

Who Will Protect Our Rights from the European Court of Human Rights?

Lawyer Mihail Ekimdjiev¹

Lately, both citizens and the media have become ever more insistent posing the question: "What is going on at the European Court of Human Rights (ECtHR, the Court)?" There are even calls for protest against "the government intervention in solving cases against Bulgaria" on the web. Tension escalated provoked by the "circular letters" the Strasbourg Court sent as New Year greetings to hundreds of Bulgarians, telling them that their applications have been declared inadmissible. Those "copy-paste letters" feature laconic ambiguity and bureaucratic arrogance. They do not contain justification indicating specific deficiencies of the rejected applications. Instead, on three lines literally, dismissively state that "*the admissibility criteria laid down in Articles 34 and 35 of the Convention are not fulfilled*". Any logical decryption of this mysterious message is impossible because Article 34 and Article 35 contain both basic admissibility conditions of individual complaints and many subconditions and specific hypotheses addressed differently by the Court. The plot thickens by the fact that some of the applications declared inadmissible are legally and factually similar to "Bulgarian" cases decided by the same court in favor of the applicants.

¹ Mihail Ekimdjiev is a lawyer practicing in Bulgaria. He is the founder and Chairman of the Board of Association for European Integration and Human Rights (www.eurorights-bg.org) and author of numerous articles on human rights issues. Lawyer Ekimdjiev participated in the preparation of over 1200 (one thousand two hundred) applications to the European Court of Human Rights. Some ECtHR Judgments delivered on those applications have provoked public debate and radical changes in the national law, as well as new trends in the ECtHR case law. Emblematic in this respect are the following Judgments: Association for European Integration and Human Rights and Ekimdjiev v. Bulgaria (Judgment of 28.06.2007, Application № 62540/00); Nencheva and Others v. Bulgaria (Judgment of 18.06.2013, Application № 48609/06); Gutsanov v. Bulgaria (Judgment of 15.10.2013, Application № 34529/10); Bulves AD v. Bulgaria (Judgment of 22.01.2009 on Application № 3991/03). (In some of the judgments the name of the author is written as Mihail Ekimdzhiev.)

The logical question "Why?" has been preventively parried with the ultimate tone of the last sentence of the letters "... *the Secretariat of the Court shall not provide further information on the meeting held and could not continue any further correspondence with you on the same issues. Under the rules of the Court, you will not get other documentation in connection with the application hereby and the case will be destroyed within one year from the date of the decision*".

The question "Why?" gained relevance in the context of the significant data from the ECtHR annual report published on 30 January 2014. The response suggests a brief retrospect of the institutional history of ECtHR.

* **The Beginnings**

The Strasbourg Court was established by a unique international treaty - the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, the Convention) of 4 November 1950. After World War II the elites of emaciated Old Europe embraced the idea of creating a European area of freedom and the rule of law based on common values and achievements. Thus, the Council of Europe (CoE) was created, the political concept of united Europe. The first condition for membership is the ratification of the Convention. It not only obliges the High Contracting Parties to respect human rights as a legal and moral foundation of a democratic society, but arms all citizens, associations and legal persons with the right to appeal to ECtHR. Thus the "forefathers" of the Convention created an accessible supranational court as a working mechanism for the protection of the fundamental rights and freedoms. Respecting the national sovereignty of the contracting states and the primary role of their courts, the ECtHR provides a similar in form and comparable in scope protection to everyone within their jurisdiction.

By the late 1950s the Convention had been ratified by Austria, Belgium, UK, Denmark, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey and Sweden. In 1974 Greece, France and Switzerland joined. The largest territorial expansion of the Council of Europe occurred after the collapse of the Communist Bloc in the early 90s. That led to a threefold increase in the number of CoE member states, among them not only countries from Central Europe and the Balkans but also countries such as Russia, Ukraine, Belarus, Albania, Georgia and Azerbaijan.

I keep nostalgic memories of those “years of innocence”. Between 1991 and 1995 CoE would gather “young” lawyers from the new Eastern European democracies in Strasbourg. Training them to work with the Convention aimed at speeding the operation and improving the institutional authority of ECtHR. The lecturers shared that the Court had been working at “low speed” for years because of the small number of applications. Apparently the internal mechanisms of the Western countries gave reliable legal protection of the fundamental rights and freedoms and ECtHR did not justify the expectations of the public. Much of its time was devoted to uniform, repetitive applications mainly against Italy and Turkey. There had been criticism that taxpayers' money sank in inefficient structures operating below their organizational capacity which did not justify the cost of their institutional support.

*** How did the European Court of Human Rights become “Eastern European”?**

The message to the Eastern Europeans was clear: “We know that you have serious human rights problems. Send applications and we will help solve the cases”. The cases in Strasbourg back then would last 2-3 years - as was the usual duration of first instance procedures in courts in Sofia. According to the naive statistical expectations the enlargement to the East would increase the number of cases in the ECtHR proportionally to the population of the new contracting states. Bureaucratic statistics had obviously overlooked crucial historical and national-psychological factors – the deep distrust of the people from the former Soviet Bloc to their national courts, and the hatred of post-totalitarian countries to human rights, which were previously labeled ideological diversion. The historical momentum of ignoring human rights in those countries systematically “lines on the conveyor belt” a huge number of violations. The inadequacy of the domestic legal systems and of the “local” institutions rendered ECtHR the only corrective remedy and last hope of the people for justice. So, the desire a court operating in full swing came true as a curse. It was literally buried under an avalanche of Eastern European cases. When Russia joined the Convention in 1998 the European Court was already gasping for breath. The looming tsunami of Russian applications made the situation critical. This led to the first radical reform with Protocol № 11 of 1 November 1998 - the termination of the CoE European Commission which pronounced on the admissibility of applications in the first instance. The Court of Human Rights which had convened for sumptuous sessions now started functioning on a permanent basis. And the rules changed.

For reasons of economy it began to rule both on the admissibility and merits of the applications. Decisions of inadmissibility began to be adopted by *committees of three* and later by *single judge formations*.

Parallel to the external pressure from the avalanche increase in applications the internal organizational and value crisis in the ECtHR also deepened. The accession of dozens of Eastern European and semi-European countries tipped the balance of power among the judges in the Court composition. Each contracting state nominates one "national" judge to the ECtHR and since 2004 the representatives of the former communist countries have already exceeded the number of Old Europe judges. This fact is of particular importance because when viewing cases the voice of the judges from Macedonia, Moldova, Albania and Azerbaijan weighs just as much as their counterparts' from Germany, France, UK and Italy. The actual problem is not in the superior number of Eastern European magistrates but in their professional profiles. An old tradition has it that the contracting states would not always send in Strasbourg their most respectable and most qualified legal professionals. In line with the dominant political *mores*, some countries thought it more convenient to send political *protégés* with various attachments. We well remember the unfortunate attempt of one former Bulgarian Deputy Minister of Justice who "self-nominated", "self-elected", and almost managed to "self-send" himself as a national judge to the ECtHR. Only the decisive intervention of CoE and the sharp reaction of human rights defenders in Bulgaria prevented that infamous "error" from becoming the sad reality. Apart from certain political dependencies and the usually accompanying competence issues, the superior number of Eastern European judges brought in a value disorientation of the court. The socialist law school whose adepts most national judges from the new contracting states are marginalizes the individual rights at the expense of the collective interest and the will of the totalitarian state. Therefore, even if politically unbiased, some judges' mentality is burdened by ideological and etatist dogmas that enter into dramatic conflict with the European legal traditions and culture.

*** What to do?**

The external pressure from tens of thousands of new applications, combined with the internal ideological and value discord drove ECtHR into institutional stupor. The duration of some cases exceeded 10 years, and by September 2011 the *pending applications* were 160 000.

In this situation the logical expectation was ECtHR and CoE to exercise their maximum authority, to put pressure on repeat offender states which had produced the most systematic, uniform and repetitive violations for years, showing disregard for their commitments under the Convention. Solid and dissuasive measures - including the enactment of the pilot-judgment procedure and an increase in the awarded damages in cases of systematic violations - seemed reliable prevention measures against factual ignoring of the ECHR in certain countries. That is why the "strategy" picked by the Court for "dealing" with the problem is paradoxical from both the legal and ethical perspective. Rather than attacking the root cause of the problem, the stubborn reluctance of post-totalitarian countries to respect fundamental rights and freedoms, the Court chose the easy way out - to suppress the symptoms of the problem, not by reducing the number of violations but by reducing the number of applications, by discouraging the people relying on its protection.

*** The Court of Human Rights v. the Human**

To escape from the huge number of pending cases and to discourage as many people as possible from their intention to seek protection, the Strasbourg Court applies different demotivating strategies. Without claiming to be exhaustive, I will outline only the most flagrant and humiliating among them.

- Decisions on the admissibility by "single judge formations"

Those are the "circular letters", insulting to the "judgment genre" I referred to at the beginning of the article². I must emphasize that I do not refer to decisions on formally defective and/or manifestly unfounded applications, written "on the knee" by graphomaniacs, paranoid or semi-literate people. On the contrary, hundreds of well-reasoned applications submitted by experienced lawyers were eliminated in this "thrifty" way, though they were based on the well-established case-law of the Court in similar cases against Bulgaria decided in favor of the applicants.

² See the attached Decision form.

Emblematic is the institutional “policy” of the ECtHR regarding applications against Bulgaria relating to tax problems. With Judgment of 22.01.2009 in the case *Bulves AD v. Bulgaria* (Application № 3991/03) the Court held that the state had no right to refuse the refund of VAT when the recipient of the supply subject to VAT in good faith could not control the behavior of their suppliers and correctly fulfilled their tax and accounting obligations. This legal standard was confirmed by the Judgment of 18 March 2010 in the Case *Business Support Centre v. Bulgaria* (Application № 6689/03). The decisive reasons of ECtHR in those two cases were consistent with the profound VAT case-law of the Court of Justice of the EU (CJEU). The principal justification of ECtHR could relate to a huge number of tax cases and “promised” a revolutionary breakthrough in the archaic practice of the Bulgarian courts. Expecting consistent implementation of the adopted legal standard of the *Bulves* Judgment dozens of tax applications were filed against Bulgaria in ECtHR. Then something happened in the machinery of the Court. Probably due to the alarmingly increasing number of VAT applications or for other “confidential” reasons, the Court decided it was more practical to eliminate these applications “at the door”. Technically this was achieved with the Judgment of 25 January 2011 on the case of *Stephen Nazarev and Others v. Bulgaria* (joined applications № 26553/05, № 25912/09, № 40107/09 and № 12509/10). It was explained there that *Bulves* and *Business Support Centre* were actually idiosyncratic cases, sort of “teething trouble”. The fate of dozens of pending VAT applications involving severe rights issues - systemic failure of the state to recover due VAT - was predetermined in that way. One and all were declared inadmissible by force of unmotivated *decisions* by *single judge formations* or with a passing reference to the Judgment on *Nazarev* despite the substantial legal and factual differences between them.

- Tailoring the facts

That strategy applies when the Court has already declared an application inadmissible, but, more as an exception has given reasons aimed at the preventive dissuading of potential applicants in similar cases. When a new case with a similar profile nevertheless appears, the ECtHR cannot always resist the temptation to tailor the facts so that they “fit” into the Procrustean bed of the prototype inadmissibility decision. Due to the fact that decisions on the eligibility are non-contestable, this approach is particularly effective when it comes to the *en masse* elimination of whole categories of applications.

- The subtle criterion “efficacy of the domestic remedies”

Exhaustion of the effective domestic remedies is a procedural prerequisite for deciding individual applications to the ECtHR inadmissible. As a rule, when a government objects on grounds of the failure to exhaust a certain domestic remedy it must prove its effectiveness. This principle was pragmatically abandoned by the Court in its Judgment of 10 September 2013 on the case *Nedyalkov and Others v. Bulgaria* (Application № 663/11). It can be inferred from it that the applicants have to prove ad hoc, and with maximum certainty, the inefficiency of the domestic remedies listed by the state. Just three months earlier, in the Judgment of 18 June 2013 on the case *Nencheva and Others v. Bulgaria* (Application № 48609/06) the Court applied an opposite legal standard under which the existence of a remedy and its effectiveness had to be proved by the state that mentioned it when challenging the admissibility of the application.

* Of Numbers and Men

The described strategies for demotivation of the people and improving the statistics of the ECtHR clearly are not aimed at dealing with the real problem posed by the growing number of violations of human rights in some countries. The purpose is the survival of the ECtHR as an institution and of its employees at the expense of the victims of violations.

The fact that most *pro forma* inadmissibility decisions are traditionally rubber-stamped in the last working days of the year makes the assumption very likely that their main purpose is to fix the annual statistics.

The latest ECtHR annual report was published on 30 January 2014³. The statistic data and the facts and trends behind it are worth a special comment:

The number of pending applications before a judicial formation by end 2013 was 99 900 compared to 128 100 by end 2012 and to 160 000 in September 2013. According to Mr. Spielmann, President of the Court, “*To go below the symbolic threshold of 100 000 pending applications is a reason for great satisfaction and encouragement*”.

³ http://www.echr.coe.int/Documents/Annual_report_2013_prov_ENG.pdf

Mr. Spielmann's statement and the number quoted above (99 900 pending cases) make it clear that the 2013 *idée fixe* was to overcome the psychological barrier of 100 000 cases (something like breaking the sound barrier in aeronautics). The moral cost to achieving this grandiose goal was obviously irrelevant. It is technology that matters - 89 737 applications were declared inadmissible with a decision and the judgments delivered were 3659. That means that judgments were delivered only on 4% of the 93 396 applications "reviewed", and some of those were also found inadmissible but with reasons justifying the case. I put "reviewed" in quotes because I have serious logical and statistical reasons to believe that some of the thousands of applications "shunned" by the single judge formations have not even been read.

If we assume that a "working year" has 12 months, 20 eight-hour working days each, that would mean that per annum, as an institution, the ECtHR has 1920 operating hours. Dividing the inadmissibility decisions (89 737) by the number of working hours (1920) shows that the Court processed 46.7 inadmissibility decisions per hour. For the 47 judges of the ECtHR, this means that each judge delivered a decision per hour. In order not to trivialize I have not included in the calculation the leaves, business trips and, of course, the time required for the judges to read, discuss and write the remaining 3659 judgments, often of impressive volume themselves.

Just for statistical purposes I venture to say that I've participated in the preparation of more than 1200 applications to the ECHR. I dare say that many of them could hardly be leafed through together with the accompanying documents within one single hour. It turns out that the same time is required to read, comprehend and decide on them ... The above data justify the assumption that the main occupation of the people at the Court in 2013 was to rubber-stamp the blanket letters only changing the names of the applicants and the application referent numbers. A worthy challenge for highly qualified lawyers, indeed. Especially at such a performance rate.

Even more impressive is the report statistics on applications against Bulgaria for 2013. Of them, 2552 were declared inadmissible and only 26 judgments were delivered. This means that of a total of 2578 applications reviewed, only 1% were resolved on the merits and the judge "responsible" for the signing of the circular inadmissibility decisions against Bulgaria "resolved" 1.32 cases per hour. Probably the Bulgarian section of the ECtHR received special commends from the President of the Court on occasion of the descent below 100 000 pending applications.

In this respect, there is still another curious detail. Only in January 2014 our law firm received 102 (one hundred and two) letters of inadmissibility by a single judge formation signed in late 2013. Awe inspiring!

*** In Memoriam**

When a corporation is unable to meet its obligations it files for bankruptcy so that it does not damage its creditors further (the word "credit" is etymologically related to "trust"). In 2011 with 160 000 pending applications, ECtHR was clearly in institutional insolvency. They did not make this fact public or adopt material change in the conditions for admissibility of individual applications. Instead, the Court continued to work mainly to its own benefit, underhandedly failing the legitimate expectations and last hope for justice of thousands of people. Save money and trust, the institutional failure of the Court devalued human rights as a value of the legal state. The moral paradox is that the bankruptcy of the ECtHR and its turning against the people favors exactly the states which are repetitive offenders in terms of violation of human rights and which have the largest contribution to the crisis in Strasbourg. The tens of thousands of rubber-stamped denials of justice which President Spielmann boasts with are indulgences of a kind for the contracting states which, by ignoring the Convention, rendered the European Court for Human Rights void.

If the trend of organized application and human fates burst shooting continues it'll take only a few years to announce, probably even more proudly, the "zeroing" of pending applications. And then what? ... Obviously, this question is irrelevant as it goes beyond the temporal horizon of some people's mandate-limited mental perspective. It is clear that when their mandates end the judges in Strasbourg will return to their "respectable jobs" including in the countries that virtually destroyed the European Court of Human Rights. But then, the modernist building will keep looming on the river Ill, a citadel memorial, a futuristic Noah's ark to preserve the last species of this "survivor" breed.