THE INVISIBLE MAJORITY: THE UNSUCCESSFUL APPLICATIONS AGAINST THE CZECH REPUBLIC BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS[1]

Ľubomír Majerčík

Abstract: In 2009 the European Court of Human Rights (ECtHR) delivered 3 judgments against the Czech Republic while rejecting 765 applications. The number of rejected applications is nearly the same as the number of newly introduced ones adding up to the insurmountable backlog of pending cases. Most often the attention is focused on judgments, leaving this majority of applications unnoticed. The failure to examine the rejected applications has two adverse effects. First, it might be a contributing factor to the expectation gap, i.e. the applicants, not knowing their small chances of success, lodge constantly raising number of applications before the ECtHR. According to their letters, the ECtHR is seen as the only avenue that can bring the "real" justice. At the same time, on numerous occasions the applicants seem not to be aware of the admissibility criteria. Attempting to bridge this expectation gap and to shed more light on the formal requirements this paper deals precisely with this group of "invisible" cases. Based on a small sample of applications it explores the "typical application", motives behind it and the most common reasons for rejection.

Resumé: Mediální i odborná pozornost věnující se výstupům Evropského soudu pro lidská práva se zaměřuje výhradně na jeho rozsudky. Ty ale představují pouhý zlomek jeho práce, neboť valná většina stížností je odmítnuta už ve fázi přijatelnosti. Předložený článek se zaměří právě na tuto „neviditelnou" většinu stížností pocházejících z České republiky. Snaží se pomocí zkoumání malého vzorku stížností odpovědět na tři otázky – kdo jsou typičtí stěžovatelé, s jakými stížnostmi se na Soud obracejí a z jakých důvodů bývají odmítáni. Odpovědi na tyto otázky by měly pomoci zmírnit přehnaná očekávání ze strany stěžovatelů, jež často vkládají své veškeré naděje do práce Soudu. Zároveň by jim měly pomoci důkladně se zaměřit na fázi přijatelnosti v řízení před Soudem.

Key words: European Court of Human Rights, backlog, admissibility requirements.

On the author: Ľubomír Majerčík is a lecturer and a PhD candidate at the Faculty of Social Sciences, Masaryk University Brno. He is also a co-founder of the Czech Human Rights Centre at the same university. This paper draws on his own personal experience as an assistant lawyer in the Registry of the ECtHR where he has been working since 2007. It was written in my private capacity and the opinions expressed are mine.

[1] This article was inspired by a similar article written by G. Dikov: The ones that lost: Russian cases rejected at the European Court, 7 December 2009, http://www.opendemocracy.net/od-russia/grigory-dikov/ones-that-lost-russian-cases-rejected-at-european-court. I am indebted to Jan Kratochvil for his contagious enthusiasm and indispensable research for this article.

Introduction

In principle there are two occasions when the Czech media become aware of the European Court of Human Rights. First, when a controversial judgment finding a violation is delivered such as *D.H. and Others v. the Czech Republic*, [GC], no. 57325/00, 13 November 2007, ECHR 2007… in which the ECtHR held that the prohibition of discrimination was violated in conjunction with the right to education on account of the fact that the applicants had been assigned to special schools as a result of their Roma origin. Second, when a political leader or a "celebrity" refer to the ECtHR as the last and the only resort to afford redress to their grievances irrespective whether this person has even brought an action before the domestic courts.

Yet the handful of judgments handed down per year regarding the Czech Republic is only the proverbial tip of the iceberg. The overwhelming and often forgotten majority of the applications lodged before the ECtHR against the Czech Republic is plainly rejected. In fact, from 1992[2] to 2008 the ECtHR delivered 144 judgments (2%) while rejecting 6101 applications as inadmissible or struck out.[3] In 2009 765 applications were declared inadmissible or struck out as compared to 3 (0,4%) judgments rendered. When it comes to estimates for the near future out of 2074 pending applications at the end of 2009 1811 (87%) applications are awaiting first examination before the Committee of three judges[4] which could roughly correspond to the number of future rejected applications. The situation is no different as regards other countries, the official statistics show that for Slovakia 78% of applications were preliminary referred to the Committee, 79% for Poland, 91% for Germany. In sum, the chances of success before the ECtHR are extremely slim, when it comes to the Czech Republic they range from 0,4% to 13%.

Who files the applications?

Who is the typical applicant approaching the ECtHR who will most probably receive a letter announcing that the Committee of three judges rejected his application? What are the reasons behind? For modelling such a typical applicant a sample of 200 random applications from years 2006–2008 was chosen. They were all rejected as inadmissible, data contained in them are accessible to the public

[2] The Czech and Slovak Federal Republic was a Contracting Party from 18 February 1992 to 31 December 1992. Following declarations made by the Czech Republic and Slovakia of their intention to succeed the Czech and Slovak Federal Republic and to consider themselves bound by the European Convention of Human Rights (Convention) as of 1 January 1993 the Committee of Ministers decided on 30 June 1993 that these new States are to be regarded as Parties to the Convention with effect from 1 January 1993. As a successor State the Czech Republic is bound by the Convention since 18 February 1992.

[3] Country Statistic, 1 January 2009, pp. 32-34, http://www.echr.coe.int/NR/rdonlyres/B21D260B-3559-4FB2-A629-881C66DC3B2F/0/CountryStatistics01012009.pdf. However it is not overly precise to compare the number of judgments on the one hand to the number of rejected applications on the other as the judgments might have stemmed from more than one application.

[4] Analysis of Statistics 2009, p. 23, http://www.echr.coe.int/NR/rdonlyres/89A5AF7D-83D4-4A7B-8B91-6F4FA11AE51D/0/Analysis_of_statistics2009.pdf.

with the exception of the detailed rulings on the admissibility. Consequently, only a generalized summary of the reasons for rejection of the cases may be presented. To my knowledge such statistics has not yet been published in scholarly literature regarding the Czech Republic. Therefore this contribution will inevitably suffer from shortcomings.

The 200 applications were filed by 215 natural persons; it is not uncommon that the applications are submitted by couples or a wider family. In addition, 11 applications (6%) were lodged by legal persons and one by a NGO. The prevalence of men as applicants is undisputed: men filed 150 applications whereas women filed 65 of them (30%). This fact cannot be explained by a high proportion of applications submitted from prisons as in the Russian context (Dikov 2009) because only 25 applications (12%) were filed from a prison.

The average age of an applicant is 54, the youngest applicant from the examined group was 18, and the oldest one was 96 at the time of lodging the application. Although under Rule 36 § 1 of the Rules of Court the legal representation is not initially obligatory, legal representatives submitted 80 applications (40%) on behalf of their clients. Yet the outcome remained the same. It would, however, require a detailed research into the cases which made it to the Chamber to determine the correlation between the legal representation and the success rate at the admissibility stage. The applicant should be represented no later than following notification of the application to the respondent Contracting Party,[5] at the same time the President of the Chamber may grant free legal aid to the applicant.[6]

When it comes to the employment status of the applicants 69 of them (32%) were employed at the time of the introduction of the application, one of the applicants even specified that he used to be a drug dealer. Ten applicants were unemployed (5%), 77 (36%) noted that they were retired,[7] 25 were serving their prison sentence.[8]

Where did they come from? Thirty-five (16%) applicants lived in Prague and 36 applicants came from other large cities with more than 100 thousand inhabitants. Besides Prague the Moravskoslezský Region was the most popular region (25 applications, 12%) and Ostrava was second most popular city – permanent address among applicants. This is understandable given the region's high crime rate which leads to a high number of criminal proceedings. Leaving aside Jihomoravský Region (21 applications) with the second largest town Brno, one can discover an interesting trend showing the increase of applications towards the west part of the country: 5 applicants came from Vysočina, Olomoucký, Zlínský and Královéhradský

[5] Rule 36 § 2 of the Rules of Court, July 2009.

[6] Rule 91 § 1, *ibid*.

[7] As only a fraction of the retired elaborated further on their employment status, the retired status was left as a separate group and no one from this group was included in any other although a few of them were employed. This group covers also applicants who have been drawing disability pension.

[8] Again, this was left as a separate category as only a minor part of this group elaborated on an employment status. It is to be noted that the total sum does not match the overall number of applicants because not all the applicants filled the forms properly.

Regions each while 12 applicants came from Jihočeský and Plzeňský Region respectively, 8 from Ústecký and Liberecký Regions each. There were 27 foreigners who brought applications against the Czech Republic. Often they were born in the Czech Republic or Czechoslovakia, fled the communist regime and came back to initiate restitution proceedings.

What are the applicants complaining of?

What was the most often subject matter of the examined applications? One can identify three recurrent themes. First, it is the length of proceedings. Although a new remedy to deal with lengthy proceedings was introduced in 2006 which was recognized as an effective remedy by the ECtHR's case-law in 2007, none of the examined applicants exhausted the remedy correctly. The case-law is settled also in case of another broad group – restitution proceedings. Since *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, 13 December 2000, ECHR 2000-II and *Kopecký v. Slovakia* [GC], no. 44912/98, 28 September 2004, ECHR 2004-IX it is established that the ECtHR is not competent to examine the circumstances of the expropriation of property before the date of the entry into force of the Convention or the continuing effects produced by it up to the present date. There is also no general obligation on the Contracting States to restore property; the restitution legislation did not generate a proprietary interest amounting to an "asset" attracting the protection of Article 1 of Protocol No. 1 without a judicial determination. On the other hand, the recent judgment *Pešková v. the Czech Republic,* no. 22186/03, 26 November 2009 shows that even the recent restitution proceedings can result in a violation of the Convention rights.

The third group of applications concerns fairness of criminal proceedings coupled sometimes with allegedly unlawful detentions. The recent judgment *Crabtree v. the Czech Republic,* no. 41116/04, 25 February 2010 is an example of a successful application regarding the legality of detention. As for the specific rights, the applicants invoke Article 6 of the Convention (fair trial) and Article 1 of Protocol No. 1 (protection of property) most often (150 applications, 75% and 46 applications, 23% respectively. Further it is Article 13 (effective remedy) and Article 8 (respect for private and family life). On the other hand the applicants did not resort to Article 9 (freedom or thought/religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) at all.

Why are the applications rejected?

Once the application is submitted, like the ancient Heracles who had to overpower the three-headed Cerberus guarding the gates of underworld, the applicant has to convince at least one judge of the three-judge Committee that his complaints conform to the admissibility requirements. This is the stage where most of the applications fail. Under Article 28 of the Convention the Committee may,

by a unanimous vote, declare inadmissible or strike out an application where such a decision can be taken without further examination.[9]

Usually the applicants raise challenges under several Articles of the Convention or its Protocols, therefore, a single application may be found inadmissible for numerous reasons. Among the grounds for rejection the most common was rejection of an application as being "manifestly ill-founded" (91 cases, 46%). This explanation covers various different scenarios. For example, an individual may complain under Article 6 that the domestic proceedings have been lengthy. In reality, however, the proceedings might have lasted for half a year before the first-instance and the appellate court.[10] The applicant may also maintain under Article 13 that there is no remedy for dealing with the lengthy proceedings. This category is also used when different aspects of an application were rejected on various different grounds. The letter to the applicant will only state that the case had failed on account of it being "manifestly ill-founded".

The second most common reason for rejection is non-exhaustion of domestic remedies; it was encountered in 68 applications (34%). It applies both to cases in which the applicants or the legal representatives do not resort to the remedies recognized as effective by the ECtHR for addressing that particular concern (e.g. examination before the Ministry of Justice for the purpose of the length of proceedings) or when the remedy is exhausted incorrectly (e.g. the constitutional appeal is submitted outside the required statutory period). Thirty applications (15%) were rejected as incompatible with the provisions of the Convention or the protocols thereto under Article 35 § 3. This concerns mainly restitution cases and cases in which Protocol 12, which the Czech Republic had not yet ratified, was invoked. The application was submitted outside the six-month time limit under Article 35 § 1 in 28 cases (14%).

Other grounds of inadmissibility are quite rare. Two applications were rejected for abuse of rights (Article 35 § 3) and one was rejected as it was substantially the same as a matter already been submitted to the UN Human Rights Committee (Article 35 § 2 b). Besides the "manifestly ill-founded" grounds for rejection the rest is much more straightforward and with knowledge of Article 35 of the Convention and the ensuing case-law they could be easily avoided. On numerous occasions the applications raised very serious and substantiated issues, however, on account of e.g. missing the six-month time-limit they were rejected.

It is significant that the applicants rarely refer to the case-law of the ECtHR in their applications. The case-law is being mentioned neither for the purposes of the admissibility nor for the purposes of the merits of the case. This fact shows that it is not because the applicants would underestimate the admissibility stage but because the case-law is not known or found useless for the argumentation.

[9] None application was struck out, these grounds of rejection is extremely rare in general. This happens often when the applicant dies and none legal successor wants to pursue the application or when the applicant ceases cooperation with the ECtHR.

[10] In fact one applicant indeed complained that his proceedings were held very quickly.

Conclusion

Numerous questions remain open for further research – why is it that men are much more active in applying? Research on the applicants who succeeded is also due. What are the "ingredients" that make the application successful? Is it the serious facts, complex domestic legislation in question or the legal representation that increase the applicants' chances?

The profile of the typical applicant cannot be changed. It will be highly probably an employed man in his fifties coming from Prague and filing a complaint under Article 6. The other part of the equation – the rejection of the most of the applications – can be changed drastically. The applicants should be well aware of the fact that their chances are very small and that the processing of their application may take a year or two. Although there is still no requirement to lodge the application in one of the official languages of the Council of Europe, although there is no fee and no obligation to be represented, which all make the impression of an easy, informal procedure, around 90% of the applications fail at the admissibility stage. With Protocol 14 coming into effect in June 2010 the new admissibility criteria will make the situation of applicants and their representatives even more challenging. The legal representatives should get thoroughly acquainted with the admissibility criteria in Article 35 of the Convention, in fact every applicant can find them and their explanation on the website of the ECtHR in Czech (and will receive them in an information pack by mail). If the criteria are properly met, the applicants' chances to succeed will increase and the recent huge backlog of cases might significantly drop.