final'. No such provision, it is true, exists in Article 29 of the Convention, which sets out the procedure if the complaint is not rejected by a committee.

According to the text of the Convention (Article 43 (1)), referral of the case to the Grand Chamber may be requested 'within a period of three months from the date of the judgment of the Chamber'. Such a request is submitted to a panel of five judges. The panel accepts the request 'if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance' (Article 43 (2)).

However, admissibility decisions are not 'judgments' within the meaning of Article 43 (1). This is evident just from Article 45 of the Convention, where a distinction is made between 'judgments' on the one hand and 'decisions' declaring applications admissible or inadmissible on the other.

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[14] See for example *Willekens v. Belgium*, no. 50859/99, § 27, 24 April 2003.

[15] See, for example, the recent case of *Cumpănă and Mazăre v. Romania* [Grand Chamber], no. 33348/96, § 134, 17 December 2004.

In practice, a request for a case to be referred to the Grand Chamber on the basis of an admissibility decision is not submitted to a panel of five judges.

*Final observations*

Finally, it is emphasised that counsel should apply to Strasbourg only if there has been a relatively serious violation of the Convention. The lack of self-restraint of applicants (whether or not legally represented) in many countries has greatly increased the workload of the Court. It should be noted in this connection that relatively few cases involve important matters of principle.

The governments of States that are parties to the Convention, which have the last word on the text of the Convention, have responded to this situation by drawing up a new admissibility criterion. When Protocol No. 14 enters into force, the Court will be able to turn applicants away if it considers that they have not suffered a significant disadvantage from an alleged violation, even if their complaints are in themselves well-founded (see Article 12 of Protocol No. 14).