



## **Applications to the European Court of Human Rights (ECtHR) – how to submit an application**

### *European Court of Human Rights*

We have been hearing more and more about striking decisions of the European Court of Human Rights (ECtHR), both against Portugal and other countries.

What is the ECtHR? How do you submit an application? What can you obtain from the Court?

The ECtHR is the jurisdictional body with competence to decide on whether a State has violated his obligations under the European Convention on Human Rights (ECHR). The Court only judges applications against States which have ratified the Convention, and not against persons or companies.

The rights at stake are broad and include the right to life, the right not to be subjected to torture, or to inhuman and degrading treatment (both with a procedural limb, which concerns the right to a proper investigation of the violation), the right to freedom, the right to a fair trial in both civil and criminal matters, the right not be tried or punished twice, the right to property, among others.

The ECtHR is located in Strasbourg, France – but it is not necessary to go there in order to submit an application: any person can apply to the ECtHR by sending a letter, in their own mother tongue. It is not possible to present a complete guide on how to make an application to the ECtHR, but we can provide some essential indications.

### *Exhaustion of Domestic Remedies*

The ECtHR only decides cases in which the national system has shown to be ineffective in putting terms to the alleged violation, and has also failed to adequately compensate the victim of the violation.

For this reason, it is necessary to specifically invoke the violation of the Convention before the national courts. To invoke it solely before the ECtHR is not sufficient. It is

desirable that the specific article of the ECHR is invoked, but if the violation of the provision of the Convention is invoked in substance, that would be enough.

If the national system has satisfying procedural mechanisms to judge the existence of a violation, the applicant should address them all before submitting an application to the ECtHR. For instance, if the applicant considers that his case has taken too long in the courts and that his right to trial within reasonable time was violated (right to a fair trial; article 6<sup>o</sup> n.º 1 of the ECHR) he has, first, to request for the proper compensation on the national administrative courts.

On the example we have given - regarding the violation of the right not be tried or punished twice, on article 4 of Protocol 7 to the Convention – the acceptance of an application by the Court would presuppose that the victim had attempted, on the second criminal or misdemeanor proceedings (in Portugal), to request the filing of the case files. Likewise, if the application is, for instance, based on the use of evidence obtained in violation of the right not to incriminate oneself, the violation also has to have been previously invoked on the criminal proceedings in Portugal, in order to obtain a decision of exclusion of that evidence from the case files.

A violation of article 5 (right to liberty), for instance, resulting from the lack of judicial review of preventive detention, presupposes also that that subject has been previously discussed on the proceedings in Portugal, through the mechanisms under the code of criminal procedure.

There are other cases in which it is not necessary to firstly try to obtain the reparation of the violation of the right in Portugal – for instance, it is the case of an application regarding the degrading conditions of the prisons in Portugal, because there is no express mechanism under Portuguese law for the compensation of victims of such a violation. In these cases, the person can make an application directly to the ECtHR.

### *Deadline*

Currently, the deadline for the submission of an application is 6 months after the definitive decision of the national courts regarding the verification of the violation (the relevant date is the one on the post office stamp). However, soon the deadline will be of 4 months only. We advise you to consult a lawyer, or the ECtHR website, in order to understand which deadline is applicable.

The form of counting the deadline is not always the same, depending on the specific violation in each case and on the invoked article of the Convention. For instance, a violation of article 6, on the part that refers to the right to a fair trial, can be invoked on the 6 months following the decision that ended the case files and that decided or should have decided about the violation of the ECHR (the relevant date is the date of the decision itself, not the res judicata one). On the other hand, a violation of the right not to be tried or punished twice, on article 4 of Protocol 7 to the Convention, can be invoked within the 6 months after the term of the second criminal proceedings, because only in that moment the person stopped being subject to a violation.

However, in the case of a violation of the right not to be subject to inhuman and degrading treatment, due, for instance, to prison conditions that violate the standards of the Convention, a violation of article 3 of the ECHR should be invoked within 6 months after the release or the transfer to another prison.

There are many other examples.

#### *What can I obtain?*

The ECtHR is not a court of appeals and therefore does not change the decision of the Portuguese courts. However, in some cases it is possible to request the alteration of the decision of the Portuguese courts, if it is directly contrary to the ECtHR decision.

Furthermore, the ECtHR can, if it sees fit and if the request is deducted on the case files, arbitrate a compensation to the applicant. This may include pecuniary and non-pecuniary damages, and also court and lawyer's fees.

#### *Do I need a lawyer?*

It is advisable that the person is represented by a lawyer, not only to elaborate the application, but also so that the lawyer can make sure that the deadlines and the conditions for the admissibility of the application are respected (in particular, in what regards the exhaustion of domestic remedies). Several times, the application to the ECtHR begins to be prepared during the case files in Portugal.

A lawyer can also evaluate your case in order to give you an opinion regarding the viability of the application.

In this initial phase, if you cannot afford a lawyer, you can request for legal aid on the Portuguese judiciary system of legal aid, on the modality of legal consultation or on the modality of filling an application before the courts.

However, in order to elaborate an application it is not mandatory to have a lawyer. You can elaborate the application on one of the several languages of the State parties of the ECHR – don't forget to use the application form available on the Court's website and to follow the instructions there indicated.

On a posterior phase, if the case is communicated to the Portuguese State (or to other State responsible for the violation), at least preliminarily, you will be obliged to constitute a lawyer. In this phase it is also mandatory to communicate with the Court and to present the written pleadings in English or French, so you will need a translator, or a lawyer that dominates those languages.

The ECtHR can, in some cases of proved lack of economic means of subsistence, grant you legal aid in order to help paying the Court and lawyer's fees (no fees are due on the proceedings before the ECtHR. However, if there is a hearing, the ECtHR can charge yours and your lawyer's travels).

*Luzia Prata Cordeiro*