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"Significant Disadvantage" Suffered by the Applicant as a New Admissibility Criterion in the Proceedings before the European Court of Human Rights : Necessary Development or too Far-Reaching Restriction on the Access to Court?

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"SIGNIFICANT DISADVANTAGE" SUFFERED BY THE APPLICANT AS A NEW ADMISSIBILITY CRITERION IN THE PROCEEDINGS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS – NECESSARY DEVELOPMENT OR TOO FAR-REACHING RESTRICTION ON THE ACCESS TO COURT?

I. INTRODUCTION

The extensive and constantly growing caseload of the European Court of Human Rights (hereinafter: the Court) has been a concern for the Council of Europe for a long time[1]. Relying on the principle of *de minimis non curat pretor (the praetor does not concern himself with trifles*), the member states decided to add a new criterion to those enumerated in Article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] (hereinafter: European Convention of Human Rights; the Convention). „Significant disadvantage" suffered by the applicant constitutes a new necessary condition to be met introduced, among other amendments, by Protocol 14[3] to the Convention.

As stated in the Explanatory Report to this Protocol[4], the aim of inserting this criterion was "to provide the Court with an additional tool which should assist it in its filtering work" and also to allow the Court to concentrate on "cases which warrant examination on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributes"[5]. It was pointed out

[1] It is estimated that at present the Court protects the rights of 800 million people in 47 states and the number of applications lodged has been growing constantly. In 1999 there were about 8,400 applications admitted for examination, whereas in 2003 this number increased to 27,200 (around 65,000 applications were already pending) and 57,200 in 2009 (when the total caseload attained 119,300 applications). See: Protocol 14: The Reform of the European Court of Human Rights, available at: http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, Rome, 4 November 1950.

[3] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No.: 194, Strasbourg, 13 May 2004.

[4] Explanatory Report to Protocol 14, Agreement of Madrid (12 May 2009), para. 39, available at: http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm.

[5] Ibidem, para. 77.

that it is very likely that there will be a constant increase in the number of applications lodged with the Court, up to a point where the remaining measures may turn out to be insufficient[6]. For this reason it was suggested that, apart from the already existing criteria, a new measure is necessary in order "to prevent system from becoming totally paralysed, unable to fulfil its central mission of providing legal protection of human rights at the European level, rendering the right of individual application illusory in practice"[7].

According to the implemented changes, the Court may now reject those applications which the judges consider too "minor" to be examined by the Court. On the one hand, it may be seen as essential for accelerating examination of the applications, on the other, however – not only the scope of "significant disadvantage" remains unclear and vague but its introduction is also highly controversial as potentially restricting individual access to court. Moreover, it is argued that it will have marginal effects in practice. More than a year now has the new admissibility criterion been in force. It is thus worth making its preliminary evaluation, especially in the light of the existing jurisprudence on the analysed issue.

II. THE ORIGIN OF THE NEW CRITERION

The notion of "*de minimis*" had been present in the Strasbourg system long before the Protocol 14 entered into force. Although it was not used by the Court directly in the reasons for the judgments, it has been often invoked by the governments in their observations, as well as by judges in dissenting opinions[8].

In February 2001 an evaluation group was set up by the Committee of Ministers. In a report delivered in September 2001[9] they put forward a proposal to revise the admissibility criteria. They stated, *inter alia*, that "what is required is a means of excluding from detailed treatment by the Court not only applications having no prospects of success but also those which, despite their having such prospects, raise an issue that is, in the view of the Court, of such minor or secondary importance that they do not warrant such treatment". At the same time they tried to refute the potential counter arguments that the proposed solution will restrict the right to individual petition by emphasizing the subsidiary role of the Court, meaning that the applicants should seek remedy at the domestic level in the first place. Regarding the caseload problem it was stressed that "the point has been reached at which a difficult choice has to be made: either the Court continues to attempt to deal in the same way with all the applications that arrive (in which

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[6] Ibidem.

[7] Ibidem, para. 78.

[8] See: *X v the United Kingdom*, application no. 4933/71, decision of 19 December 1972; *Dudgeon v the United Kingdom*, application no. 7525/76, judgment of 22 October 1981 (dissenting opinion of judge Matscher); *Eyoum-Priso v France*, application no. 24352/94, decision of 4 September 1996; *Koumoutsea and others v Greece*, application no. 56625/00, decision of 13 December 2001; *O'Halloran and Francis v the United Kingdom*, applications nos. 15809/02 and 25624/02, judgment of 29 June 2007 (dissenting opinion of judge Pavlovschi).

[9] Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights of 27 September 2001, available at: https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr.

event it will slowly sink), or it reserves detailed treatment for those cases which, in the light of its overall object and purpose, warrant such attention"[10].

After the abovementioned report had been delivered, the Steering Committee for Human Rights released its report taking into consideration the previous propositions[11]. They pointed out that the new criterion would be significantly beneficial to the functioning of the Court, particularly a lot of time can be saved by examining admissibility in the light of the new criterion before verifying the remaining requirements. What is more, it won't restrict the individual's right to access to court as only applications with no general interest for the human rights protection will be rejected[12]. The Committee was thus convinced that such a new criterion would reduce the workload without making any fundamental changes in the existing system.

Additionally, a document prepared by a study group of the Court's registry needs to be invoked, in which it was estimated that among 406 cases examined at the beginning of 2003, only 19 of them (which is around 5%) would be rejected on the basis of the proposed criterion[13]. What is particularly interesting, the registry group analysed what sort of cases could be covered by the new threshold. They came to a conclusion that for certain all the complaints under Articles 2, 3 (excluding spurious complaints, such as "mental torture"), 5 (all cases concerning deprivation of liberty) and 7 (these applications normally should be considered "of general interest") of the Convention cannot be rejected on this ground as violations of those provisions will always constitute a significant disadvantage to the applicant. As far as the remaining provisions are concerned, the applicability of the new measure will depend on the degree of interference and on what was at stake for the applicant. They also gave examples of possible types of cases that could fall within the new criterion, namely those dealing with the length of the civil proceedings involving less than 500 euros, disputes between neighbours or disputes about the place to which a pension should be sent. Nonetheless, they admitted that such a proposal "imply an important policy decision since it cannot be denied that it will in effect entail some restriction of the individual's access to court".

The debate on the new criterion was very stormy. Some states (especially Austria, Belgium, Finland, Hungary, Latvia and Luxembourg) together with non-governmental organizations strongly opposed against its inclusion into the text of the Convention (Mowbray, 2007: p. 53). The Parliamentary Assembly indicated that the proposed measure is vague, subjective and potentially leading to serious injustice[14]. Amnesty Interna-

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[10] Ibidem, para. 92.

[11] Steering Committee for Human Rights (CDDH), *Guaranteeing the long-term effectiveness of the European Court of Human Rights*, Final report containing proposals of the CDDH (adopted by the CDDH on 4 April 2003), available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2003)55&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864.

[12] Ibidem, Drafting example for Article 35, para. 4.

[13] Reflection Group on the Reinforcement of the Human Rights Protection Mechanism (CDDH-GDR), *Impact Assessments of Some of the Reform Proposals under Consideration*, Document prepared by a study group of the Registry, Strasbourg, 12 March 2003, available at: http://www.coe.int/t/e/human_rights/cddh/3._committees/07.%20other%20committees%20and%20working%20groups/archives/06.%20guaranteeing%20human%20rights%20%28cddh-gdr%29/01.%20working%20documents/2003/2003_017_en.asp.

[14] See: PACE Opinion 251 of 28 April 2004 on Protocol 14, text adopted by the Assembly on 28 April 2004 (13th Sitting), para. 11: "The Assembly cannot accept the proposal to add a new admissibility criterion to Article 35 (individual applications) of the Convention because it is vague, subjective and liable to

tional pointed out that this amendment would not achieve its aim but, on the contrary, it will now take the Court longer time to decide on the cases.[15] The opponents of the amendment questioned in general the need for a new criterion asserting that the number of admissible non-repetitive cases remains in a very small proportion to the Court's total caseload. Moreover, Austria suggested that finding the lack of significant disadvantage will send "an unintended negative message that some human rights violations are not significant" (Reiss, 2009: pp. 302–303). Among judges and scholars there were also fears that the future jurisprudence on the issue won't be uniformed as each Chamber will give its different interpretation (Confronti: 2005, p. 306). Nevertheless, the Committee of Ministers finally approved the proposed text so that the Protocol 14 became opened for signature on 13 May 2004 and subsequently, as a result of prolonged ratification process by the Russian Federation, entered into force on 1 June 2010.

III. THE SCOPE OF THE "SIGNIFICANT DISADVANTAGE" TEST

As set out in Article 35(3)(b), the Court declares inadmissible any individual application if it considers that the applicant did not suffer significant disadvantage. However, the application cannot be found inadmissible if "respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal". The new criterion is thus composed of three elements, namely the significant disadvantage suffered by the applicant itself together with two safeguard clauses.

As far as the applicability *ratione temporae* is concerned, according to Article 20 of Protocol 14, the new criterion applies to all pending applications, except those previously declared admissible. What is more, during the first two years following its entry into force, application of the criterion is reserved to Chambers and the Grand Chamber which should establish clear case-law principles for its operation in concrete contexts.

Since the discussed criterion was added to Article 35 (3) as point b) it should be noted that it now co-exists with the thresholds stipulated in point a), namely the requirement that the application is not manifestly ill-founded and it does not constitute an abuse of the right to individual application. Therefore, the Court gained broader power to find the cases inadmissible. As a result, a case which is well founded but is considered too minor to be examined on merits may be rejected on the new ground.

1. THE MEANING OF "SIGNIFICANT DISADVANTAGE"

The Court has already stated in its so far delivered decisions on the issue in question that "the severity of a violation should be assessed, taking account of both the

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do the applicant a serious injustice, and would exclude only 1.6% of existing cases. In addition, it may have the unintentional effect of discriminating against female applicants to the Court, by, for example, putting a premium on financial disadvantages suffered." Text available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EOPI251.htm.

[15] See: *Amnesty International Comments on the Interim Activity Report: Guaranteeing the Long-Term Effectiveness of the European Court of Human Rights*, paras. 33–37, http://www.amnesty.org/en/library/asset/IOR61/005/2004/en/6d1d6461-d63b-11dd-ab95-a13b602c0642/ior610052004en.pdf.

applicant's subjective perceptions and what is objectively at stake in a particular case"[16].

There were justified grounds to presume that the financial impact would be the sole factor deciding about rejecting the applications. The Court points out however that the level of severity should be examined not only in the light of the financial impact of the matter in dispute, assessed objectively, but also the importance of the case for the applicant in particular circumstances of each case[17]. Therefore, the pecuniary interest involved is not the only element to be taken into account when determining whether the applicant has suffered a significant disadvantage as violation of the Convention may also concern vital questions of principle and thus cause a significant disadvantage without affecting pecuniary interests[18].

Undoubtedly even modest pecuniary damages may be important for the applicant, depending on a personal financial situation and other individual circumstances of the case. At the same time, however, the Court emphasises that a particularly petty amount of money is to be considered as being of minimal significance for the applicant. Thus, even if the applicant's subjective perception is that the case was meaningful, it does not suffice for the Court to conclude that he suffered a significant disadvantage. The applicant's subjective feelings about the impact of the alleged violations always need to be justifiable on objective grounds[19].

2. SAFEGUARD CLAUSES

The two safeguard clauses were included into the scope of the criterion in order to prevent the Court finding cases inadmissible, despite being deprived of significant disadvantage for the applicant, when the respect for human rights requires their examination, or when they were not appropriately examined at the domestic level.

A. WHETHER RESPECT FOR HUMAN RIGHTS REQUIRES AN EXAMINATION OF THE CASE ON THE MERITS

The Court is obliged to continue examination of the case, even in the absence of a significant damage caused to the applicant, if respect for human rights as defined in the Convention and the Protocols thereto so requires. This clause can be compared to the second sentence of Article 37 § 1 of the Convention which has a similar function in the context of striking applications out of the list of cases[20].

Undoubtedly the wording of this clause is of a very general character, therefore each case has to be interpreted individually. According to the Practical Guide on the Admissibility such questions may arise, for instance, where there is a need to clarify States' obligations under the Convention or to persuade States to resolve an existing structur-

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16 *Korolev v Russia*, application no. 25551/05, decision of 1 July 2010.

17 *Burov v Moldova*, application no. 38875/03, decision of 14 June 2011, para. 25.

18 *Korolev v Russia*, *op. cit.* Such a situation took place in the case of woman found guilty of petty theft and reprimanded (*Luchaninova v Ukraine*, application no. 16347/02, judgment of 9 June 2011), where the Court held that despite any financial penalty imposed on the applicant, the matter had in fact a significant impact on her both personal and professional life (she was dismissed from work), thus in consequence the case was examined on the merits.

19 Ibidem.

20 Explanatory Report, *op. cit.*, para. 81.

al problem affecting persons in the same position as the applicant[21]. The Court needs to verify whether a problem arising from the case has been already examined by the Court. If the relevant domestic law has changed or the application is only of historic interest since similar cases have been previously decided, the respect for human rights would not require any further examination of the same complaint[22].

B. WHETHER THE CASE WAS DULY CONSIDERED BY A DOMESTIC AUTHORITY

Secondly, under the new criterion no case which has not been adequately examined at the domestic level may be rejected. The purpose of the present safeguard clause is to ensure that every case receives a judicial examination whether at the national or European level in order to avoid a denial of justice. It is also worth noting that this clause is in accordance with the principle of subsidiarity, as reflected in Article 13 of the Convention, which requires availability of an effective remedy against violations at the national level[23]. On the other hand, it should be stressed that the notion of "duly examined" cannot be seen as obliging states to examine each single claim before its domestic courts[24].

It is important to note that during the 8th session of the Committee of Experts on the Reform of the Court, Germany submitted a proposal to amend the new criterion by deleting its second clause[25]. They argued that this part is unnecessary as the principle of subsidiarity is already included in the first paragraph of Article 35, which moreover does not require such an additional condition as "due examination" by a domestic authority. It was further claimed that without this passage, the new criterion could be applied more easily[26]. In their common statement of 10 January 2012, the group of non-governmental organizations strongly opposed introducing such an amendment. They claim that this clause, as an expression of subsidiarity, should bind the Court to examine the complaints when the domestic system turns out to be ineffective in order not to lead to a denial of justice[27]. Nevertheless, during the High Level Conference in Brighton held in April 2012 it was concluded that the second clause should be removed. The Committee of Ministers was thus invited to adopt the amending instrument by the end of 2013[28].

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[21] *Practical Guide on the Admissibility Criteria*, Council of Europe/European Court of Human Rights, December 2010 as amended on 31 March 2011, available at: http://www.echr.coe.int/NR/rdonlyres/B5358231-79EF-4767-975F-524E0DCF2FBA/0/Guide_pratique_ENG.pdf.

[22] *Ionescu v Romania*, application no. 36659/04, decision of 1 June 2010.

[23] *Korolev v Russia*, *op. cit*.

[24] *Ladygin v Russia*, application no. 35365/05, decision of 30 August 2011.

[25] Steering Committee for Human Rights, Committee of Experts on the Reform of the Court, Report of the 8th meeting (2–4 November 2011), DH-GDR(2011)R8, paras. 9–11.

[26] Steering Committee for Human Rights, Committee of Experts on the Reform of the Court, Report of the 1th meeting (17–20 January 2012), DH-GDR(2012)R1, para. 5.

[27] *Council of Europe: Comments on Follow-Up to the Interlaken and Izmir Declarations on the Future of the European Court of Human Rights*, statement of the non-governmental organizations: Amnesty International, the AIRE Centre, the European Human Rights Advocacy Centre (EHRAC), the Helsinki Foundation for Human Rights (HFHR), INTERIGHTS, the International Commission of Jurists (ICJ) and JUSTICE, paras. 25–30, available at: http://www.amnesty.org/en/library/asset/IOR61/001/2012/en/ad166295-0b04-4ef6-beac-8a83f762c674/ior610012012en.pdf.

[28] High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 19–20 April 2012, para. 15 c.

IV. REVIEW OF THE COURT'S JURISPRUDENCE ON THE NEW CRITERION

Although it may seem relatively early to assess the new criterion as there is not much jurisprudence on the issue yet, it is worth making some preliminary comments on how it was interpreted by the Court so far. One can observe that many of those cases concerned the evaluation of the financial impact of the matter for the applicant. Fortunately, the Court started developing jurisprudence also in different factual circumstances.

The number of cases already examined in the light of the new criterion concerned pecuniary loss, usually small amounts of money the applicants sought. The very first case where the new criterion was invoked and subsequently applied by the Court is *Ionescu v Romania*. The applicant claimed before the domestic courts the sum of 90 euros for failure to perform contractual obligations by the transport company. The Court noted that the applicant's financial loss was marginal and further pointed out that there was no evidence that the result of the case would have had a significant effect on his personal life. Regarding the safeguard clauses, the Court stated that it had already examined the issue of application of procedural provisions by domestic courts. As the case was also duly examined by the Bucharest District Court, all the necessary criteria of the new threshold were fulfilled. Consequently, the Court found the application inadmissible on account that the applicant did not suffer a significant disadvantage.

Similarly in *Korolev v Russia* the applicant filed a complaint in order to recover from the domestic authorities a sum of money amounting to RUB 22,50 (less than 1 euro). The Court was surprised by such a tiny amount of the pecuniary loss. Despite being aware that even very little financial loss may be of substantial impact for the applicant, the Court had no doubt that in this particular case such a sum was of minimal significance for the applicant. As the applicant's claim was limited only to pecuniary loss allegedly suffered, the Court found the complaint inadmissible under the new criterion. It may seem somehow strange, however, that the Court did not invoke the *Ionescu* case at all. That is probably why very detailed reasoning of the decision was given. Those first two decisions were subsequently broadly invoked in the following cases.

The third case where the new criterion was used is *Rinck v France*[29]. After exceeding the speed limit by 1 k.p.h. (according to a measurement made by a radar speed gun with the margin of error deducted), the applicant was given a penalty notice which he contested, requesting the disclosure of the police documentation. The domestic court rejected his demand and found Mr Rinck guilty as charged, ordering him to pay a fine of 150 euros and deducting one point from his driving license. The Court of Cassation dismissed his appeal on the points of law. The applicant complained of a breach of the equality of arms principle in the judicial proceedings under Article 6 § 1 of the Convention. He maintained that by refusing to produce documents by the prosecutor, which was crucial for the outcome of the case, he was prevented from refuting the allegations against him. The European Court of Human Rights once again focused on the financial aspect and found that the pecuniary damage suffered by the applicant was

[29] Application no. 18774/09, decision of 19 October 2010. See also similar case: *Fernandez v France*, application no. 65421/10, decision of 17 January 2012.

not significant, at the same time underlining that in the file there was nothing indicating that the result of the case would have significant effects on his personal situation. Since the subject of the burden of proof and the right to access to evidence had already been the subject of the Court's rulings, the application was rejected[30]. Therefore, despite the complaint referred to the conduct of the judicial proceedings, because of lack of both significant financial loss and a new issue requiring examination on the merits, the Court found the case inadmissible.

After examining cases concerning financial damages, the Court fortunately widened the applicability of the new criterion. In cases against the Czech Republic – *Holub*[31], *Bratři Zátkové association*[32] and *Čavajda*[33] the applicants took part in the proceedings before the Constitutional Court in the result of which their cassation appeals were dismissed. They claimed that they had not received information about observations submitted by lower courts and the Supreme Court. The Court noted that in the domestic court's observations there was no additional reasoning to those already contained in the judgment available to the applicants, and furthermore that nothing could suggest that the appeals would have been successful. What is more, the applicants failed to specify what new arguments they would have raised apart from those already submitted in their appeals. All three cases were therefore found inadmissible by the Court on account that none of the applicants suffered significant disadvantage in their right to take part properly in the proceedings before the Constitutional Court. What is very important, in the *Holub* case the Court stressed that the "disadvantage" related to the applicant's procedural rights and not to the financial sum at stake in the civil proceedings.

In the case *Havelka v the Czech Republic*[34] the applicant sued a lawyer for his alleged unjust enrichment and claimed 3,561 Czech korunas (around 99 euros). Subsequently, he lodged a claim with the Ministry of Justice for compensation for non-pecuniary damage resulting from the excessive length of the proceedings. The unreasonable length of the proceedings was acknowledged by the Ministry of Justice and the applicant was awarded the sum of CZK 26,000. In addition to this sum the applicant was subsequently granted CZK 14,000 by the Prague District Court, thus altogether he was awarded the equivalent of EUR 1,515 for the length of the proceedings. The Court emphasised that when the applicant complains about the length of the proceedings, his subjective perceptions and what is objectively at stake for him have to be assessed in a general way. It is important to stress that "contrary to the majority of cases in which the Court has already applied the new inadmissibility criterion, in cases concerning the length of proceedings the financial loss or the amount of the initial claim involved cannot be taken as a sole indication of a 'significant disadvantage'". In this case the Court also stated that although the award given cannot be considered as providing adequate and sufficient redress, the sum does not differ from the appropriate just satisfaction

[30] See also similar cases concerning financial claims: *Gaftoniuc v Romania*, application no. 30934/05, decision of 22 February 2011; *Ştefănescu v Romania*, application no. 11774/04, decision of 12 April 2011; *Fedotov v Moldova*, application no. 51838/07, decision of 24 May 2011; *Burov v Moldova*, application no. 38875/03, decision of 14 June 2011; *Kiousi v Greece*, application no. 52036/09, decision of 20 September 2011.

[31] Application no. 24880/05, decision of 14 December 2010.

[32] Application no. 20862/06, decision of 8 February 2011.

[33] Application no. 17696/07, decision of 29 March 2011.

[34] Application no. 7332/10, decision of 20 September 2011.

to such an extent that could cause the applicant a significant disadvantage. The Court came to a conclusion that the applicant's inconsistent attitude towards the proceedings which involved only a modest claim does not show the general importance of the case for him. The application was consequently rejected.

According to the factual circumstances of the case *Jančev v the former Yugoslav Republic of Macedonia*[35], which relates to the access to a property, the applicant constructed a wall dividing his and his neighbour's properties and was subsequently ordered to destroy it. As this obligation was a result of the applicant's unlawful actions, the Court found that no significant disadvantage may be observed in the case. Particularly, the applicant did not provide the Court with any evidence proving that his financial situation resulting from the case would have had a significant effect on his personal life. Although the applicant complained that the court's decision was not pronounced publicly which was obligatory under the domestic law, the Court found that it has already addressed on many occasions the issue of public pronouncement of judgments. What is also important, the domestic court of appeal found that the fact of not pronouncing the decisions constituted a procedural flaw, but was not relevant for its validity. Bearing in mind the above, the Court stated that the situation in question does not constitute a denial of justice imputable to the respondent state.

Finally, it is worth noting the dissenting opinion of judge Lopez Guerra joined by judge Gyulumyan given for the case of *Fomin v Moldova*[36]. In this case it was considered whether the new criterion should be applied. Ultimately the application was declared admissible as the judges noticed a close relation between the second safeguard clause and the complaint under Article 6 of the Convention. Judge Lopez Guerra observed that the question whether there was due consideration by the domestic courts shall be distinguished from the examination of the case on merits in the light of Article 6 of the Convention. He reminded that in *Holub* the Court emphasised that the requirement of having been "duly considered" should not be interpreted as strictly as the requirements of a fair trial. Therefore, it appears that the case should have been declared inadmissible.

V. MAKING USE OF THE NEW CRITERION BY STATES

The addition of the new admissibility threshold may be beneficial to the state parties to the European Convention of Human Rights. They may now enlarge their preliminary objections with additional argumentation. However, it does not seem so easy to be successful bearing in mind the first cases where the Court commented on the governments' suggestions that the new criterion should be applied.

In the case concerning equal treatment under labour law, *Živić v Serbia*[37], the Government maintained that the application should be rejected under the new measure. The Court, however, did not agree and dismissed the Government's objections. Although the amount of salary the applicant sought was not very high, the complaint referred to the important issue of inconsistency of the domestic case-law concerning equal working

[35] Application no. 18716/09, decision of 4 October 2011.
[36] Application no. 36755/06, judgment of 11 October 2011.
[37] Application no. 37204/08, decision of 13 September 2011.

conditions. The Court pointed out that such a practice affects many individuals, undermining the public confidence in courts and the legal certainty and equality of individuals before the law. It was stressed that this case needs to be distinguished from *Ionescu v Romania* the Government referred to. For these reasons the Court stated that not only because the "significant financial impact and substantive nature of the matter at stake, the applicant has suffered a significant disadvantage as a result of the alleged violation of the Convention, but also (even assuming that the applicant has not suffered a significant disadvantage) that the case raises issues of general interest.[38]"

Also in the case *Gaglione and others v Italy*[39] the Court dismissed the Government's reasoning based on the new criterion. This case concerned the delayed execution of the judgments awarding the applicants compensations for excessive length of the judicial proceedings questioned under the "Pinto" Act. The Government invoked the "significant disadvantage" criterion, maintaining that default interest had been awarded to the applicants and that they could institute the fresh "Pinto" proceedings. The Court pointed out that these arguments had been already rejected on several occasions, observing that "requiring the applicants to bring fresh proceedings would be tantamount to locking them into a vicious circle in which the malfunctioning of one remedy would oblige them to have recourse to a second one". The Court thus dismissed the objection on the grounds of inadmissibility raised by the Italian Government.

The Government's preliminary objections relying on the new criterion were also rejected in *Sancho Cruz and others v Portugal*[40]. This case similarly concerned a delay in payment of the compensation awarded to the applicants. The Government claimed that two of the applicants had been already awarded compensation for pecuniary damage at the domestic level. As the case referred to expropriation, the Court found that the disadvantage suffered was in fact significant. The Court further stated that the question whether the applicants received compensation to a potentially higher amount than the amount of just satisfaction they would receive from the Court should not be examined in the light of the new criterion, which requires an examination of the merits, not only the result of the case [41].

Finally, in *Dudek v Germany (VIII)*[42], the Government submitted that the unreasonable length of the proceedings was not of great importance to the applicant as it concerned minor sums of money and was not detrimental to the applicant's financial situation. The Court pointed out that there was no effective domestic remedy against the excessive length of civil proceedings under German law, therefore the case has not been "duly considered by a domestic tribunal". It is very interesting to note that the Court, invoking the example of the case *Bock v Germany*[43], examined before the entry into force Protocol 14, eventually rejected the case as constituting an abuse of the right to petition pursuant to Article 35 § 3 (a) of the Convention. A similar situation took place in

[38] Application no. 37204/08, judgment of 13 September 2011, paras. 33–42.

[39] Application no. 45867/07 and 479 others judgment of 21 December 2010.

[40] Application no. 8851/07 and 14 others, judgment of 18 January 2011.

[41] Ibidem, para. 35.

[42] Applications nos. 12977/09, 15856/09, 15890/09, 15892/09 and 16119/09, decision of 23 November 2010.

[43] Application no. 22051/07, decision of 19 January 2010.

the case *Almeida and Vasconcelos De Melo v Portugal*[44], where the applications were rejected as manifestly ill-founded.

VI. CONCLUSION

From the very beginning the new criterion has been criticised for being unclear and vague. It appears that hitherto the Court has not clarified this term in a sufficient manner[45]. Until this time, the Court has not invoked the new measure often. At the time of writing there has been only 17 decisions rejecting the applications on this ground. It is clear that the Court is very cautious about applying the new measure and the applications rejected on this ground do not raise questions of very controversial nature. When the Court encounters doubts, it is preferred to invoke other available tools from the admissibility requirements list. It is problematic all the more that there may be justified grounds to fear what is going to happen when it comes to decide on the issue by the single-judge formation. The members of the Council of Europe are aware of marginal effects of the new criterion. In the Interlaken Declaration and Action Plan of 2010 they invited the Court to "give full effect to the new admissibility criterion provided for in Protocol No. 14 and to consider other possibilities of applying the principle *de minimis non curat praetor*"[46]. Also during the Izmir Conference in April 2011 they expressed concern that the new criterion is not as effective as intended, thus once again the Committee of Ministers was invited to initiate work in order to make it more efficient in practice[47].

It is more than likely that the new criterion will not solve the problem of the extensive caseload. This purpose will be difficult to achieve as it is estimated that it may be applied only to a small number of pending cases. Among the applications lodged before Protocol 14 came into force, about 90% were found inadmissible under existing criteria and around 60% were repetitive cases (Lagoutte, 2007: p. 33). It should be agreed that, invoking the President Wildhaber's words, the introduced measure "will not turn off the tap; it will not even slow down the flow"[48]. It is thus necessary to consider whether it is needed at all. There are many opinions that the new criterion is useless, as in similar cases examined before the reform, the Court simply found them inadmissible under the remaining grounds[49]. As was demonstrated with regard to the above-cited cases of *Dudek* and *Almeida and Vasconcelos De Melo* it may be argued that the already existing criteria are sufficient and capable of covering the scope of the significant disadvan-

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[44] Applications nos. 18061/08 and 45922/09, decision of 29 March 2011.

[45] Some claim that too extensive interpretation of the new criterion can also be very detrimental to the Court's work as it may undermine its previous jurisprudence (See: Christoffersen, 2009: p. 541).

[46] High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, para. 9 c).

[47] High Level Conference on the Future of the European Court of Human Rights, Izmir Declaration, 26–27 April 2011, para. 4.

[48] Address by Luzius Wildhaber, President of the European Court of Human Rights, High Level Seminar on the Reform of the European Human Rights System, Oslo, 18 October 2004, http://www.echr.coe.int/NR/rdonlyres/A3C0B824-A785-4E64-BC6E-FE40B4060DD2/0/2004_Oslo_LW.pdf.

[49] See: http://strasbourgobservers.com/2010/08/25/de-minimis-non-curat-praetor-principle-in-the-court%E2%80%99s-practice.

tage as well[50]. This argument is all the more accurate when taking note of other human rights protection systems offering possibility of lodging individual petitions. Neither the human rights bodies within the United Nations (the Human Rights Committee, the Committee Against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of Persons with Disabilities), nor the Inter-American system contain such a restrictive measure. However, after coming to a conclusion that a case does not reveal a genuine human rights issue, it may be simply found inadmissible on the ground of "abuse of the right of submission"[51] or due to being "manifestly groundless or obviously out of order"[52]. Such situations took place, for instance, before the Human Rights Committee where the petitions concerning very trivial matters were rejected[53].

What is the most important though, is the fact that the new criterion has been strongly criticised for restricting the right to individual petition, fairly regarded as the foundation of the whole European human rights system (Cançado Trindade, 2011: p. 36–37; Paraskeva, 2007: pp. 210–214). The Strasbourg Court has always been considered a last resort for justice, available to everyone who has not received remedy at the domestic level. That is why it might seem astonishing that, as a result of the introduced changes, the Court may now evaluate the importance of human rights violations, finding some of them more significant than the others. Thus, it is difficult not to agree with opinions that "the full right to an international remedy for every human rights victim does not exist any longer" (Vanneste, 2005: p. 83).

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[50] There are also opinions that despite having such an opportunity, the Court did not use the new measure in very obvious cases (see: *Golemanova v Bulgaria*, application no. 11369/04, judgment of 17 February 2011); http://strasbourgobservers.com/2011/05/09/how-significant-is-the-%E2%80%98significant-disadvantage%E2%80%9D-of-the-new-admissibility-criterion-part-ii/.

[51] Art. 3 of the Optional Protocol to the International Covenant on Civil and Political Rights (G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302); art. 22(2) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res., 10 December 1984, United Nations Treaty Series, vol. 1465, p. 85); art. 2 and 4 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (G.A. Res., 6 October 1999, United Nations Treaty Series, vol. 2131, p. 83); art. 2 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (G.A. Res., 13 December 2006, Doc. A/RES/61/106, Annex II); art. 77(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (G.A. Res., 18 December 1990, United Nations Treaty Series, vol. 2220, p. 3; Doc. A/RES/45/158. Only the Committee on the Elimination of Racial Discrimination does not contain any clause that would allow for rejecting cases on similar ground, see: art. 14 of the Convention on the Elimination of All Forms of Racial Discrimination (G.A. Res., 21 December 1965, United Nations Treaty Series, vol. 660, p. 19). One must note however that the UN petition system significantly differs from the functioning of the European one since the Committees are not courts with the power of delivering binding judgments, as it takes place in the case of the European Court of Human Rights.

[52] Art. 47 c) of the American Convention of Human Rights ("Pact of San Jose", Organization of American States, Costa Rica 22 November 1969).

[53] *M.A.B., W.A.T. and J.-A.Y.T. v Canada*, Communication No. 570/1993, U.N. Doc. CCPR/C/50/D/570/1993 (1994); *H.J.H. v the Netherlands*, Communication No. 448/1991, U.N. Doc. CCPR/C/43/D/448/1991 (1991). The first case concerned the applicants asserting that the domestic anti-narcotic law prevents them from practising their beliefs, while in the second the applicant questioned an obligation to put a vignette on a registered car.

On the other hand however, whether we like it or not, important reforms are necessary in order to make the Court's work more efficient (Caflisch, 2006: p.410). What is more, no matter how understandable the critical comments are, the European Court should not be regarded as "small claims court", where the matters of the most trivial nature will find their solution (Hioureas: 2006, p. 733)[54]. Therefore, it is desirable for the Court to have such a tool to make it possible to assess whether the particular case raises a problem of sufficiently serious nature as to deserve an examination. The new measure equips the Court with such a "safety valve" which may help to deal with the flood of applications (Mantouvalou, Voyatzis, 2010: p. 335.) Certainly, it is for the Court to decide about how to use the available instruments in the most appropriate way.

In conclusion, for the above-mentioned reasons, even though it proved to be without any significant effect on the functioning of the Court so far, undoubtedly it is too early to criticise the new criterion entirely. Now, when at least the essential elements of the measure have been interpreted, it should be easier for the Court to apply it. Nevertheless, the future will show its true utility. It is to be hoped that the introduced criterion will not undermine the prestige of the Court, constituting such an important element in the European public order "on which the democratic stability of the continent greatly depends" (Lemmens, Vandenhole, 2005: p. 422).

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[54] See also: UK Prime Minister David Cameron speech on the European Court of Human Rights delivered on 25 January 2012, available at: http://www.number10.govuk/news/european-court-of-human-rights/.

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