ADMISSIBILITY DECISIONS

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6.1 The Decision on Admissibility

As discussed in Section 1.7.3 and in Part II of this *Handbook*, the Court, prior to communicating an application to the respondent Government, examines whether it is not clearly in admissible. An application (or parts thereof) deemed admissible at this early stage may then be communicated to the respondent Government. The Government may then submit its arguments against the application's admissibility. This section addresses the admissibility evaluation that takes place following the application's communication to the respondent Government.

Following the receipt of the respondent Government's observations on the admissibility and merits of the case and the applicant's observations in reply, and if no friendly settlement has been reached, the Court will again address the application's admissibility. In some cases the Chamber may decide to hold a hearing on admissibility of the application.[458] When the Court determines admissibility in a separate decision (i.e. when the joint procedure has not been applied or has been discontinued) such a decision will typically contain the following components:

- Name of the case and of the Section, application number and names of the judges of the Chamber,
- Date of introduction of the application and date of adoption of the decision,
- THE FACTS, consisting of THE CIRCUMSTANCES OF THE CASE: the details of the applicant, together with the facts as submitted by the parties, and, if deemed necessary, RELEVANT DOMESTIC LAW AND PRACTICE,
- COMPLAINTS,
- THE LAW,
- Conclusion(s) reached by the Chamber.

The facts as submitted by the parties will be summarised in the "Facts" part of the decision. If the facts of the case are in dispute, they will be set out separately. Furthermore, documents submitted to the Court by the parties together with their observations, in so far as they are relevant, may also be summarised in this part of the decision. Relevant domestic law and practice may be summarised before describing the applicant's complaints under the Convention.

458 See Section 1.14 above.

In the "Law" part of the decision, the respondent Contracting Party's objections to the admissibility of the complaints(s) and the applicant's responses thereto will be examined. If the Chamber concludes that the applicant has complied with the formal requirements of admissibility within the meaning of Convention Articles 34 and 35, most notably that he or she has exhausted the relevant domestic remedies and has lodged the application within the required six-month time limit, the Chamber will proceed to examine the merits of the case to establish whether (any of) the complaints are manifestly ill-founded. If the case is deemed not to be manifestly ill-founded, it will be declared admissible. As was the case at the communication stage, it is possible that some of the complaints are declared inadmissible and the remainder of the application admissible.

It must be pointed out here that a failure by the Government to object to the admissibility of an application may result in the Court declaring the application admissible. The reason for this is that communication of an application means, in effect, that the application was deemed not to be *prima facie* inadmissible. For example, in the case of *İpek v. Turkey* the Court observed that the respondent Government, beyond arguing in its observations that the "application should be declared inadmissible as being premature, imaginary and ill-founded" had not raised any other objections to its admissibility[459]. The Court, in concluding that the application was not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, stated that "[n]o other grounds for declaring it inadmissible have been raised by the Government and the Court sees no reason to do so of its own motion".[460]

6.2 Admissibility with the Government's Objections Joined to the Merits of the Case

As described elsewhere in this *Handbook*, Contracting Parties are under an obligation – referred to as a positive obligation – to carry out effective investigations into allegations of ill-treatment and killings.[461] They are also under an obligation under Article 13 to provide effective remedies to those whose Convention rights and freedoms have been violated. Criminal investigations which continue for long periods of time without any tangible results may be deemed by the Court to be ineffective investigations in

459 *İpek v. Turkey*, (dec.) no. 25760/94, 14 May 2002.
460 *Ibid.*
461 See in particular Section 10 below.

violation of the Contracting Party's positive obligations under Articles 2 and 3 of the Convention and/or of their obligations under Article 13 of the Convention to provide effective remedies. It follows, therefore, that the issue of exhaustion of remedies may be closely linked both to the issue of positive obligations and the issue of effective remedies within the meaning of Article 13 of the Convention.

The examination of the question of whether an applicant has exhausted domestic remedies (i.e. an admissibility issue) requires the Court in some cases – most notably cases in which complaints are made under Articles 2, 3, and/or 13 – to determine the effectiveness of investigations which have been continuing for long periods of time without yielding any results and the outcome of which the applicant has not awaited before lodging an application to the Court. In such circumstances, the Chamber will abstain from examining the issue in its admissibility decision, since it will want to avoid making a ruling at the admissibility stage about the ineffectiveness of an investigation which would in effect amount to a declaration of a violation of the positive obligation under Articles 2 or 3 and/or of the obligation under Article 13 to provide an effective remedy. Therefore, where the examination of the Government's objection based on non-exhaustion of a particular remedy is inextricably linked to the substance of the applicant's complaint, the Court will join that issue to the merits of the case and will deal with it in its judgment.[462]

A survey of the Court's case law illustrates that, in the great majority of applications in which the Court joined to the merits the Government's objection based on exhaustion of domestic remedies, the Contracting Parties involved were subsequently found to have breached their positive obligation to carry out an effective investigation. In its admissibility decision in the case of *Kişmir v. Turkey*, for example, the Court, noting that "the Government's preliminary objection as to the criminal procedure raised issues that are closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention", decided to join that preliminary objection to the merits.[463] When the Court subsequently concluded in its judgment that the authorities had failed to carry out an effective investigation into the applicant's complaints as required by Article 2, it logically rejected the Government's preliminary objection regarding exhaustion of domestic remedies, based on the finding that there were no effective domestic remedies for the applicant to exhaust.[464]

462 See, for example, *Khashiyev and Akayeva v. Russia*, cited above, § 115.
463 *Kişmir v. Turkey* (dec.), no. 27306/95, 14 December 1999.
464 *Kişmir v. Turkey*, cited above.

6.3 Inadmissibility and its Consequences

Inadmissibility decisions – whether adopted by a Chamber or a Committee – are final. The parties cannot request that the case be referred to the Grand Chamber pursuant to Article 43 of the Convention. Furthermore, a new application lodged by the applicant based on the same facts will be declared inadmissible pursuant to Article 35 § 2 (b) as being "substantially the same as a matter that has already been examined by the Court".[465] There are, however, two circumstances in which the Court may re-examine an application based on the same facts.

Firstly, and as mentioned earlier, if the application is declared inadmissible for non-exhaustion of a domestic remedy, after exhausting that particular domestic remedy, the applicant may submit a new application based on the same complaints. Exhaustion of the domestic remedy will result in a new domestic decision, which is regarded as "relevant new information" within the meaning of Article 35 § 2 (b). In any event, this will not amount to a re-examination of the complaints by the Court; in its inadmissibility decision it will have limited its finding to the exhaustion of domestic remedies, without addressing the merits of the case. However, this happens rarely in practice because by the time the Court examines the application and declares it inadmissible, the applicant will most likely have missed the time limit prescribed in national legislation within which to make use of the relevant remedy. As explained above, applicants are expected to comply with domestic rules of procedure when exhausting domestic remedies. Where an action instituted by an applicant, be it an appeal or otherwise, is dismissed because of his or her non-compliance with a procedural requirement, for instance the time limit within which to file the appeal, this will be regarded by the Court as a failure to exhaust the domestic remedy. The rationale for this is that, as a result of the applicant's non-compliance, he or she has not afforded the national authorities an opportunity to deal with the substance of the complaints.

The second possibility for the Court to re-examine an application occurs pursuant to the operation of Article 37 § 2 of the Convention. According to that provision,

> "[t]he Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course".

However, this possibility should by no means be perceived as an opportunity to appeal against a decision of inadmissibility. The Court will only restore an

465 See also Section 2.9 above.

inadmissible case to its list of cases if its decision on the admissibility was based on a factual error which is relevant to the conclusion or where new circumstances have arisen justifying the Court's resumption of the examination of the case. Such factual errors may include overlooking a letter introducing the application which affected the calculation of the six-month time limit or where the Court relied on a fact that was not correct[466].

6.4 Admissibility and its Consequences

If the case is declared (partially) admissible in a separate decision, the Court may ask the parties to respond to specific questions, to submit observations on a particular issue, or to submit additional evidence.[467] Additionally, the Court might instead inform the parties that it requires no further information or observations but that the parties may nevertheless submit any additional evidence or observations that they wish. Any material thus submitted by a party will be transmitted to the other party for information or for comment, but only if the Court deems it necessary. At this stage of the proceedings it is thus not automatic that an applicant will be allowed to respond to observations submitted by the respondent Government.

The information and explanations concerning observations, set out above in the section on communication of the application (Section 5), are also applicable to observations which the applicant may submit at this stage of the proceedings. However, applicants should take particular note of paragraph 13 of the "Practice Direction on Written Pleadings"[468] which stipulates that the parties' pleadings following the admission (admissibility) of the application should include:

i. a short statement confirming a party's position on the facts of the case as established in the decision on admissibility;

ii. legal arguments relating to the merits of the case;

iii. a reply to any specific questions on a factual or legal points put by the Court.

At this stage of the proceedings the scope of the case will have been determined by the Court's admissibility decision; that is to say, if only some of the

466 See Reid, p. 36.
467 *Khashiyev and Akayeva v. Russia*, cited above, § 11.
468 See Appendix No. 3.

complaints have been declared admissible, the applicant should not address the complaints declared inadmissible in his or her observations on the merits. Further observations on the merits give the applicant a final opportunity to support his or her case with adequate evidence and argumentation, and for this reason applicants are advised to avail themselves of this opportunity even if the Court does not specifically require further observations at this stage.[469]

469 See also Leach p. 81 *et seq.*