

Irish Human Right Commission and the Law Society of Ireland
Promoting and Protecting Human Rights in Ireland
The Role of the Irish Constitution and European Law
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*Exhaustion of domestic remedies: importance of the constitutional
remedy²*

A. Introduction

1. **Sources** of the inadmissibility requirements: Articles 1, 34 and 35
2. The **impact** of the admissibility requirements: the statistics
3. The **general approach** to the application of admissibility criteria: flexibility versus formalism³

B. General principle: exhaustion of domestic remedies Article 35 § 1

1. The **requirement** to have raised the substance of the Convention complaints in domestic proceedings which are *available* and likely to be adequate and *effective* in providing redress for the alleged wrong.
2. Its **purpose**: prior review by Contracting Party⁴
3. Key aspect of the principle of **subsidiarity**⁵
4. No need to explicitly invoke the Convention complaint: must do so in such a manner as would allow the judicial authorities to remedy the alleged violation⁶.

¹ Ms A. Austin, Head of Division, Registry of the European Court of Human Rights. Any views expressed are the writer's own.

² Anna Austin, Head of Division, Registry, European Court of Human Rights, Any opinions expressed are the authors own and do not bind the Court.

³ *Cardot v. France* (1991); *Yasa v. Turkey* (1998); *Dobrev v. Bulgaria* (2006); *Blecic v. Croatia* (2006); *Walker v. UK* (2000)

⁴ *Selmouni v. France* (1999)

⁵ *Akdivar v. Turkey* (1996), § 65; and *McFarlane v. Ireland* (2010), § 122

5. The necessity to comply with formal **procedural domestic requirements** including time-limits and applicable court fees
6. The **relevant date for determining** the effectiveness of remedies: by reference to national law at on introduction of the application and exceptions⁷ allowing for the “Pilot judgment” procedure⁸ .
7. There is a distribution of the **burden of proof**:
 - Prior to communication, the applicant to provide sufficient information to avoid *de plano* inadmissibility.
 - following communication, the burden is on the Government to show, with precision⁹, that the remedy is “available in theory and in practice (accessible, capable of providing redress and offering reasonable prospects of success)¹⁰. The applicant must then demonstrate that the remedy was exhausted, was not effective/adequate in the particular circumstances of the case or that there were special circumstances absolving him from the requirement to exhaust (below).

C. Special Importance of exhausting the constitutional remedy

In a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation. A declaratory action before the High Court, with a possibility of an appeal to the Supreme Court, constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights¹¹

⁶ *Fressoz v. Roire v. France* (1999)

⁷ *Bauman v. France* judgment of 2002, § 47.

⁸ A Pilot judgment identifies a systemic/endemic violation and generally comprises a requirement by the Court under Article 46 of the Convention on the State to introduce a remedy followed by a review by the Court of that remedy’s effectiveness and, if appropriate the summary inadmissibility of follow up cases: for example, a compensatory remedy in Turkey for forced displacement of Kurdish villagers from South–East Turkey (*Doğan and Others v. Turkey* (nos. 8803-8811/02, 8813/02 and 8815-8819/02, ECHR 2004 followed by No. 18888/02 *Aydın İcyer v. Turkey*, Decision of 12 January 2006.

⁹ *Foti v. Italy* (1982) and *Apostol v. Georgia* (2006)

¹⁰ *Deweer v. Belgium* (1980); and *Paksas v. Lithuania* (no. 34932/04) [GC] § 76

¹¹ *Patrick Holland v. Ireland*, no. 24827/94, (dec.) 14.4.1998, DR 93; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, (dec.) 19 June 2003; and *D v. Ireland*, no. 26499/02 (dec.), 28.6. 2006

D. Limits of the obligation to exhaust the constitutional remedy

(a) The existence of the remedy could be too uncertain¹²:

(b) The remedy could be ineffective because:

- there was no chance of success¹³;

- time is of the essence and the remedy takes too long¹⁴

- the decision of the court is not capable of providing a remedy¹⁵.

- are damages, as well as the declaratory orders, necessary for the remedy to be effective and, if so, are damages available?

(c) The constitutional remedy would not be accessible¹⁶

(d) The constitutional remedy would be inappropriate because:

- the particular issue is not properly one for the constitutional courts¹⁷;

- it was not foreseen that the remedy would be so used¹⁸

(e) Where there is a choice of remedies reasonably open, the applicant can choose one avenue of redress and, even if that avenue is unsuccessful, he or she is not expected to exhaust the remaining (constitutional) option¹⁹.

(f) Where legal aid is not available to the applicant, he/she cannot afford legal representation and cannot conduct the litigation him/herself²⁰;

¹² *McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010

¹³ Compare *D v. Ireland* with *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010 (1st and 2nd applicants)

¹⁴ *McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010

¹⁵ The constitutional remedy will be ineffective if the finding of unconstitutionality cannot quash or modify the impugned measure taken against the individual by the State (*Ven v. Hungary* (1993) and *Csikos v. Hungary* (2006)) or lead to the quashing of judicial decisions taken on the basis of the unconstitutional act (*Apostol v. Georgia* (2006))

¹⁶ *Immobiliare Saffi v. Italy* (1999) and *Miconi v. Italy* (2004)

¹⁷ *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010 (3rd applicant)

¹⁸ *Birney and Others v. Ireland* 52079/08 and 52054/08 (dec.) 10.1.2012

¹⁹ *Mary O'Reilly v. Ireland*, Comm dec. (1996); and *O'Keefe v. Ireland*, no. 35810/09 (dec.) 26.6.2012

²⁰ *Airey v. Ireland* (1979) although this is rarely accepted as a reason not to, at least, attempt to exhaust domestic remedies *X. v. Ireland*, no. 14079/04 (dec.) 15.12.2009

(g) Special circumstances absolving an applicant from exhausting the remedy. The threshold is high and the remedy would have to be “dangerous or impossible” rather than “difficult or onerous”:

- administrative practice in situations of conflict²¹
- administrative practice in peaceful situations²².

(h) If the respondent State fails to plead non-exhaustion, the Court may decide not to examine the issue²³.

E. Interaction with Article 13 of the Convention

Effectiveness can be reviewed on the merits of Article 13 when:

- (a) there is a serious dispute as to the effectiveness²⁴;
- (b) the applicant reasonably exhausted another remedy which is considered sufficient for the purposes of Article 35 § 1 of the Convention²⁵

²¹ Compare the recognition of an administrative practice in the case-law beginning with *Akdivar v. Turkey* (1996) with the more recent narrowing of this exception in *Kanlibas v. Turkey* (2005) and *Isayeva, Yusupova and Bazayeva v. Russia* (2005)

²² *AB v. the Netherlands* (2002);

²³ *N.C. v. Italy*, Grand Chamber judgment 2002

²⁴ *McFarlane v. Ireland* [GC], no. 31333/06, 10 September 2010

²⁵ *O’Keeffe v. Ireland*, no. 35810/09 (dec.) 26.6.2012