FRIENDLY SETTLEMENT AND STRIKE OUT (Articles 37-38)

8.1 Friendly Settlement

8.1.1 Introduction

The friendly settlement procedure under the Convention – very much like an out of court settlement in national legislation – affords the parties an opportunity to resolve an issue, usually on payment to the applicant by the respondent Contracting Party of a specified sum of money or on the basis of an undertaking by the respondent Contracting Party to provide appropriate resolution of the issue, or both. The basis for friendly settlements is found in Article 38 of the Convention,[502] the relevant parts of which provide as follows:

> "1. If the Court declares the application admissible, it shall
> …
> (b) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
> 2. Proceedings conducted under paragraph 1 b. shall be confidential."

Furthermore, Article 39 provides that if a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

It must be stressed at this juncture that, although Article 38 speaks of the Court placing itself at the disposal of the parties to secure a friendly settlement only after the application is declared admissible, it does not prevent the parties from making proposals at earlier stages of the Court's proceedings.[503] Indeed, according to Article 37 § 1, the Court may at any stage of the proceedings strike an application out of its list of cases on the basis of a friendly settlement. Moreover, and as described above, when the joint procedure is applied, parties are asked to state their positions on the subject of friendly settlement at the communication stage of the proceedings. The parties will be informed that, regarding the requirement of strict confidentiality under Rule 62 § 2, any submissions made in this respect should be set out in a separate document, the contents of which must not be referred to in any submissions made in the context of the contentious proceedings. If the parties let it be known that they are interested in reaching a settlement, the Registry will be prepared to make a suggestion for an appropriate arrangement.

502 See also Rule 62 of the Rules of Court.
503 Obviously not before the application has been communicated to the respondent Contracting Party.

If a settlement is reached before the application has been declared admissible, the Court will strike the case out in a decision. Otherwise, it will do so in a judgment.

If the Court decides to examine the admissibility and merits of a case at the same time, in accordance with Article 29 § 3 of the Convention and Rule 54A, the Registrar of the relevant Chamber, at the time of communication the case[504] will ask the respondent Government to inform the Court in its observations on admissibility and merits of its position regarding friendly settlement of the case and any proposals it may wish to make. If the respondent Government has made no proposal for friendly settlement by the time it submits its observations, when forwarding the Government's observations to the applicant, the Registrar will ask the applicant to indicate his or her position regarding a friendly settlement of the case.

8.1.2 Friendly Settlement Declaration

The terms of a friendly settlement will be set out in a declaration which will be signed by the parties and submitted to the Court. The parties' declarations in the case of *Sakı v. Turkey* are reproduced in the *Textbox* below and may serve as an illustration of the form and contents of friendly settlement declarations in a case which concerns complaints under Article 3 of the Convention.

On receipt of the declarations, the Court will examine the terms with a view to establishing whether respect for human rights as defined in the Convention and the protocols is upheld in the declaration; pursuant to Article 37 § 1 (c), the Court may continue the examination of the application if, as mentioned above, respect for human rights so requires and in spite of the parties' intention to settle the case.

A friendly settlement declaration signed by a Government may include the Government's expression of regret for the actions which have led to the bringing of the application. For example, in the case of *Sakı v. Turkey*, the respondent Turkish Government submitted in its declaration that it

> "…regret[ted] the occurrence, as in the present case, of individual cases of ill-treatment by the authorities of persons detained in custody notwithstanding existing Turkish legislation and the resolve of the Government to prevent such occurrences."

504 If no decision has been taken by the Court to examine the case in a joint procedure, at the time of forwarding the admissibility decision.

Furthermore, the Turkish Government also accepted in the same declaration that:

> "recourse to ill-treatment of detainees constitutes a violation of Article 3 of the Convention"

and undertook:

> "to issue appropriate instructions and adopt all necessary measures to ensure that the prohibition of such forms of ill-treatment – including the obligation to carry out effective investigations – is respected in the future."[505]

Governments may be willing to settle cases for a number of reasons. For example, they may wish to settle a case in which complaints are based on national legislation which the Court has previously identified as incompatible with the Convention or which the respondent Contracting Party has itself acknowledged is incompatible with the Convention. For example, in the case of *Zarakolu v. Turkey*, the applicant, owner of a publishing company, was convicted under the Prevention of Terrorism Act for having disseminated propaganda in support of a terrorist organisation in a book published by her company. The application lodged by the applicant was struck out of the Court's list of cases as the parties subsequently reached a settlement on the basis of a declaration made by the Turkish Government which included, *inter alia*, the following acknowledgement:

> "The Government note that the Court's rulings against Turkey in cases involving prosecutions under the provisions of the Prevention of Terrorism Act relating to freedom of expression show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. The Government undertake to this end to implement all necessary reform of domestic law and practice in this area, as already outlined in the National Programme of 24 March 2001".[506]

As pointed out above, friendly settlement declarations may include terms pursuant to which a respondent Government may undertake to take specific action to resolve the issue. For example, the case of *K.K.C. v. the Netherlands*, which concerned the intended expulsion of the applicant – a Russian national of Chechen origin – to Russia, where the applicant argued there was a real risk he would be subjected to treatment contrary to Article 3 of the Convention, was struck out on the basis of the settlement reached between the parties. Pursuant to the terms of the declaration, the respondent

505 *Sakı v. Turkey*, cited above, § 12.1
506 *Zarakolu v. Turkey*, no. 32455/96, 27 May 2003, § 19.

Government undertook to issue the applicant a residence permit without restrictions.[507]

Parties are expected to stipulate in their respective declarations that the settlement will constitute the final resolution of the case and that they will not request the referral of the case to the Grand Chamber under Article 43 § 1 of the Convention.[508]

Textbox xi Example of Friendly Settlement Declaration

THE PARTIES' DECLARATIONS IN THE CASE OF *SAKI v. TURKEY* (No. 29359/95)

THE GOVERNMENT'S DECLARATION

I declare that the Government of the Republic of Turkey offer to pay *ex gratia* to Ms Özgül Saki the amount of 55,000 French francs with a view to securing a friendly settlement of the application registered under no. 29359/95. This sum, which also covers legal expenses connected with the case, shall be paid, free of any taxes that may be applicable, to a bank account named by the applicant. The sum shall be payable within three months from the date of delivery of the judgment by the Court pursuant to Article 39 of the European Convention on Human Rights. This payment will constitute the final resolution of the case.

The Government regret the occurrence, as in the present case, of individual cases of ill-treatment by the authorities of persons detained in custody notwithstanding existing Turkish legislation and the resolve of the Government to prevent such occurrences.

It is accepted that the recourse to ill-treatment of detainees constitutes a violation of Article 3 of the Convention and the Government undertake to issue appropriate instructions and adopt all necessary measures to ensure that the prohibition of such forms of ill-treatment – including the obligation to carry out effective investigations – is respected in the future. The Government refer in this connection to the commitments which they undertook in the Declaration agreed on in Application no. 34382/97 and reiterate their resolve to give effect to those commitments. They note that new legal and administrative measures have been adopted which have resulted in a reduction in the occurrence of ill-treatment in circumstances similar to those of the instant application as well as more effective investigations.

507 *K.K.C. v. the Netherlands*, no. 58964/00, 21 December 2001, § 26.
508 See Section 9.2 below.

The Government consider that the supervision by the Committee of Ministers of the execution of Court judgments concerning Turkey in this and similar cases is an appropriate mechanism for ensuring that improvements will continue to be made in this context. To this end, necessary co-operation in this process will continue to take place.

Finally, the Government undertake not to request the reference of the case to the Grand Chamber under Article 43 § 1 of the Convention after the delivery of the Court's judgment.

THE APPLICANT'S DECLARATION

I note that the Government of Turkey are prepared to pay *ex gratia* the sum of 55,000 French francs covering both pecuniary and non-pecuniary damage and costs to the applicant, Ms Özgül Saki, with a view to securing a friendly settlement of application no. 29359/95 pending before the Court. I have also taken note of the declaration made by the Government.

I accept the proposal and waive any further claims in respect of Turkey relating to the facts of this application. I declare that the case is definitely settled.

This declaration is made in the context of a friendly settlement which the Government and the applicant have reached.

I further undertake not to request the reference of the case to the Grand Chamber under Article 43 § 1 of the Convention after the delivery of the Court's judgment.

8.1.3 Enforcement of Undertakings Expressed in a Friendly Settlement Declaration

According to Article 46 § 1 of the Convention, Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Furthermore, paragraph 2 of the same provision stipulates that final judgments of the Court shall be transmitted to the Committee of Ministers which will supervise their execution.[509] It follows, therefore, that the Committee of Ministers is responsible for the supervision of a judgment in which the case was struck out on the basis of a friendly settlement. In case of a failure by the respondent Government to uphold the terms of its friendly settlement declaration, applicants may seek assistance from the Committee of Ministers.

When a friendly settlement is concluded before the case is declared admissible, the case will be struck out in a decision rather than a judgment. In such cases problems may arise since Article 46 of the Convention speaks only of the Contracting Parties' obligation to abide by judgments, and does not mention decisions. However, this "loophole" will be eliminated following the entry into force of Protocol No. 14, which amends Article 39 such that the Court will be able to place itself at the disposal of the parties with a view to securing a friendly settlement at any stage of the proceedings. Furthermore, if a friendly settlement is concluded, the Court will strike the case out by means of a decision and not a judgment, regardless of whether that settlement was reached before or after the case was declared admissible. Such decisions will be transmitted to the Committee of Ministers, which will supervise the execution of the terms of the friendly settlement as set out in the decision.

8.2 Strike Out

Article 37 of the Convention provides as follows:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> a. the applicant does not intend to pursue his application; or
>
> b. the matter has been resolved; or
>
> c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

509 See Section 9.3 below.

> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
>
> 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course".

An application may be struck out of the Court's list of cases by a Committee[510] or by a Chamber.

8.2.1 Absence of Intention to Pursue the Application (Article 37 § 1 (a))

Article 37 § 1 of the Convention provides for an applicant's withdrawal of his or her case. However, in dealing with a request for withdrawal, the Court must first examine whether respect for human rights as defined in the Convention and the Protocols nevertheless requires that the Court continue the examination of the application. For example, the case of *Tyrer v. the United Kingdom* concerned the applicant's complaint regarding corporal punishment under Article 3 of the Convention. The applicant informed the Commission that he wished to withdraw his application. However, the Commission decided it could not accede to this request, "since the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved".[511] The applicant took no further part in the proceedings but the Court examined the complaints *ex officio* and concluded that the applicant had been subjected to degrading treatment in violation of Article 3.[512]

The Court will also strike an application out if the applicant fails to respond to letters and/or fails to submit his or her observations and any other documents requested by the Court. The applicant's inactivity is interpreted as a lack of intention on his or her part to pursue the case. Before striking the case out in such a situation, the Court will give the applicant adequate opportunities to reply and will warn him or her in a letter – sent by registered post – of the possibility that the case might be struck out of the Court's list.[513]

The case of *Nehru v. the Netherlands* illustrates the fact that in situations where an applicant is unable to contact the Court over an extended period of time – in this case almost 3 years – the Court is likely to consider the application to have been abandoned. In *Nehru*, the applicant, a Sri Lankan national

510 Article 28 of the Convention.

511 *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978, § 21.

512 *Ibid.*, § 35.

513 See, *inter alia*, *Starodub v. Ukraine* (dec.), no. 5483/02, 7 June 2005, in which the applicant failed to respond to the Court's letter for more than a year and a half.

whose request for an interim measure under Rule 39 of the Rules of Court to suspend his expulsion had been rejected by the Court on 10 November 1999, was deported to Canada by the Netherlands authorities on 18 November 1999. A day later, on 19 November 1999, the applicant was deported from Canada to Sri Lanka. Nothing further was heard from him either by his lawyer or by the Court. In its decision of 27 August 2002, the Court noted that it could neither find it established that the applicant no longer wished to pursue his application nor that the matter had been resolved. It went on to state the following:

> "Although the Court would not exclude that an expulsion carried out speedily might frustrate an applicant's attempts to obtain the protection to which he or she is entitled under the Convention, the Court notes that there is no indication that the applicant, during the period that has elapsed since his expulsion from the Netherlands, has sought in one way or another to contact his lawyer in the Netherlands in relation to his application. In these circumstances, the Court cannot but conclude that there is no indication whatsoever that the applicant intends to pursue his application. In reaching this conclusion, the Court has taken into account its competence under Article 37 § 2 of the Convention to restore the case to its list of cases if it considers that the circumstances justify such a course".[514]

8.2.2 Resolution of the Matter (Article 37 § 1 (b))

In its judgment in the case of *Ohlen v. Denmark*, the Court stated that:

> "[i]n order to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b) or that for any other reason established by the Court, it is no longer justified to continue the examination of the application within the meaning of Article 37 § 1 (c), and that there is therefore no longer any objective justification for the applicant to pursue his application, the Court considers that it must examine whether the circumstances complained of directly by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed".[515]

Thus, in a case where the applicant complains of his or her impending expulsion to a country where he or she runs a real risk of being subjected to ill-treatment in violation of Article 3, the Court will conclude that the matter at issue has been resolved if the respondent Contracting Party subsequently issues the applicant a residence permit thereby eliminating the possibility of deportation. After all, in such a situation, where the applicant no longer faces expulsion, the risk of ill-treatment also no longer exists.[516]

514 *Nehru v. the Netherlands* (dec.), cited above.
515 See *Ohlen v. Denmark*, no. 63214/00, 24 February 2005, § 26.
516 See, for example, *Sokratian v. the Netherlands* (dec.), no. 41/03, 8 September 2005.

8.2.3 Strike Out "for any other reason" (Article 37 § 1 (c))

This provision gives the Court a large measure of discretion and may, for example, be used in a situation where the applicant wishes to pursue his or her application even though in the view of the Court this is no longer necessary. Thus, the Court struck out three cases introduced by Iranian nationals and their families in which they complained that their expulsion to Iran by the Turkish Government would expose them to treatment contrary to Articles 2, 3, and 8 of the Convention. However, after submitting their applications they moved to and settled in Finland, Norway, and Canada respectively. They nevertheless informed the Court that they wished to pursue their applications and maintained that, notwithstanding their resettlement in third countries, the Court should still examine their complaints on the merits. However, given that they no longer faced forced return to Iran, the Court found that the applicants could no longer claim to be victims within the meaning of Article 34 of the Convention and decided that it was no longer justified to continue the examination of the applications.[517]

The Court has also used its powers to strike an application out on the basis of so-called 'unilateral declarations' submitted by respondent Governments, usually following the applicants' rejection of a respondent Government's offer of friendly settlement. For example, in the case of *Akman v. Turkey*, which concerned the killing of the applicant's son allegedly by members of the security forces, the parties had been unable to reach a friendly settlement. Five days before the Court was to hold a fact-finding hearing in Turkey to establish the disputed facts of the case,[518] the respondent Government submitted to the Court a declaration on the basis of which it invited the Court to strike the application out of its list of cases. In the declaration, the Turkish Government expressed its regret for the deaths which resulted from excessive use of force, as was the case with the death of the applicant's son, and offered to pay the applicant 85,000 GBP. The applicant, for his part, asked the Court to reject the Government's initiative and stressed, *inter alia*, that the proposed declaration omitted any reference to the unlawful nature of the killing of his son. In upholding the respondent Government's request, the Court stated in its judgment that it had:

> "carefully examined the terms of the Government's declaration. Having regard to the nature of the admissions contained in the declaration as well as the scope and extent of the various undertakings referred to therein, together with the amount of compensation proposed, the Court considers

517 See, respectively, *M.T. v. Turkey* (dec.), no. 46765/99, 30 May 2002; *A.E. v. Turkey* (dec.), no. 45279/99, 30 May 2002; *A.Sh. v. Turkey* (dec.), no. 41396/98, 28 May 2002.

518 See Section 11.3 below for information on fact-finding missions.

> that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)) … The Court notes in this regard that it has [previously] specified the nature and extent of the obligations which arise for the respondent State in cases of alleged unlawful killings by members of the security forces under Articles 2 and 13 of the Convention…".[519]

This same reasoning was subsequently applied by the Court in striking out the cases of, *inter alia*, *Haran v. Turkey*, *Toğcu v. Turkey*, and *T.A. v. Turkey.* These three cases concerned allegations that close relatives of the applicants' had been disappeared by security forces, and in each case the applicants asked the Court to reject the Government's unilateral declaration.[520] However, in *T.A. v. Turkey* the Grand Chamber subsequently decided that the application should not have been struck out because, in view of the gravity of the violation at issue, the Government's declaration offered an insufficient basis for holding that it was no longer justified to continue the examination of the application. In reaching that conclusion the Court considered the following:

> "The Court accepts that a full admission of liability in respect of an applicant's allegations under the Convention cannot be regarded as a condition *sine qua non* for the Court's being prepared to strike an application out on the basis of a unilateral declaration by a respondent Government. However in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is prima facie evidence in the case-file supporting allegations that the domestic investigation fell short of what is necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers in the context of the latter's duties under Article 46 § 2 of the Convention, an investigation that is in full compliance with the requirements of the Convention as defined by the Court in previous similar cases... As the unilateral declaration made by the Government in the present case contains neither any such admission nor any such undertaking, respect for human rights requires that the examination of the case be pursued pursuant to the final sentence of Article 37 § 1 of the Convention…".[521]

519 *Akman v. Turkey*, no. 37453/97, 26 June 2001.

520 *Haran v. Turkey*, no. 25754/94, 26 March 2002; *Toğcu v. Turkey* (strike out), no. 27601/95, 9 April 2002; *T.A. v. Turkey*, no. 26308/95, 9 April 2002. The judgments in these cases have led to intense criticism of the Court; see Leach p. 79 *et seq.*

521 See *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26308/95, 6 May 2003, §§ 84-85. The Grand Chamber subsequently examined the merits of the case and adopted its judgment on the merits on 8 April 2004. Also, on 1 March 2005 the Court decided, pursuant to Article 37 § 2 of the Convention, to restore the above mentioned *Toğcu v. Turkey* case to its list of cases and adopted its judgment on the merits of the case on 31 May 2005; see §§ 8-14 of the Court's judgment of 31 May 2005. A request made by the Turkish Government in another case which also concerned the disappearance of the applicant's son, to strike the case out on the basis of a unilateral declaration, was rejected by the Court in the light of the principles laid down in the Grand Chamber's judgment in the case of *Tahsin Acar v. Turkey*; see *Akdeniz v. Turkey*, no. 25165/94, 31 May 2005, § 8.

Cases raising less serious issues may nevertheless still be struck out on the basis of a unilateral declaration submitted by a respondent Government despite the applicant's opposition.[522]

8.3 Concluding Remarks

Given the very heavy workload of the Court, the friendly settlement procedure affords the Court an opportunity to clear up its docket in order to focus on cases which justify merits decisions. Nevertheless, as pointed out above, the Court has powers to review the undertakings in friendly settlement declarations and may refuse to strike a case out if it considers that respect for human rights as defined in the Convention and the Protocols requires an examination on the merits.

The importance and the time-saving potential of friendly settlements has been identified in a report drawn up by Lord Woolf, former Lord Chief Justice of England and Wales and member of the Group of Wise Persons established by the Council of Europe's Third Summit in Warsaw in May 2005. The purpose of the report was to draft a comprehensive strategy to secure the long-term effectiveness of the European Convention on Human Rights and its control mechanism. Lord Woolf's report recommends that the Court establish a specialist "Friendly Settlement Unit" in the Registry, to initiate and pursue proactively a greater number of friendly settlements.[523] The report invites the Court to consider whether it would be desirable or appropriate to strike out an application under Article 37 § 1 (c) on the grounds that the applicant has unreasonably refused to agree to what the Court considers to be a satisfactory friendly settlement offer. According to Lord Woolf, given the safeguards provided by Article 37, this would be an appropriate use of the Court's powers to strike out applications and would give greater weight to friendly settlement negotiations, and would ensure that friendly settlement offers were only rejected for good reason.

In cases concerning allegations of ill-treatment within the meaning of Article 3 of the Convention, applicants may negotiate with respondent Governments to obtain specific undertakings, such as an undertaking to carry out an effective investigation into his or her allegations of ill-treatment. If the respondent Government refuses to carry out such an investigation as part of the friendly

522 See *Van Houten v. the Netherlands*, no. 25149/03, 29 September 2005.
523 The report may be accessed at www.echr.coe.int

settlement agreement, the applicant may argue that striking the case out solely on the basis of monetary payment represents insufficient redress and request that the Court continue to examine the merits of the case.[524] In this context it must be reiterated that civil or administrative proceedings which are aimed solely at awarding damages rather than identifying and punishing those responsible are not regarded as effective remedies in the context of Article 3 complaints.[525]

524 The same argument would also be relevant if the Court decides to strike the case out on the basis of a unilateral declaration submitted by the respondent Government and despite the applicant's rejection of the settlement offer.

525 See *Tepe v. Turkey* (dec.), cited above in Section 2.4.2 (d) (i).