



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

**CASE OF OBOTE v. RUSSIA**

*(Application no. 58954/09)*

JUDGMENT

Art 11 • Freedom of peaceful assembly • Dispersal of flash mob and administrative fine for failure to comply with prior-notification requirement  
• Proportionality • Authorities' failure to show tolerance towards peaceful gathering despite absence of any risk of insecurity or disturbance

STRASBOURG

19 November 2019

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Obote v. Russia,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President*,

Georgios A. Serghides,

Helen Keller,

Dmitry Dedov,

María Elósegui,

Gilberto Felici,

Erik Wennerström, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 22 October 2019,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 58954/09) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Andrey Delionovich Obote (“the applicant”), on 27 October 2009.

2. The applicant was represented by Mr I. Sivoldayev, a lawyer practising in Voronezh. The Russian Government (“the Government”) were represented by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicant alleged a violation of his right to freedom of assembly.

4. On 13 May 2015 notice of the application was given to the Government.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1986 and lives in Mozhaysk, Moscow Region.

6. On 31 January 2009 the applicant and six other people decided to hold a “flash mob”<sup>1</sup> in front of the Office of the Russian Government in Moscow.

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1. The Cambridge Dictionary defines a flash mob as “a group of people who arrange, by email or mobile phone, to come together in a place at the same time, do something funny or silly, and then leave” (<https://dictionary.cambridge.org/dictionary/english/flashmob>).

According to the Guidelines on Freedom of Peaceful Assembly (second edition), prepared in 2010 by the OSCE/ODIHR Panel of Experts on the Freedom of Assembly and by the

7. They arrived there at around 1 p.m. on the same day and positioned themselves at Gorbatty Bridge, each holding a blank sheet of paper with their mouths covered with adhesive tape.

8. At 1.20 p.m. the police ordered the group to disperse. The applicant asked to be informed of the grounds for such an order. He was taken to Presnenskiy police station.

9. The applicant was charged under Article 20.2 § 2 (breaches of the established procedure for the organisation or conduct of public gatherings, meetings, demonstrations, marches or pickets) of the Code of Administrative Offences (“the CAO”) relating to his participation in a public gathering because the requirement of prior notification under the Federal Law on Gatherings, Meetings, Demonstrations, Processions and Pickets, no. FZ-54 of 19 June 2004 (“the Public Events Act”) had not been respected.

10. On 11 March 2009 the justice of the peace of the 378th circuit of the Presnenskiy District of Moscow convicted the applicant of the administrative offence under Article 20.2 § 2 of the CAO and sentenced him to a fine of 1,000 Russian roubles (approximately 22 euros (EUR)). The judgment read, in so far as relevant, as follows:

“At 1.20 p.m. on 31 January 2009 [the applicant] ... as a participant in the public event [in the form of] a static demonstration (*пикетирование*), breached the established procedure for the conduct of a public event ...

[The applicant] denied his guilt in respect of the administrative offence ... He had been aware of the need to comply with the notification procedure when organising a public event, but in this particular case, in his opinion, such compliance had not been necessary as the act had not been political in character but had been a flash mob, that is to say a synchronised action of several people. ... He had told the police officers that the participants in the act had not been involved in a public event but had been taking photos on the bridge while holding blank sheets [of paper] ...

The court declines [the applicant’s] arguments because his guilt in the administrative offence ... has been proved by the bulk of evidence examined in the course of the court hearing ...

... [The applicant] voluntarily and directly participated in the public event in the form of a static demonstration that had been taking place in breach of the procedure set out by the [Public Events Act] and failed to comply with the lawful order by the police officers to stop the static demonstration.

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Council of Europe’s European Commission for Democracy through Law (Venice Commission), “[a] flash mob occurs when a group of people assemble at a location for a short time, perform some form of action, and then disperse. While these events are planned and organized, they do not involve any formal organization or group. They may be planned using new technologies (including text messaging and Twitter). Their raison d’être demands an element of surprise, which would be defeated by prior notification” (<https://www.osce.org/odihr/73405?download=true>).

The court dismisses [the applicant's] argument that the act did not amount to a public event in the form of a static demonstration and that he did not participate in a public event because the evidence collected in this case has shown otherwise. ...”

11. The applicant appealed, challenging the applicability of the Public Events Act to the circumstances of the case and contesting the fine imposed on him.

12. On 28 April 2009 the Presnenskiy District Court of Moscow upheld the judgment of 11 March 2009. The appeal judgment read, in so far as relevant, as follows:

“The court dismisses [the applicant's] and the lawyer's arguments [presented] in the statement of appeal because, in the court's opinion, the objective side of the [applicant's] actions in the form of his appearance at around 2 p.m. on 31 January 2009 among the group of comrades, [with whom] they had agreed [to do so] on the Internet, on the bridge in front of the building at 2 Krasnopresnenskaya Embankment in Moscow, his covering his mouth with adhesive tape, carrying sheets of A4 paper without any inscriptions or images, and being present for ten to fifteen minutes in that place in the absence of any permission whatsoever fully meets the criteria of the administrative offence set out in Article 20.2 § 2 of [the CAO] in the form of a static demonstration.”

## II. RELEVANT DOMESTIC LAW

13. For a summary of the relevant domestic law and practice see *Kasparov and Others v. Russia* (no. 21613/07, § 35, 3 October 2013); *Navalnyy and Yashin v. Russia* (no. 76204/11, §§ 43-44, 4 December 2014); *Novikova and Others v. Russia* (nos. 25501/07 and 4 others, §§ 67-69, 26 April 2016); and *Lashmankin and Others v. Russia* (nos. 57818/09 and 14 others, §§ 216-312, 7 February 2017).

14. The provisions of the Public Events Act as in force at the material time directly relevant to the present case are set out below.

15. Section 2(1) defined a “public event” as an open, peaceful event accessible to all, organised at the initiative of citizens of the Russian Federation, political parties, other public associations, or religious associations with the aims of expressing or developing opinions freely and voicing demands on issues related to political, economic, social or cultural life in the country, and issues related to foreign policy.

16. The Public Events Act distinguished between five types of a public event: a gathering (*собрание*); a meeting (*митинг*); a demonstration (*демонстрация*); a march (*шествие*); and a “static demonstration” (*пикетирование*) (for further details, see *Lashmankin and Others*, cited above, § 219).

17. Section 2(6) defined a static demonstration as a form of public expression of opinion that does not involve movement or the use of loudspeaker equipment, where one or more citizens with placards, banners

and other means of visual expression station themselves near the target object of the static demonstration.

18. In accordance with sections 5(4)(1) and 7(1)(3), notification in respect of a static demonstration involving several persons must be submitted no later than three days before the intended static demonstration or, if the end of the time-limit falls on a Sunday or a public holiday, no later than four days before the intended static demonstration. No notification was required for “gatherings” and static demonstrations involving one person.

19. In accordance with section 7(3), notification must contain the following elements: (a) the purpose of a public event; (b) its form; (c) its place; (d) its date and the time of its beginning and ending; (e) an envisioned number of participants; (f) methods by employing which the organiser of a public event intends to ensure that public order be maintained and emergency medical aid be made available; (g) the full name of the organiser of a public event, his or her address and phone number; (h) the full names of persons authorised by the organiser of a public event to represent him or her in the course of a public event; (i) the date of submitting the notification.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

20. The applicant complained that the authorities’ putting an end to the flash mob and his prosecution for an administrative offence violated his right to freedom of assembly, as provided in Article 11 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

#### **A. Submissions by the parties**

##### *1. The Government*

21. The Government submitted at the outset that the applicant had not suffered a significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. They argued that the application had been “entirely

unrelated to the fine imposed on the applicant” (see *Zwinkels v. the Netherlands* (dec.), no. 16593/10, § 25, 9 October 2012) and, consequently, the matter in dispute had had no financial impact. They further argued that in any event the fine imposed on the applicant had been of a modest amount. The applicant had not demonstrated that the administrative proceedings against him had had any adverse effect on him. The issues raised in the application were subject to the Court’s well-established case-law (*Berladir and Others v. Russia*, no. 34202/06, 10 July 2012). The charges of an administrative offence against the applicant had been examined by domestic courts in two instances. The Government concluded that the application should be declared inadmissible under Article 35 § 3 (b) of the Convention.

22. The Government further submitted that the applicant’s actions had fully corresponded to the definition of a static demonstration under section 2(6) of the Public Events Act. Under section 7 of the Public Events Act, static demonstrations were subject to a notification procedure, which was compatible with the requirements of Article 11 of the Convention and served the purpose of preventing disorder. In the Government’s view, sanctioning a participant in a public event for the failure to follow the notification procedure was a prerogative of a State.

23. The domestic courts had rejected the applicant’s argument that he had not participated in a static demonstration because it had been clear that a group of people standing with their mouths taped and holding blank sheets of paper had in fact been demonstrating outside a Government building. The applicant himself had claimed before the domestic courts that he had been aware of the need to notify the authorities of the planned static demonstration. Moreover, the applicant had intentionally sought to test whether his actions would be considered as a protest activity in order to provoke a conflict. In the absence of prior notification of the static demonstration, the applicant had been subjected to the administrative sanction set out in Article 20.2 § 2 of the CAO. The fine imposed on the applicant had been proportionate to the nature of his offence.

## 2. *The applicant*

24. The applicant submitted that the administrative proceedings against him that had resulted in a fine had amounted to a disproportionate interference with his right to freedom of assembly. The domestic courts had failed to perform a balancing exercise to assess the proportionality of the interference to any aims related to protecting the public interests.

25. Disagreeing with the Government’s position regarding the inadmissibility of the application, the applicant emphasised that, despite the fact that the administrative proceedings against him had been examined at two levels of jurisdiction, in the absence of a meaningful balancing exercise and proportionality analysis it could not be said that his complaint under

Article 11 of the Convention had been “duly considered by a domestic tribunal”. The applicant further submitted that the fine imposed on him had had a “chilling effect” which would affect his exercise of the right to freedom of assembly in the future, and that the notification procedure under the Public Events Act had built barriers precluding participants in peaceful assemblies from enjoying their rights.

## **B. The Court’s assessment**

### *1. Admissibility*

26. The Court will begin by turning to the Government’s objection under Article 35 § 3 (b) of the Convention, which reads as follows:

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

27. The Court has considered the rule contained in this provision to consist of three criteria. Firstly, has the applicant suffered a “significant disadvantage”? Secondly, does respect for human rights compel the Court to examine the case? Thirdly, has the case been duly considered by a domestic tribunal (see *Smith v. the United Kingdom* (dec.), no. 54357/15, § 44, 28 March 2017)?

28. The first question of whether the applicant has suffered any “significant disadvantage” represents the main element. Inspired by the general principle *de minimis non curat praetor*, this first criterion of the rule rests on the premise that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed taking into account both the applicant’s subjective perceptions and what is objectively at stake in a particular case. In other words, the absence of any “significant disadvantage” can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant. However, the applicant’s subjective perception cannot alone suffice to conclude that he or she has suffered a significant disadvantage. The subjective perception must be justified on objective grounds (see, with further references, *C.P. v. the United Kingdom* (dec.) no. 300/11, § 42, 6 September 2016). A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless



of pecuniary interest (see *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010).

29. In considering whether the applicant has suffered a “significant disadvantage” in the circumstances of the present case, the Court notes that he complained before it about the administrative-offence proceedings against him that had been instituted following his participation, together with six other people, in a flash mob and had resulted in a fine of EUR 22.

30. The Government submitted that the present application was “entirely unrelated to the fine imposed on the applicant” (see paragraph 21 above). The Court cannot agree with this assertion for the reason that the domestic courts fined the applicant for his failure to notify the authorities of his intention to hold a static demonstration. This measure, unlike the fine imposed on the applicant in *Zwinkels* (cited above, §§ 3 and 6), was thus directly linked to the crux of the application at hand.

31. While the size of the fine was indeed modest, and the applicant did not advance any arguments to demonstrate that it had been significant to him in the light of his personal situation, his subjective perception of the alleged violation was that he had experienced a chilling effect of the administrative-offence proceedings that would affect the exercise of his right to freedom of assembly in the future (see paragraph 25 above). The Court reiterates that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society (see, among other authorities, *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 98, 15 November 2018). In cases concerning freedom of assembly the Court, when applying the admissibility criterion contained in Article 35 § 3 (b) of the Convention, should take due account of the importance of this freedom and exercise a careful scrutiny (compare, in the context of Article 10, *Sylka v. Poland* (dec.), no. 19219/07, § 28, 3 June 2014; see also, in the context of Article 11, *Berladir and Others v. Russia*, no. 34202/06, § 34, 10 July 2012, and *Öğrü v. Turkey*, no. 19631/12, § 18, 17 October 2017). Considering that the applicant was subjected to administrative-offence proceedings for his participation in a peaceful assembly, the alleged violation of Article 11 of the Convention in the present case concerns, in the Court’s view, “important questions of principle”. The Court is thus satisfied that the applicant suffered a significant disadvantage as a result of the administrative-offence proceedings against him regardless of pecuniary interests and does not deem it necessary to consider in the context of its analysis of the Government’s objection whether respect for human rights compels it to examine the case or whether it has been duly considered by a domestic tribunal (see, *mutatis mutandis*, *M.N. and Others v. San Marino*, no. 28005/12, § 39, 7 July 2015).

32. Accordingly, the Court dismisses the Government’s objection pertaining to Article 35 § 3 (b) of the Convention.

33. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## 2. Merits

34. The Court will examine this case in the light of the general principles regarding the right to freedom of assembly established in its case-law that have been recently summarised in the case of *Navalnyy* (cited above, §§ 98-103).

35. Even though the Government have not contested before the Court the applicant's allegation that there had been an interference with his right to freedom of peaceful assembly, the Court considers it appropriate to emphasise the following. It has been the Court's constant approach to regard the notion of an assembly as an autonomous concept (*ibid.*). Given the format of the gathering that the applicant has described as a flash mob, the Court considers that it fell within the notion of "peaceful assembly" contained in Article 11. The applicant intended to take part in this assembly and never denied it; even if he did not consider it a "public event" or a "static demonstration" subject to notification under the applicable national law, he had been exercising his right to freedom of peaceful assembly under Article 11 of the Convention. In the Court's view, the dispersal of the assembly and the ensuing sanctions constituted "a restriction", within the meaning of the second paragraph of Article 11, and thus an interference with his right to freedom of peaceful assembly as protected by the first paragraph of this Article (*ibid.*, § 108). It thus remains for the Court to be ascertained whether the interference was "prescribed by law", pursued one or more legitimate aims under paragraph 2 of Article 11, and was "necessary in a democratic society" for the achievement of the aim or aims in question (see *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 102, ECHR 2015).

36. The Government referred to the provisions of the Public Events Act as a legal basis for the interference complained of and asserted that it had pursued a legitimate aim of the prevention of disorder.

37. The Court observes that the police dispersed the assembly of seven people and a fine was imposed on the applicant following the administrative-offence proceedings on the sole grounds that no prior notification of a static demonstration had been given to the authorities. The Government asserted that the applicant's actions had constituted a static demonstration subject to prior notification (see paragraph 22 above). The applicant stressed both at the national level and before the Court that the assembly he had taken part in could not be regarded as a static demonstration within the meaning of the Public Events Act. The main controversy between the parties thus lies in whether the Public Events Act

was applicable to the assembly in the form of a flash mob – were it not so, the applicant should not have been sanctioned for the breach of the rules on organising a static demonstration under Article 20.2 § 2 of the CAO.

38. The Court observes that the definition of a static demonstration under the Public Events Act (see paragraphs 17-18 above) is broad to the extent that a vast array of social situations may fall under it. Any stationary gathering in public – no matter how small and short, irrespective of its purpose or context, and regardless of its potential to cause disruption to ordinary life – of two or more people (solitary static demonstrations being exempt from the prior-notification requirement) holding any object that could be regarded as “a means of visual expression” may be declared unlawful unless a document containing a lengthy list of elements (see paragraph 19 above) has been submitted to the authorities no later than three days before the gathering.

39. The Court has already pointed out that the Russian regulatory framework governing public gatherings provides for a broad interpretation of what constitutes a gathering subject to notification and allocates to the authorities excessively wide discretion in imposing restrictions on such gatherings through rigid enforcement (see *Navalnyy*, cited above, § 150). Regardless of whether an assembly in the form of a flash mob falls within the scope of the Public Events Act, it is essential for the Court to establish whether the applicant’s right to peaceful assembly has been respected. In view of its findings below it is unnecessary to decide whether the interference with the applicant’s right to freedom of assembly was “prescribed by law” or pursued one or more legitimate aims (see, *mutatis mutandis*, *Mătăsarū v. the Republic of Moldova*, nos. 69714/16 and 71685/16, § 32, 15 January 2019). The Court will focus on assessing whether the interference was “necessary in a democratic society”.

40. In examining the necessity of the impugned interference with the right to freedom of assembly in the present case, the Court will examine, on the basis of the relevant principles summarised in *Kudrevičius and Others* (cited above, §§ 142-60), whether the measures taken against the applicant were proportionate to legitimate aim invoked by the Government, namely “the prevention of disorder”, and whether the reasons adduced by the national authorities to justify them were “relevant and sufficient”. In doing so it will assess whether these measures answered a pressing social need.

41. Under the Court’s well-established case-law, an unlawful situation, such as the staging of a demonstration without prior authorisation, does not necessarily justify an interference with a person’s right to freedom of assembly. While rules governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public demonstrations, since they allow the authorities to minimise the disruption to traffic and take other safety measures, their enforcement cannot become an end in itself. In particular, where demonstrators do not engage in acts of

violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (*ibid.*, § 150).

42. The Government suggested that the applicant's aim in organising the flash mob had been to test whether his actions would be considered as a protest activity in order to provoke a conflict with the authorities (see paragraph 23 above). What is salient to the Court is the fact that nothing in the actions of the applicant and the other participants in the flash mob could be described as incitement to violence or rejection of democratic principles. They did not do anything capable of causing disorder or disruption to ordinary life. Indeed, seven people standing in silence with their mouths sealed with adhesive tape and holding blank sheets of paper hardly represent a threat to public order. However, the domestic authorities did not show the requisite degree of tolerance towards their peaceful gathering despite the absence of any risk of insecurity or disturbance, seemingly in disregard of what the Court has emphasised on numerous occasions, namely that the enforcement of rules governing public assemblies should not become an end in itself (see *Kudrevičius and Others*, § 155, and *Navalnyy*, § 144, both cited above).

43. When finding the applicant guilty of the administrative offence under Article 20.2 § 2 of the CAO, the justice of the peace and the Presnenskiy District Court did not assess the level of disturbance the assembly had caused, if any. They merely observed that the applicant had failed to comply with the prior-notification requirement in respect of the social situation that, in their view, had doubtlessly amounted to a static demonstration (see paragraphs 10 and 12 above). The Court reiterates that the proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other (see *Kudrevičius and Others*, cited above, § 144). It considers that the domestic judicial bodies in the course of the administrative-offence proceedings against the applicant did not seek to strike this balance giving the preponderant weight to the formal unlawfulness of the presumed static demonstration.

44. The Court further points out that it has previously held that the offence set out in Article 20.2 § 2 of the CAO should be classified as "criminal", regard being had to the general nature of the offence, and given that the purpose of the sanction is punitive and deterrent in nature, all of which is a characteristic of the criminal sphere (see *Mikhaylova v. Russia*, no. 46998/08, §§ 57-69, 19 November 2015, and *Navalnyy*, cited above, § 79). Accordingly, the applicant was subject to sanctions which, although classified as administrative under domestic law, were "criminal" within the

autonomous meaning of Article 6 § 1, thereby attracting the application of this provision under its “criminal” head. However, a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction and notably to deprivation of liberty. Where the sanctions imposed on a demonstrator are criminal in nature, they require particular justification. The freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale – for participation in a demonstration which has not been prohibited, so long as that person does not her or himself commit any reprehensible act on such an occasion (see *Navalnyy*, cited above, § 145).

45. In view of the above, the Court cannot find that the applicant’s freedom of peaceful assembly as protected by the Convention was outweighed by any interests on the part of the respondent State in restricting the exercise of that freedom with a view to preventing disorder. The reasons relied on by the respondent State did not correspond to a pressing social need. Even assuming that they were relevant, they are not sufficient to show that the interference complained of was “necessary in a democratic society” (*ibid.*, § 146). Notwithstanding the national authorities’ margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed on the applicant’s right to freedom of assembly and any legitimate aim pursued.

46. Accordingly, the Court holds that there has been a violation of Article 11 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

48. The applicant claimed 4,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government submitted that the applicant’s rights under the Convention had not been breached and that the amount claimed was excessive.

50. The Court awards the applicant the amount claimed in respect of non-pecuniary damage.

**B. Costs and expenses**

51. The applicant did not submit claims for costs and expenses. Accordingly, the Court considers that there is no call to award them any sum under that head.

**C. Default interest**

52. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Dismisses* the Government's objection regarding the alleged lack of significant disadvantage;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 11 of the Convention;
4. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 19 November 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips  
Registrar

Paul Lemmens  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the opinion of Judge Serghides joined by Judge Dedov is annexed to this judgment.

P.L.  
J.S.P.

CONCURRING OPINION OF JUDGE SERGHIDES, JOINED  
BY JUDGE DEDOV

**The single integrated admissibility rule of Article 35 § 3 (b) of the  
Convention**

1. In brief, the facts of the present case were the following. The applicant together with six other persons organised a flash mob near a government building in Moscow. The police dispersed the gathering and brought the applicant to a police station. He was charged with and found guilty of an administrative offence, namely a breach of the rules on holding a public event, because he had not notified the authorities in advance of his intention to hold a “static demonstration” and was fined EUR 22. In the course of the administrative-offence proceedings the applicant insisted that the flash mob could not be considered a static demonstration as the gathering had not been one of a political nature, but his argument was rejected. The applicant complained that the authorities’ termination of the flash mob and his prosecution for an administrative offence violated his right to freedom of assembly, as protected by Article 11 of the Convention.

2. The Government raised a *de minimis* objection, relying on Article 35 § 3 (b) of the Convention, which provides as follows:

“3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

Under Article 35 § 4 of the Convention, “[t]he Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings”.

3. The judgment was unanimous in finding that the application was admissible and that there had been a violation of Article 11. The judgment was also unanimous as to the amount awarded to the applicant for non-pecuniary damage, namely EUR 4,000. The purpose of this concurring opinion is to explain how and why I reached the finding that the present application was admissible, by using a different interpretation and analysis of Article 35 § 3 (b) of the Convention from that used in the judgment.

4. I decided to make a comprehensive and rather extensive legal analysis in this concurring opinion because the said provision is a relatively new one in the Convention and calls for a thorough interpretation. It should also be said that with the adoption of this provision, a number of applications have now been considered inadmissible which in the past would not have met the



same fate. The provision at hand may have an impact on the effective protection of human rights because the Convention is a shield of protection for any violation of the rights safeguarded by it. Therefore, the interpretation and application of the provision under discussion is very important. The fact that Article 45 § 2 of the Convention has been interpreted as not giving a judge the right to deliver a separate opinion in the context of a decision, but only in that of a judgment, has prevented judicial dialogue on Article 35 § 3 (b) from developing in inadmissibility decisions where complaints were dismissed on the basis of this new criterion. Since this did not happen in the present case, I now have the opportunity to write a separate opinion and attempt to develop my views regarding the interpretation and application of the provision.

### **1. The three limbs of Article 35 § 3 (b)**

5. Article 35 § 3 (b) of the Convention sets out the following three cumulative limbs (elements or conditions), which must be fulfilled in order for an application to be found inadmissible:

(a) the applicant has not suffered a significant disadvantage;

(b) respect for human rights does not require examination on the merits;  
and

(c) the case was duly considered by a domestic court.

Paragraph 27 of the judgment presents these three limbs in the form of questions.

### **2. Different interpretative approaches to Article 35 § 3 (b)**

6. In the present case, the judgment considers the application admissible based on its rejection of only the first limb of Article 35 § 3 (b), without examining the other two.

7. As the Court stated in *Nina Vasilyevna Shefer v. Russia* ((dec), no. 45175/04, § 17, 13 March 2012), “no formal hierarchy exists between the three elements of Article 35 § 3 (b) ... However, the question of whether the applicant has suffered a ‘significant disadvantage’ is at the core of this admissibility criterion ... while the remaining two elements are intended to be safeguard clauses ...”. In the same vein, Harris, O’Boyle and Warbrick<sup>1</sup> argue that “[t]here is no strict hierarchy or *order* in which the Court will consider the limbs”.

8. Indeed, the Court’s approach has varied, that of the present judgment being only one example: in *Nicoleta Gheorgie v. Romania* (no. 23470/05, §§ 24-26, 3 April 2012) the Court found the application admissible after

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1. See Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 4th edition, Oxford, 2018, at p. 78 (emphasis added).

rejecting only the second limb of Article 35 § 3 (b); in *M.N. and Others v. San Marino* (no. 28005/12, § 39, 7 July 2015, referred to at paragraph 31 of the judgment in the present case) the Court found the application admissible after examining both the first two limbs of the said provision but not the third; in *Andrey Nikolayevich Savelyev v. Russia* (no. 42982/08, §§ 22, 24-35, 21 May 2019), the Court (Third Section, as in the present case) declared the application inadmissible in accordance with Article 35 §§ 3 (b) and 4, after examining all three limbs of the provision and finding that all three grounds for the rejection of an application under the above admissibility criterion had been satisfied.

### **3. The approach of the present judgment**

9. The relevant part of the judgment explaining why admissibility is based only on the first limb of Article 35 § 3 (b) is paragraph 31:

“31. While the size of the fine was indeed modest, and the applicant did not advance any arguments to demonstrate that it had been significant to him in the light of his personal situation, his subjective perception of the alleged violation was that he had experienced a chilling effect of the administrative-offence proceedings that would affect the exercise of his right to freedom of assembly in the future ... The Court reiterates that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society ... In cases concerning freedom of assembly the Court, when applying the admissibility criterion contained in Article 35 § 3 (b) of the Convention, should take due account of the importance of this freedom and exercise a careful scrutiny ... Considering that the applicant was subjected to administrative-offence proceedings for his participation in a peaceful assembly, the alleged violation of Article 11 of the Convention in the present case concerns, in the Court’s view, ‘important questions of principle’. The Court is thus satisfied that the applicant suffered a significant disadvantage as a result of the administrative-offence proceedings against him regardless of pecuniary interests and does not deem it necessary to consider in the context of its analysis of the Government’s objection whether respect for human rights compels it to examine the case or whether it has been duly considered by a domestic tribunal ...”

10. Based on the above, the Court dismissed the Government’s objection under Article 35 § 3 (b) of the Convention (see paragraph 32 of the judgment).

### **4. Proposed approach – a holistic and coherent approach**

11. I will now attempt to explain which, in my view, is the most appropriate manner of interpreting and applying Article 35 § 3 (b). I adhere to the approach followed by the Court in *Andrey Nikolayevich Savelyev* (cited above), namely that all limbs of the said provision must be examined cumulatively. However, I will endeavour below to substantiate the holistic and coherent approach, since in *Savelyev* no reasons were given for

examining all limbs of the provision and it was not proposed there that all limbs be examined together as a uniform rule, as the present opinion now seeks to do.

12. Despite the fact that the second and third limbs of Article 35 § 3 (b) are phrased as provisos to the acceptance of the first limb, in my view, all three limbs consist of parts of the same integrated rule, like the elements of interpretation in Article 31 § 1 of the Vienna Convention on the Law of Treaties (VCLT), which when “thrown into the crucible” are considered by the International Law Commission and by the Court to form a unity, a single and integrated or combined rule or process of interpretation<sup>2</sup>.

13. A uniform and holistic examination of Article 35 § 3 (b), taking all the limbs together rather than separate examination of each limb, is justified for many reasons. One reason will be immediately mentioned, namely that all three grounds must be satisfied before an application can be declared inadmissible, thus showing that they are all indispensable elements for the admissibility of the application. My submission is that this approach is necessary in order to reject this ground of inadmissibility, i.e. in concluding that the case is admissible. In the present case the Court considers that once the first criterion of inadmissibility is not fulfilled, then there is no need to examine the others, but the holistic approach that I propose is not only a means of preventing an unjustified conclusion of inadmissibility, it is also a means of reinforcing any rejection of such a conclusion by ensuring effectiveness. Other reasons will be explained later on, after first examining the drafting history and the aim of the provision.

**(a) Drafting history and aim of Article 35 § 3 (b) – the compromise between two principles**

14. The new admissibility criterion of “no significant disadvantage” was introduced in the Convention by Protocol No. 14 which took effect from 1 June 2010.

15. It is apparent from paragraphs 39 and 77-85 of the Explanatory Report to Protocol No. 14 “for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention”, especially from paragraphs 78 and 81-83 quoted below, that the limbs of the provision in question and more generally its formulation were the result of a kind of compromise between: (a) the survival of the efficiency of the Court and the prevention of the Convention system from being paralysed due to the overload and the increasing number of cases coming before it, and (b) the effective protection of human rights in meritorious cases:

“78. The introduction of this criterion was considered necessary in view of the ever-increasing caseload of the Court. In particular, it is necessary to give the Court

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2. See Yearbook of the International Law Commission 1966, vol. II, at pp. 219-20, § (8); *Colder v. the United Kingdom*, no. 4451/70, § 30, 26 February 1975 (Plenary).

some degree of flexibility in addition to that already provided by the existing admissibility criteria, whose interpretation has become established in the case-law that has developed over several decades and is therefore difficult to change. This is so because it is very likely that the numbers of individual applications to the Court will continue to increase, up to a point where the other measures set out in this protocol may well prove insufficient to prevent the Convention system from becoming totally paralysed, unable to fulfil its central mission of providing legal protection of human rights at the European level, rendering the right of individual application illusory in practice.”

“81. The second element is a safeguard clause to the effect that, even where the applicant has not suffered a significant disadvantage, the application will not be declared inadmissible if respect for human rights as defined in the Convention or the protocols thereto requires an examination on the merits. The wording of this element is drawn from the second sentence of Article 37, paragraph 1, of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court’s list of cases.

82. A second safeguard clause is added to this first one. It will never be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal. This clause, which reflects the principle of subsidiarity, ensures that, for the purposes of the application of the new admissibility criterion, every case will receive a judicial examination whether at the national level or at the European level.

83. The wording of the new criterion is thus designed to avoid rejection of cases warranting an examination on the merits. As was explained in paragraph 39 above, the latter will notably include cases which, notwithstanding their trivial nature, raise serious questions affecting the application or interpretation of the Convention or important questions concerning national law.”

16. For the purposes of the drafting history of the said admissibility criterion and a better understanding of the above-mentioned compromise, it should be noted that the original proposal of the Steering Committee for Human Rights (CDDH)<sup>3</sup> for drafting Article 35 § 3 (b)<sup>4</sup>, read:

“3. The Court shall declare inadmissible any individual application submitted under Article 34

...

(b) if the applicant has not suffered a significant disadvantage and if the case raises neither a serious question affecting the interpretation or application of the Convention or the protocols thereto, nor a serious issue of general importance.”

17. The explanatory note (entitled “argument”) accompanying this proposal explained the following<sup>5</sup>:

“This proposal is fully in line with the principle of subsidiarity that underpins the whole of the control mechanism set up by the Convention since it is primarily for

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3. See Steering Committee for Human Rights (CDDH), “Guaranteeing the long-term effectiveness of the European Court of Human Rights” – Final report containing proposals of the CDDH, adopted by the CDDH on 4 April 2003 (CDDH(2003)2006 Final), 6-7.

4. CDDH(2003)2006 Final, at pp. 12-13.

5. *Ibid.*, at p. 13.

national authorities to protect the rights guaranteed by the Convention. This proposal would:

- a. allow the Court, when it deems it necessary, to examine admissibility first under this new requirement before looking, where appropriate, at the remaining admissibility requirements, which would save time;
- b. entail no significant restriction of the individual’s judicial protection and make it possible to reject applications which do not have any interest from the general point of view of the protection of human rights. This especially means that ‘clone cases’ could only be dismissed, if there was no significant disadvantage which would have affected the applicant; and
- c. therefore make it possible for the Court to concentrate on the more important cases.

This new admissibility requirement would aim to reject cases considered as ‘minor’, pursuant to the principle whereby judges should not deal with such cases (*‘De minimis non curat praetor’*). A first assessment carried out by a study group of the Court’s registry tends to show that the introduction of this requirement would have a limited but definite impact on the workload of the judges and the registry ... This proposal would also save the registry a considerable amount of time in each case where it was applied.

...

Whether to accept this proposal or not does, however, imply an important policy decision since it cannot be denied that it will in effect entail some restriction of the individual’s access to the Court.”

18. As is clear from paragraph 81 of the Explanatory Report to Protocol No. 14, the final wording of the second limb of the provision at hand, thus the respect for the human rights criterion, was drawn from the identical ground for striking out applications under Article 37 § 1 of the Convention. As is rightly argued by Professor William Schabas<sup>6</sup>, “[t]here [i.e. in Article 37 § 1] it [the criterion] fulfils a similar function in the context of decisions to strike applications from the list. The same criterion is also used in article 39(1) as a basis for a friendly settlement between the parties”<sup>7</sup>.

19. The idea of the survival of the Court’s efficiency, thus, the long-term effectiveness of the Court, is reflected in the first limb of Article 35 § 3 (b), and the idea of effectively protecting human rights (the effectiveness principle) is reflected in the second limb of the provision. Moreover, the principle of subsidiarity, which was referred to in the above Explanatory Report and note, is reflected in the third limb of the provision. This third criterion will be abolished by Article 5 of Protocol No. 15<sup>8</sup>, which is likely to enter into force soon, but this does not affect the present case in any way.

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6. See William A. Schabas, *The European Convention on Human Rights – A commentary*, Oxford, 2015.

7. *Ibid.*, at p. 784.

8. Since Article 2 of Protocol No. 15 will incorporate the principle of subsidiarity into the Preamble to the Convention, the third limb of the provision at issue will no longer be necessary.

It should be clarified that I use the effectiveness principle in the present opinion in what I consider to be its two capacities, which are interrelated, namely a method or tool of interpretation and a norm of international law (whereby a Convention provision must be effective and treated as such)<sup>9</sup>.

20. In my humble view, the effectiveness principle, which should apply also at the admissibility stage<sup>10</sup>, is undermined in general by the provision at hand. However, this principle is secured: (a) to a certain extent in the first limb, in the sense that it saves those applications where an applicant has suffered a major disadvantage from not being found inadmissible; and (b) to a greater extent in the second limb, as that limb requires respect for human rights. The principle is thus undermined less if all limbs are considered and taken together as a whole. In the same vein, Harris, O’Boyle and Warbrick rightly argue that “[t]he latter two limbs were introduced as ‘safeguards’ against an over-broad application of the criterion ...”<sup>11</sup>.

21. The above historical argument as regards the aim of the provision at hand and in particular the compromise between two principles is another strong argument for asserting that the said provision must be read as a whole and as a single rule of admissibility.

**(b) An argument drawn from the criticism of Article 35 § 3 (b)**

22. The intention of the drafters of Protocol No. 14, namely to secure the long-term effectiveness of the Court and the Convention is clear not only from paragraph 78 of its Explanatory Report (quoted above) but throughout the whole Report, especially from its introduction<sup>12</sup> as well as from the title of the report of the CDDH, “Guaranteeing the long-term effectiveness of the European Court of Human Rights”. Despite this noble intention, the negative criticism of the original draft of the provision (quoted above) was quite severe, as can be seen from the following note of the Final Report of the CDDH:

“Several CDDH members expressed serious reservations about the proposal to include this new admissibility requirement and questioned the need for it for legal and practical reasons and also as a matter of principle. ...

They take the view that the new admissibility requirement would also have negative repercussions from the point of view of the protection of human rights in general and might shift the cases concerned to the United Nations human rights mechanisms.

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9. See Georgios A. Serghides, “The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles”, in (2017), 30, *Hague Yearbook of International Law*, 1, at pp. 2, 5-6.

10. See paragraphs 40-43 below.

11. See Harris, O’Boyle and Warbrick, *op. cit.*, at p. 77.

12. See § 2 (of the introduction): “Ten years later, at a time when nearly all of Europe’s countries have become party to the Convention, the urgent need has arisen to adjust this mechanism, and particularly to guarantee the long-term effectiveness of the European Court of Human Rights (hereinafter referred to as ‘the Court’), so that it can continue to play its pre-eminent role in protecting human rights in Europe”.

They conclude that the proposed amendment would dramatically undermine the principle of the right to individual application. Its net impact could rather be negative than positive, even in the long run.

Non-governmental organisations, national institutions for the promotion and protection of human rights and experts invited to a consultative meeting organised by the CDDH's Reflection Group on 17-18 February 2003 also expressed their clear objection of principle to the curtailment of the right of individual petition."<sup>13</sup>

23. Despite the fact that the original proposal was ultimately changed so as to include in the second limb of the provision “respect for human rights”, the same criticism of the new provision is still tenable. Nikos Vogiatzis<sup>14</sup> eloquently argues as follows:

“It is argued that the new provision sits uncomfortably with the principle of access of individuals to international justice. Thus the provision undermines the right to an individual petition to the Strasbourg Court, a right which has transformed the European legal order and has contributed to the preservation of the ECtHR's legitimacy. Accordingly, the new criterion constitutes a misunderstanding of the subsidiary principle: while the Council of Europe's mission is, undeniably, to encourage national authorities and courts to prevent or provide address for violations in the first place, this does not mean, nonetheless, that the Court should deny justice as the jurisdiction of last resort. Further, the method introduced is to some extent problematic as it presupposes an assessment of the merits *before* the decision on admissibility in sensitive areas of human rights litigation. Lastly, the case law concerning the interpretation of Article 35(3)(b) ECHR in its first years suggests that the ECtHR may primarily focus on the *financial* damage suffered by the applicant before approaching Strasbourg, thereby indirectly proceeding with some form of classification of ECHR rights.”<sup>15</sup>

“It is submitted that while there is merit to these arguments, the right of individual petition cannot be ‘sacrificed’. This right preserves the ECtHR's legitimacy to the eyes of petitioners, while being important from the perspective of the rule of law ...”<sup>16</sup>

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13. See note 3 at p. 14 of the CDDH, “Guaranteeing the long-term effectiveness of the European Court of Human Rights” – Final report containing proposals of the CDDH, adopted by the CDDH on 4 April 2003 (CDDH(2003)2006 Final).

14. See Nikos Vogiatzis, “The Admissibility Criterion under Article 35(3)(b) ECHR: A ‘Significant Disadvantage’ to Human Rights Protection”, in *ICLQ*, vol. 65, January 2016, pp. 185-211. The part of the title of the article after the colon is indicative of his severe criticism of the provision at hand, using the terminology from the provision itself. See also criticism of the provision by Costas Paraskeva, *The Relationship Between the Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights (With the case study on Cyprus and Turkey)*, Antwerp-Oxford-Portland, 2010, at pp. 51-58; Leo Zwaak and Therese Cachia, “The ECtHR: A Success Story?” in (2004) *Human Rights Brief*, vol. 11, issue 3, 32, at p. 35; Pietro Sardaro, “Individual Complaints”, in Paul Lemmens and Wouter Vandenhole (eds), *Protocol 14 and the Reform of the ECHR*, Antwerp-Oxford 2005, 45, at p. 67; and Robert Harmsen, “The ECtHR as a Constitutional Court: Definitional Debates and the Dynamics of Reform”, Conference in Memory of Stephen Livingstone, Queen's University, Belfast, 7 & 8 October 2005. See also, for a favourable appreciation of the new criterion, Luzius Wildhaber, “A Constitutional Future for the ECtHR”, in *Human Rights Law Journal*, vol. 23, No. 5-7, 2002, 161, at p. 164.

15. *Ibid.*, at p. 187.

“It can further be argued that since the Convention guarantees minimum standards of protection, it appears incompatible with the ‘European philosophy of human rights protection’ to grant the Court with discretion not to examine cases where the applicant has not suffered a significant disadvantage.”<sup>17</sup>

“The Explanatory Report was keen to underline that ‘[t]he wording of the new criterion is thus designed to avoid rejection of cases warranting an examination on the merits’. And yet in the same Report one reads that the ‘new criterion may lead to certain cases being declared inadmissible which might have resulted in a judgment without it’. These two sentences appear to be somewhat contradictory, but there is an additional clarification: ‘[i]ts main effect, however, is likely to be that it will in the longer term enable rapid disposal of unmeritorious cases’. The term ‘unmeritorious’, which means ‘not worth examining’, does not imply that there had been no violation. On the contrary, it implies that, although there might have been a violation, the Court may decide not to examine it, because the disadvantage suffered by the applicant was not ‘significant’. But does this not mean that the ECtHR will proceed with the merits of the case ... before deciding on the admissibility? How is it otherwise possible to assess the ‘significance’ of the disadvantage before examining the right in question, the facts of the given case, the conduct of the national authorities, the national legislation, and eventually the damage suffered, possibly – yet importantly – applying the proportionality test?”<sup>18</sup>

24. In my view, the above criticism helps, *inter alia*, to support the suggested proposal for reading the provision at hand as a whole, thus as a single and closely integrated rule of admissibility. This is so because by reading the provision as a whole, the principle of access to the Court and the principle of effectiveness are less undermined. This will be explained further below. In addition, one must be pragmatic and take the provision as it is, by following the proposed holistic approach, having in mind as constant reminders the aim of the provision and the compromise of principles contained therein.

**(c) The *de minimis* principle requires examination of the first two limbs together**

25. The *de minimis non curat praetor* principle is inherent in Article 35 § 3 (b). The manner, however, in which it is phrased, with two provisos or caveats, a negative formulation of the first limb and a double negative formulation of the third limb, makes apprehension of the provision difficult.

26. The level of severity of the first limb is higher than the *de minimis* principle and this by itself is not in line with the principle of effectiveness: I argue that if the first limb is taken alone and not together with the second limb, the former may not be limited to the *de minimis* principle, but be wider than that *in the sense that it can render inadmissible complaints which are not significant but nonetheless are not insignificant either*. The negative formulation of the phrase “not suffered a significant disadvantage” in Article 35 § 3 (b) is wider than a positive formulation of the same phrase,

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16. *Ibid.*, at p. 194.

17. *Ibid.*, at p. 198.

18. *Ibid.*, at p. 199.



such as “suffering an insignificant disadvantage”. To be more precise, “not suffering a significant disadvantage” may amount to suffering a trivial or negligible, small, moderate, or any lower level or degree of suffering other than significant suffering. However, the phrase in a positive formulation, such as “suffering an insignificant disadvantage” does not cover a small or moderate disadvantage, but only a trivial or a too small or unimportant one, thus being consistent with the *de minimis* principle.

27. In brief, in my submission, what is not significant is not *necessarily* insignificant, because between the two measures there may be many other measures or nuances of a lower or greater degree of importance. Consequently, by taking the first limb alone, certain small or moderate or not very big violations of human rights can be considered inadmissible, a result contrary to the principle of effective protection of human rights, which does not distinguish between violations according to their degree of suffering unless the violation is of course trivial (and save in the case of Article 3, which makes a distinction between three kinds of ill-treatment). After all, in every case the central issue is whether or not there has been a violation of a Convention provision and the preliminary issue of admissibility cannot close the door to violations other than interference which is indeed trivial.

28. That being said, if one reads the first limb in conjunction with the second, thus considering that respect for human rights may require the examination of the case on the merits, the ambit of the first limb may be limited by the second limb only to trivialities and thus give effect to the *de minimis* principle.

29. It can be concluded that another reason why the first two limbs must be read together is because it is only then that there will be a guarantee that the *de minimis* principle may apply. Otherwise, an application could be found inadmissible for the suffering of a disadvantage which is not insignificant, a result which may run counter to the principle of access to the Court and the effectiveness principle. Such a result may constitute a regression of human rights protection and therefore not be in line with the aim of the Council of Europe as stated in the Preamble to the Convention, namely “the maintenance and further realisation of Human Rights and Fundamental Freedoms”. Between two interpretations of the provision in question, namely the holistic and the piecemeal, that which does not lead to the above results, which is only the first one, should be preferred.

**(d) A requirement of logic: considering all limbs under the umbrella of a *prima facie* examination on the merits**

30. The uniform and holistic examination of Article 35 § 3 (b) is also justified by logic, because it is not correct to say that an applicant has not suffered a significant disadvantage, subjectively and objectively<sup>19</sup>, without

examining at the same time whether respect for his or her human right does not require examination of the application on the merits. Nor is it correct to argue that respect for human rights requires examination of the application on the merits without considering what disadvantage the applicant has suffered and what impact it had on him or her. Lastly, it is not correct to say that the “case” was not duly considered by a domestic tribunal without entering into a *prima facie* examination of the merits of the “case”.

31. As has been seen, the first limb may enhance the efficiency of the Court, thus its long-term effectiveness, but may also undermine the principle of effective protection of human rights as applied in a particular case. However, the second limb, which is based on the principle of effectiveness, may prevent the first limb from undermining the said principle in a case where and to the extent that the first limb does so. It can be maintained that the second limb counterbalances the long-term effectiveness of the Court by the practical and effective application of the relevant Convention provision in the concrete case.

32. Therefore, if the two limbs are looked at together in the proper way, also taken together with the third limb, which is based on the principle of subsidiarity (see paragraph 82 of the said Explanatory Report quoted above), both the efficiency of the Court and the principle of effectiveness, as well as the principle of subsidiarity, may be satisfied. However, as has been said above, the third limb will be abolished by the entry of force of Protocol No. 15.

33. All limbs require a *prima facie* examination on the merits, which brings them under the same umbrella of such examination.

34. In line with what has said above is the Court’s *Practical Guide on Admissibility Criteria*<sup>20</sup> prepared by its Registry and available on the website of the Court, where the “no significant disadvantage” inadmissibility ground<sup>21</sup> as well as the “manifestly ill founded” inadmissibility ground<sup>22</sup> (of Article 35 § 3 (a) of the Convention), are classified and examined under the heading “inadmissibility based on merits”<sup>23</sup>.

35. It is apparent from the last extract, quoted in paragraph 23 above, of the article by Nicos Vogiatzis<sup>24</sup> that the Court, in dealing with the provision at hand, also enters into the merits of the case. He substantiates this by making reference to the case-law of the Court, and, in particular, to *Megalska v. Poland* (no. 10368/05 § 64, 4 December 2012), where the

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19. On this double test of suffering, subjective and objective, see paragraph 28 of the judgment; William A. Schabas, cited above, at pp. 783-784; Karen Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 6th edition, London, 2019, at p. 58; Harris, O’Boyle and Warbrick, cited above, at p. 78.

20. Updated on 31 August 2019. See also Nicos Vogiatzis, *op. cit.*, at p. 201.

21. See *Guide, op. cit.*, at pp. 67-77.

22. *Ibid.*, at pp. 61-62.

23. *Ibid.*, at p. 61.

24. See Nicos Vogiatzis, *op. cit.*, at p. 199.

Court decided to join the admissibility criterion of Article 35 § 3 (b) to the merits<sup>25</sup>:

“It is noteworthy that the existing case law concerning the new criterion already demonstrates an explicit recognition by the Court of this merger between admissibility and merits. Particularly when the question of proportionality is at stake, the Court (it seems) will decide to jointly examine admissibility and merits. In *Megalska v. Poland* [§ 64] for example the Court explained that

‘the alleged lack of significant disadvantage is inseparably linked with the Court’s assessment of the proportionality of the measure complained of, in particular with the question whether, in consequence of the revocation of her pension, the applicant suffered an ‘excessive burden’ for the purposes of Article 1 of Protocol No. 1 to the Convention. That being so the Government’s argument [on the application of the ‘significant disadvantage’ criterion] would, in the Court’s view, more appropriately be dealt with at the merits stage.’”

36. In my view, the Court in the present case, when dealing with the first limb of the provision at hand also looked in effect at the merits of the case. In paragraph 31 of the judgment it explains that “the alleged violation of Article 11 of the Convention in the present case concerns, in the Court’s view, ‘important questions of principle’”<sup>26</sup>. But the Court cannot decide whether the case raises important questions of principle without first engaging in a *prima facie* examination on the merits. This phrase, namely “important questions of principle” used by the present judgment is similar to the phrase used by the original proposal for the draft of Article 35 § 3 (b), thus, “a serious question affecting the interpretation or application of the Convention or the protocols thereto ... a serious issue of general importance”<sup>27</sup>. One should remember however that this phrase of the original draft was in the second limb of the Article, which was replaced later on with the phrase “respect for human rights” in the final draft, the first limb of the provision both in its original and final versions being the same.

37. It is clear from paragraphs 42-43 of the present judgment, dealing with the merits of the case (after establishing that the application is admissible), that the “case” had not been “duly” considered by the domestic courts, especially if the term “case” in Article 35 § 3 (b) is considered to be the Convention complaint before the Court. In particular, in paragraph 42, it is said that the domestic courts, in the course of the administrative-offence proceedings against the applicant, did not seek to strike a balance between the requirements of the purposes listed in Article 11 § 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other, and they gave preponderant weight to the formal unlawfulness of the

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25. *Ibid.*, at p. 200.

26. See also *Živić v. Serbia*, no. 37204/08, § 41, 13 September 2011, where the Court found that, even assuming that the applicant had not suffered a significant disadvantage, the case raised issues of general interest which required examination.

27. See the whole text of the proposal in paragraph 16 above.

presumed static demonstration. This shows that what the Court found at the merits stage could also have been found at the admissibility stage as a *prima facie* consideration in reinforcing its finding that the application was admissible<sup>28</sup>.

38. The Court in the present case refers (with approval) to *M.N. and Others* (cited above). However, as has been said above, in that case the Court examined the first two limbs of Article 35 § 3 (b) together, but nonetheless the Court in the present case did not follow this approach since it examined only the first limb.

39. It can be concluded that since both the first and second limbs of the provision require entering into the merits of the case, it is more logical for the first two limbs to be examined together, taking into account the fact that the second limb may restrict the first limb, so as to prevent the effectiveness principle and the principle of access to the Court from being undermined.

**(e) In case of doubt, the effectiveness principle for the case at hand rather than the long-term effectiveness of the Convention must prevail**

40. If there is any doubt as to whether the application is admissible or not – which anyway does not apply in the present case as it is clear – by following the effectiveness principle the benefit of the doubt should go to the admissibility rather than the inadmissibility of the application, thus ultimately in favour of the right and the alleged victim. This is an aspect of the effectiveness principle which is also reflected in the maxims *in dubio pro juris/pro libertatae/pro persona* as well as in the maxim *ut res magis valeat quam pereat*.

41. This aspect of the effectiveness principle, which applies more generally in international law<sup>29</sup>, should apply in my view not only to the merits of a case but also at the admissibility stage, because it cannot meaningfully be applied only at the merits stage if the door to the merits is firmly closed at the admissibility stage. The efficiency of the Court must always seek and lead to the effectiveness of human rights and not merely to a higher productivity in the disposal of cases.

42. The holistic approach I propose is also important because without it, thus without examining all the limbs of the admissibility criterion as a whole, one cannot be sure about the admissibility of the application when there is some doubt about it, i.e. when there is a doubt as to whether to

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28. See also paragraph 35 above.

29. See on this principle: Hersch Lauterpacht, “Restrictive Interpretation and Effectiveness in the Interpretation of Treaties”, in *BYIL* (1945), 48 at pp. 50-51, 69; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, 2008, repr. 2013, at p. 414; my partly dissenting opinion in *Simeonovi v. Bulgaria* [GC], no. 21980/17, §§ 44-45, 12 May 2017; my concurring opinion in *Merabishvili v. Bulgaria* [GC], no. 72508/13, § 31, 28 November 2017; and my partly dissenting opinion in *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 19 and 53, 15 December 2016.

apply the effectiveness principle in the concrete case and find the application admissible or to pursue the long-term effectiveness of the Convention and reject the application as inadmissible for lack of significant disadvantage.

43. The proposed holistic approach is therefore important because it suggests that *in dubio*, the effectiveness principle must prevail, which no other approach can do if it is not holistic. It is also important because a property of the effectiveness principle is a harmonising one<sup>30</sup> and by using this property, a better harmonisation is achieved between the different limbs of the provision at hand.

**(f) Two tests of minimum level of severity**

44. Indeed, the “no significant disadvantage” admissibility criterion of Article 35 § 3 (b) is by its nature a kind of test of a minimum level of severity (seriousness). However, this is not the only test of a minimum level of severity applied by the Court. The attainment of a minimum level of severity (threshold of severity) test, a test not laid down anywhere in the Convention, but rather Court-made, was required by the Court as early as 1978 in the case of *Ireland v. the United Kingdom* for alleged ill-treatment to fall within the scope of Article 3 of the Convention. Since then, about thirty-two years before the entry into force of Protocol No. 14, there has been an abundance of case-law requiring such a minimum test for Article 3 complaints<sup>31</sup> which has so far been extended also to Article 8 complaints and there is nothing to guarantee that it cannot be applied by the Court in relation to other Articles, though regarding every right different considerations of suffering may apply. Conversely, the “no significant disadvantage” admissibility criterion is not limited to any human right; consequently it can apply in theory and/or in practice in respect of any human right, including the rights guaranteed in Articles 3 and 8. The issue of seriousness or severity of an alleged violation in the above two contexts was acknowledged by the Court in *Denisov v. Ukraine* ([GC], no. 76639/11, §§ 110-12, 25 September 2018):

“(iv) Minimum level of severity of the alleged violation

110. In cases where the Court employs the consequence-based approach, the analysis of the seriousness of the impugned measure’s effects occupies an important place. The Court has addressed the issue of the seriousness or severity of the alleged violation in several contexts. Notably, it has done so when assessing the ‘significant

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30. See Georgios A. Serghides, “The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the Other Convention Principles”, cited above, at pp. 3, 14-15.

31. On the threshold regarding Article 3 rights, see Yataka Arai-Yokoi, “Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR”, in (2003) *Netherlands Quarterly of Human Rights*, vol. 21/3, pp. 385-421.

disadvantage’ under Article 35 § 3 (b) of the Convention as an explicit admissibility requirement for the whole system of the Convention rights ... The Court has also consistently applied a threshold of severity in cases concerning Article 3 of the Convention ...

111. The concept of threshold of severity has been specifically examined under Article 8. In environmental cases, in particular, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant’s ability to enjoy his or her home or private or family life. The Court has ruled that the assessment of this minimum level in such cases is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual’s health or quality of life ... This approach has also been applied in nuisance cases under Article 8 with close similarities to the environmental cases mentioned above ...

112. In addition, the Court has ruled that an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life ... This requirement covers social reputation in general as well as professional reputation in particular ...”

45. In connection with the above, the following questions may arise: (a) whether the above-mentioned two tests of the minimum level of severity can apply regarding the same complaint in a case, or whether the application of one in such a case can exclude the application of the other; (b) whether there is or can be an overlap between these two tests; and (c) whether they use the same or similar means in measuring the severity threshold. If the answer to any of the above questions is in the affirmative, then there may be an additional reason to apply the “no significant disadvantage” admissibility criterion with more caution and as a single, integrated rule of interpretation, so as to better ensure the effectiveness principle.

46. It is pertinent to examine first how the Court-made test of the minimum level of severity is used. It has been used by the Court in order to find out whether an alleged violation falls within the scope of Article 3 or Article 8, as the case may be. And for the alleged violation to be so considered, it must attain a minimum level of severity. It seems that the Court has never defined what the “scope” of a right is<sup>32</sup>. However, the term “scope” seems to mean the extent of the area or subject matter that a right deals with or to which it is relevant. It can also be said that the scope of a right, as used in the Court-made test of minimum severity, is the *ratione materiae* applicability of the right. In other words, it is “the subjective content of the rights that calls for effective protection”<sup>33</sup>. I also believe that

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32. On the scope of rights generally, see Laurens Lavrysen, “The Scope of Rights and the Scope of Limitations”, in Eva Brems and Janneke Gerards, *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge, 2013, pp. 163-82.

33. These are words used by Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden-Boston, 2009, at p. 56. However, these words were not used by Christoffersen to expressly explain what the scope of a right is, but, dealing with the effectiveness principle as a manner of

the scope of a right is the scope of its protection in a wider sense, before being weighed against any limitations, also taking into account the aim<sup>34</sup> of the relevant Convention provision as well as its text, by following the single integrated rule of interpretation of Article 31 § 1 of the VCLT. I humbly suggest, that, in determining the scope of a right (including its different dimensions), the “intension”<sup>35</sup> and the “extension”<sup>36</sup> of the relevant term in a Convention provision must also be taken into account. These dimensions of a term, “intension” and “extension”, I borrow from logic and I consider them extremely relevant and important also for the interpretation of legal terms concerning human rights. In logic<sup>37</sup> “intension” consists of the essential qualities, properties or characteristics of the terms, while “extension” consists of the things to which the term refers<sup>38</sup>.

47. Having said that, the scope of a right can be represented as a circle. If the Court’s requisite minimum severity of an alleged violation of the right in question is not reached, then the complaint is out of the scope of the right. According to the case-law of the Court<sup>39</sup>, however, when a measure falls short of Article 3 ill-treatment, it may nevertheless fall foul of Article 8. For instance, conditions of detention may give rise to an Article 8 violation where they do not attain the level of severity necessary for a violation of Article 3<sup>40</sup>. In such cases, one cannot speak of one circle but of two circles, where the complaint falls outside the circle of protection of Article 3 but falls within the circle of protection of Article 8.

48. Though there is no doubt that the Court-made test of the minimum level of severity concerns the scope of a right, there is, regrettably, a lack of

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interpretation, he thus used them to explain that “the main question will often be how to identify the substantive content of the rights that call for effective protection”. For me, this “main question” refers to and also describes the scope of a right.

34. In the *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, (law part) I B § 3, Series A no. 6, the then Plenary of the Court said that “[t]o determine the scope of the ‘right to education’, within the meaning of the first sentence of Article 2 of the Protocol, the Court must bear in mind the aim of this provision”.

35. Or “connotation” or “comprehension” or depth.

36. Or “denotation” or “classification” or width.

37. See on “intension” and “extension” in logic: H. E. Cunningham, *Textbook of Logic*, New York, 1924, at pp. 26-27, 37; A. Wolf, *Textbook of Logic*, London, 1938, first Indian edition, repr. 1976, at pp. 323-324; Horace William Brindley Joseph, *An Introduction to Logic*, 2nd edition (revised), Oxford, 1916, at pp. 136, 142-43, 155; W. Stanley Jevons, *The Principles on Logic: A treatise on logic and scientific method*, 2nd edition, New York, 1887, at pp. 25-26; Evangelos P. Papanoutsos, *Logic* (in Greek), 2nd edition, Athens, 1974, at pp. 52-53.

38. There is an inverse relationship between “extension” and “intension” (see bibliography in note 37 above) but it is not the purpose of this opinion to explain further this relationship.

39. See, *inter alia*, *Wainwright v. the United Kingdom*, no. 12350/04, § 43, 26 September 2006.

40. See *Raninen v. Finland*, no. 20972/92, § 63, 16 December 1998.

consistency as regards (a) the stage of proceedings in which it is raised, i.e. at the merits stage or the admissibility stage; and (b) how the Court proceeds when it applies this test, i.e. by finding whether or not there has been a violation, or declaring that the application is *ratione materiae* inadmissible or that it is manifestly unfounded. In particular, there is case-law where the Court examined the test: (a) at the merits stage, and found no violation of Article 3<sup>41</sup>; (b) at the merits stage, and found a violation of Article 3<sup>42</sup> or Article 8<sup>43</sup>; (c) at the merits stage, and rejected the complaint under Article 8 as manifestly ill founded<sup>44</sup>; (d) at the admissibility stage and found no violation of Article 3<sup>45</sup>; (e) at the admissibility stage and rejected the complaint under Article 8 as incompatible *ratione materiae* pursuant to Article 35 § 3 (a)<sup>46</sup>; (f) at the admissibility stage and rejected the complaint under Article 3 as manifestly ill-founded pursuant to Article 35 § 3 (a)<sup>47</sup>. This lack of consistency renders the application of the test in question uncertain as regards the above issues, with possible repercussions for the substance of the right; it is one thing, for instance, to apply the test in question at the merits stage and to find no violation of the allegedly impugned right<sup>48</sup> and another to find that the complaint is manifestly ill-founded at the admissibility stage. In the same vein, it is one thing when applying the test to make a full examination of the

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41. See, for instance, *Chernega and Others v. Ukraine*, no. 74768/10, §§ 149, 154-156, 18 June 2019; *V. the United Kingdom*, no. 24888/94, §§ 70, 79-80, 16 December 1999; *Yaroslav Belousov v. Russia*, nos. 2653/13 and 60980/14, §§ 122-25, 127-28, 4 October 2016; *Petrakidou v. Turkey*, no. 16081/90, §§ 61-63, 27 May 2010; *Valašinas v. Lithuania*, no. 44558/98, §§ 101, 106, 24 July 2001; *Bouyid v. Belgium*, no. 23380/90, §§ 46, 52, 21 November 2009; *N. v. the United Kingdom* [GC], no. 26565/05, §§ 29, 51, 27 May 2008; *S. H. H. v. the United Kingdom*, no. 60367/10, §§ 70, 95, 29 January 2013.

42. See, for instance, *Ireland v. the United Kingdom*, no. 5310/71, § 162, 18 January 1978 (Plenary); *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 158-60, 210-11, 15 December 2016; *Bouyid v. Belgium* [GC], no. 22380/09, §§ 86-87, 111-13, 28 September 2015; *Selmouni v. France* [GC], no. 25803/94, §§ 82, 91-95, 105, 28 July 1999; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 172, 177, 184, 23 February 2016; *Jalloh v. Germany* [GC] no. 54810/00, §§ 67, 82, 11 July 2006; *Elberte v. Latvia*, no. 61243/08, §§ 125-26, 130, 143, 13 January 2015; *Paposhvili v. Belgium* [GC], no. 41738/10, §§ 150, 155, 174, 178-79, 206, 13 December 2016.

43. See, for instance, *Fadeyeva v. Russia*, no. 55723/00, §§ 66-67, 79, 92-93, 133-34, 9 June 2009; *Moreno Gómez v. Spain*, no. 4143, §§ 57-63, 16 November 2004.

44. See, for instance, *Kleuver v. Norway*, no. 45837/99, § 2 (of conclusion), 30 April 2002; *Benjamin v. Hungary*, no. 36568/07, § 4, 4 March 2014.

45. See, for instance, *Oya Ataman v. Turkey*, no. 74552/01, §§ 19-27, 5 December 2006.

46. See, for instance, *Denisov v. Ukraine*, cited above, §§ 88-89, 94, 133-34; *Šečić v. Croatia*, no. 40116/02, § 3 b., 15 June 2006.

47. See, for instance, *Slivenko and Others v. Latvia*, [GC], no. 48321/99, §§ 107-08, 9 September 2003 (dec.); *Manitaras and Others v. Turkey*, no. 54591/00, §§ 97, 99, 101-02, 3 June 2008.

48. For instance, because the applicant did not establish beyond reasonable doubt (which is a standard of proof pertinent to criminal law) that she was subjected to treatment contrary to Article 3, as were the facts in *Petrakidou*, cited above, §§ 61-63.



case on the merits and find a violation or no violation of a right and another when applying the test to make only a *prima facie* examination of the case and to find that the complaint is *ratione materiae* inadmissible or even ill-founded.

49. The function of the “no significant disadvantage” admissibility criterion is different from the Court-made test of the minimum level of severity. This criterion operates when the complaint is within the scope of the right in question, thus within the circle explained above, after the other test of severity permits it to enter. This order or sequence of the application of the two tests of severity is supported by the approach of the Court in *Denisov* (cited above, §§ 88-89, 94, 133-134), where the Court rejected the Article 8 complaint as being incompatible *ratione materiae* pursuant to Article 35 § 3 (a), because it did not cross the threshold of seriousness for an issue to be raised under this provision. Subsequently, the Court decided that, in the light of this conclusion, it was not necessary to rule on the Government’s second objection based on the admissibility criterion of Article 35 § 3 (b).

50. In brief, the functional difference between the “no significant disadvantage” admissibility criterion and the Court-made test of the minimum level of severity is that the latter assists the Court in determining whether the complaint is within the scope of the relevant Convention provision, namely whether it is within the circle of protection of the right. And if the complaint is within the scope of the right, thus within the circle of its protection, the “no significant disadvantage” admissibility criterion’s role is to assist the Court in determining whether the applicant has not suffered any significant disadvantage. In my submission, in the circle of the scope of the right, an insignificant disadvantage can be seen as falling inside the circle but very close to its periphery, and thus far away from the centre of the circle, where the core of the right lies.

51. Despite their different functions, it could be argued that the two tests of minimum level of severity may operate as two allied forces regarding a particular complaint, one not to allow a complaint to enter the circle of protection of the right, and the other – in case the complaint manages to enter the said circle – not to leave it there (by rendering the application inadmissible). And, as has been said above, the means used by the two tests in their function is the same, i.e. the applicant’s suffering: enough suffering to enter the circle of the right’s protection (a sort of “passport” to enter) and no significant suffering to stay in the circle. Furthermore, the nature of the assessment of this measure (i.e. the suffering) regarding both tests is the same, namely a *relative* one, depending on all circumstances of the case<sup>49</sup>.

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49. As regards the relative nature of the test under Article 35 § 3 (b), see paragraph 28 of the judgment in the present case. As regards the relative nature of the Court-made minimum level of severity, see, *inter alia*, *Ireland v. the United Kingdom*, cited above, § 149; *Yaroslav Belousov*, cited above, § 121; *V. v. the United Kingdom*, cited above, § 70;

52. Taking into consideration the fact that the operation of the two tests has negative repercussions for the effective protection of human rights, as well as the uncertainty described above regarding the application of the Court-made test of the minimum level of severity, the proposed holistic approach to the admissibility criterion in question will be the most appropriate approach: it will function in favour of not leaving the complaint to go outside the circle of the right's protection by rejecting the application as inadmissible, unless the issue is really trivial and the disadvantage an applicant suffers is really insignificant. Surely, the holistic approach of a single, closely integrated rule of admissibility of Article 35 § 3 (b) will have a less negative impact on the practical and effective protection of a right than any other approach.

**(g) A final concern**

53. Article 20 § 2 of Protocol No. 14 provides that the new admissibility criterion of no significant disadvantage “shall not apply to applications declared admissible before the entry into force of the Protocol”. However, as it further provides “[i]n the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.” Indeed, since the two years after the entry into force of Protocol No. 14 passed, both the Committee and single judge formations have applied the new admissibility criterion, although very rarely in the latter case.

54. Indeed, for the Committees, there is no problem in applying all the above principles, engaging in a *prima facie* examination of the merits of the case and applying the single and closely integrated rule of admissibility, by taking into account harmoniously the long-term effectiveness of the Court and the effectiveness principle in the concrete case.

55. However, the single judges' role under Article 27 is different: they “may declare inadmissible or strike out of the Court's list of cases an application ... where such a decision can be taken without further examination” (§ 1), and their decision “shall be final” (§ 2); but if they do not “declare an application inadmissible or strike it out”, they must “forward it to a committee or to the Chamber for further examination” (§ 3).

56. As is mentioned in paragraph 67 of the Explanatory Report to Protocol No. 14, referring to the competence of the single judges, “where such a decision can be taken without further examination ... [t]his means that the judge will take such decisions only in clear-cut cases, where the inadmissibility of the application is manifest from the outset”. It is added that: “The latter point is particularly important with regard to the new admissibility criterion introduced in Article 35 ... in respect of which the

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*Chernega and Others*, cited above, § 149; *Khlaifia and Others*, cited above, § 159; *Mozer*, cited above, § 177; *Jalloh*, cited above, § 67; *Paposhvili*, cited above, § 174.

Court's Chambers and Grand Chamber will have to develop case-law first ...”.

57. Despite the fact that it is assumed that single judges only deal with clear-cut cases and they have the right to forward the case to a Committee or a Chamber, their limited competence only to take a decision without further examination cannot, in theory and practice, guarantee that the effectiveness principle and the principle of access to justice are always well secured in applying the new admissibility criterion.

58. Fortunately, my above concern does not apply to the present case, which, rightly so, is before the Chamber.

59. I nevertheless refer to it, since I decided to make a thorough analysis of the new admissibility criterion and also to explain my fear about the survival of the principle of effectiveness and the principle of access to justice in the future, in the event that the *prima facie* examination on the merits practice is abandoned by the Court. Moreover, my fear extends to the future of the Convention and the legitimacy of the Court, since the new admissibility criterion, as well as the Court-made test of the minimum level of severity, may affect the most central feature on which the Convention system is based, namely the right of individual application.

## **5. Application of the proposed approach to the facts of the case**

60. It is clear from the above analysis how the limbs of Article 35 § 3 (b) are closely interconnected between themselves.

61. Since, in my view, the Court must look at the provision at hand as a whole in order to decide on the admissibility of the application, I have done so in the present case, and I have reached the same conclusion as that of the judgment, namely that the application is admissible. In particular, I find: (a) as the judgment does, that the applicant suffered a significant disadvantage as a result of the administrative-offence proceedings against him regarding his participation in a peaceful assembly; (b) that respect for his right to freedom of assembly requires examination of the application on the merits; and (c) that, though the case was considered by the domestic courts, it does not seem to have been “duly” considered as required by the third limb of the provision.

62. Consequently, I find that none of the limbs of the provision were satisfied in the present case, and, for this reason, the Government's objection that the present application was inadmissible on the basis of Article 35 § 3 (b) was unfounded and therefore had to be dismissed.