

FAIR TRIALS INTERNATIONAL



A Guide to

**Applying to the European Court of Human
Rights when fair trial rights have been
violated**

October 2012

This Guide is available online at www.fairtrials.net/publications/training/ECtHRGUIDE

About Fair Trials International

Fair Trials International ('FTI') is a UK-based non-governmental organisation that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

We pursue our mission by providing assistance, through our expert casework practice, to people arrested outside their own country. We also addresses the root causes of injustice through broader research and campaigning and build local legal capacity through targeted training, mentoring and network activities. In all our work, we collaborate with our Legal Expert Advisory Panel, a group of over 80 criminal defence practitioners from 25 EU states.

Although we usually work on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, thanks to the direct assistance we provide to hundreds of people each year, we are uniquely placed to provide evidence on how policy initiatives affect suspects and defendants throughout the EU.

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Applying to the European Court of Human Rights when fair trial rights have been violated

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What this guide covers

The European Court of Human Rights (**ECtHR**) has a massive backlog of cases: a big part of its workload involves claims by individuals who have been through criminal trials in their home state, that the state has violated their right to a fair trial – a right guaranteed under Article 6 of the European Convention on Human Rights¹ (**ECHR**). This paper gives practical advice on how to apply to the ECtHR in the context of Article 6. It covers both applications for substantive relief, brought under Article 34 ECHR, and applications for interim measures, which are made under Rule 39 of the ECtHR's Rules of Court².

In *'Questions and Answers'*, a guide for potential applicants available on the ECtHR website³, the Registry of the ECtHR notes that *'in view of the current backlog of cases'* applicants may have to wait a year before the Court can even proceed with an initial examination of admissibility. Around 90% of applications received by the Court are deemed inadmissible.

We hope that, by highlighting the main elements of a successful application, we will help lawyers to avoid some of the most common pitfalls and make sure that their clients' applications are found to be admissible and well substantiated.

Who can claim?

Any private individual or legal entity, such as a company, charity or other association, can claim. You do not need to be a national of one of the 47 states bound by the Convention (known as the "**High Contracting Parties**") but the violation complained of must have been committed by one of those States in its own "jurisdiction", which usually means on its territory. The claimant must have directly and personally been the victim of the violation – this is discussed further below.

What relief does the Court give?

Even if the Court finds that there has been a violation of Article 6, it will not necessarily order financial compensation: a finding of breach is often considered to be a sufficient remedy. However, compensation may be awarded in the form of "just satisfaction". If you wish to claim compensation, you must do this at the Chamber stage within two months of the Court finding your application admissible. The Court may also rule that the State should pay any expenses incurred by the claimant in the litigation process if a violation is found. Costs are not awarded against unsuccessful claimants.

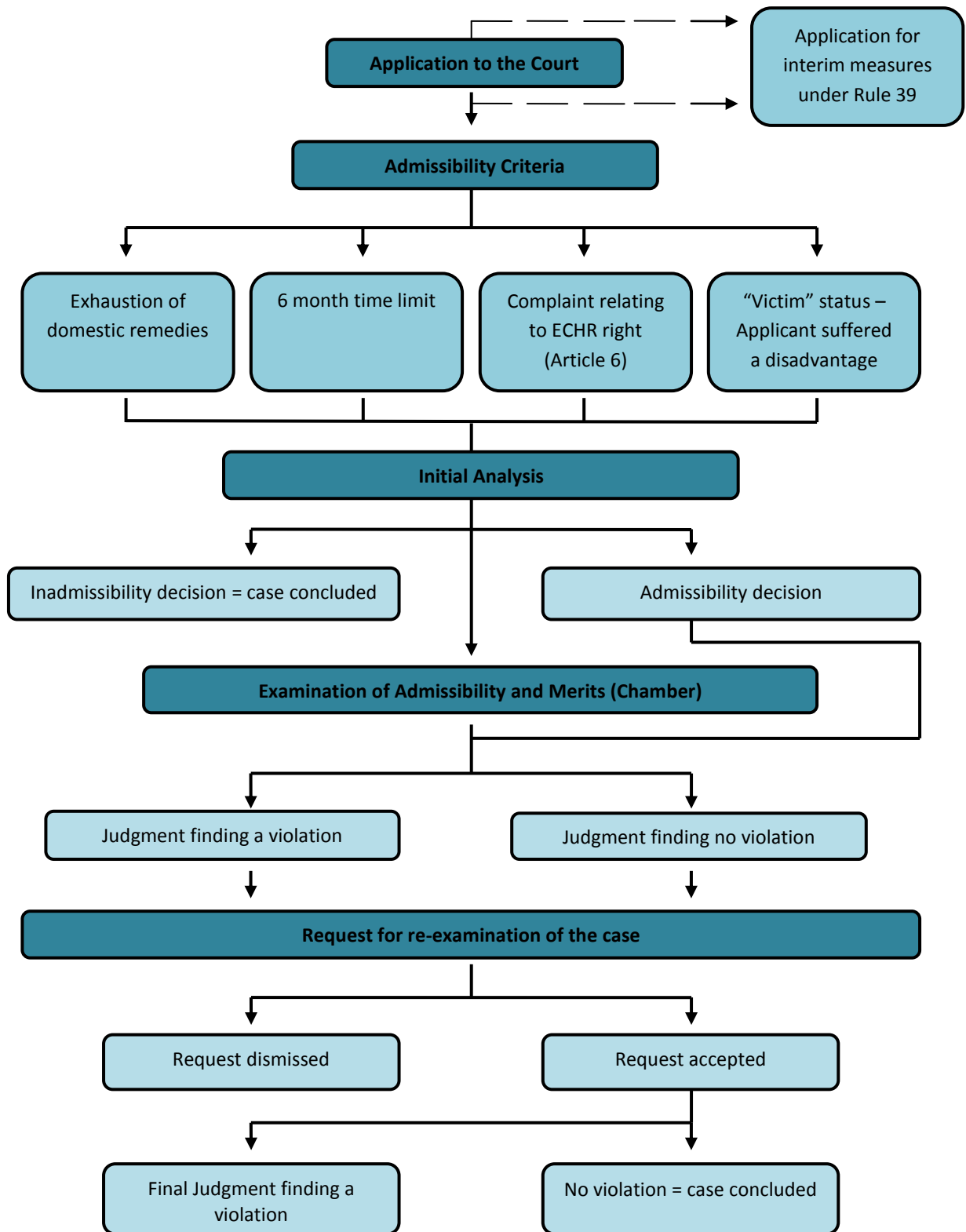
¹ Full text of ECHR including Article 6 here: http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf

² Latest edition entered in to force on 01.09.2012

³ <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/>

The application process

These are the essential stages.



Article 6 applications – key questions

When can I bring an application for a violation of Article 6 ECHR?

Individual applications concerning alleged breaches of Article 6 – the right to a fair trial – may be brought under Article 34⁴ ECHR. Article 6 applies, in criminal proceedings, to the entire period of the case starting with the moment that a person is charged with an offence.⁵ Applications cannot relate solely to proceedings that have taken place after conviction and final sentence. Article 6 does not apply to extradition proceedings except in exceptional circumstances⁶. It is important to ensure all domestic remedies have first been exhausted – see further below.

Can I apply to the court for a violation of the EU Charter of Fundamental Rights?

Since the Lisbon Treaty came into force in 2009, the Charter has become directly enforceable in the 47 Council of Europe States. The aim of the Charter is not to establish new rights, but to make the basic protections set out in the ECHR and elsewhere more visible and offer an additional source of protection to European citizens. It may be of assistance in cases where you wish to challenge the way in which an EU law with a criminal justice element has been implemented nationally.

Although extradition is not generally covered by the scope of Article 6, Article 47 of the Charter of Fundamental Rights extends its safeguards to extradition in the EU context. The Charter provides that no person may be extradited to a state where there is a serious risk of death, torture or inhuman treatment. Article 47 of the Charter provides a slightly wider protection of the right to an effective remedy and a fair trial than Article 6 ECHR in that it may be applied in any case relating to the operation of EU law, such as the EU Framework Decisions introducing the European Arrest Warrant or the European Supervision Order. In this sense, the Charter may require States to use discretionary powers given to them under Directives or Framework Decisions, if the failure to do so would violate fundamental rights.

Whom can I lodge an application against?

You can lodge an application against any state party to the ECHR. The act or omission complained of must have been committed by a public authority in that country (for example, a court or an administrative authority). You cannot lodge an application against an individual or private institution.

⁴ Article 34 provides: *The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*

⁵ *Eckle v Germany*: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57476>

⁶ (although see below on “flagrant denial of justice” cases and note specific point on Charter of Fundamental Rights, above)

What conditions must be satisfied to lodge an application?

As shown in the diagram on p5, you must meet four key criteria to ensure that the application is admitted. It is essential that these are all met, for your case to progress. In 2011, 90% of applications to the Court were declared inadmissible. Checking off the points below will help you avoid this.

Admissibility checklist

1. All domestic remedies exhausted?

Before you make an application to the ECtHR you must ensure that you pursue all possible remedies in your own country, including all possible appeals against the original conviction. This gives your national authorities the opportunity to rectify the alleged violation. You must do this even where the relevant ECHR provisions and jurisprudence have not been implemented into your national law.

2. Application falls within six month time limit?

You must submit your application within six months of the final decision that was taken in your country. This period starts from the date your client first received knowledge of the final domestic decision. This is a strict time limit and cannot be extended.

3. Complaint engages a Convention right?

You must be able to show that there has been a breach of a right guaranteed under the ECHR (in this case Article 6). A large proportion of Article 6-related claims fail because they are declared to be inadmissible at this stage. You need to analyse your client's case very carefully against the detailed provisions in Article 6 and in light of all the applicable case law on Article 6, to satisfy yourself that this is a valid claim⁷. In recent years, the most litigated requirement of Article 6 is the obligation on States to ensure that proceedings do not exceed a "reasonable time". Fair Trials International has produced detailed information on every single EU member state's ECHR and ECtHR record on Article 6⁸. This contains lists of all infringement rulings against every EU country for breaching Article 6 in criminal cases (as well as Article 5 as far as concerns pre-trial detention).

4. Victim directly affected by the violation?

The Court will only accept applications from or on behalf of a victim of a violation of an ECHR right. The victim must have suffered a significant disadvantage as a result of the violation.

- **Direct victim** This means that your client is, personally and directly, a victim of a violation of Article 6 and has suffered a significant disadvantage. However, there have been cases where the Court has accepted a more flexible definition of this requirement on a case-by-case basis, to include "potential" victims. This has included extradition cases where there is a

⁷ See the February 2012 Council of Europe publication, "*Protecting the right to a fair trial under the European Convention on Human Rights*", by Dovydas Vitkauskas and Grigoriy Dikov, which contains a full list of authorities and in-depth analysis on the subject. Available on Council of Europe website and at: http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb12_fairtrial_en.pdf

⁸ This information is on our website at: <http://www.fairtrials.net/justice-in-europe/>

serious risk of a ‘flagrant denial of justice’ in the requesting (ie prosecuting) country – see further under “Extradition cases” below.

- **Indirect victim?** It is also possible that the Court will accept an application on behalf of an ‘indirect’ victim if that person is closely connected to the actual victim of the violation, for example a spouse or partner (see *Gradinar v Moldova*⁹ – an Article 6(1) case on court impartiality).

What kinds of complaints tend to fail at the admissibility stage?

The most common examples of applications under Article 6 that are deemed inadmissible are:

- **“Fourth instance” complaints:** The ECtHR cannot be called on to nullify domestic rulings or re-examine them as an appeal court. Most fourth instance complaints are made under Article 6(1) concerning the right to a ‘fair hearing’. This phrase is commonly misunderstood resulting in its being misused as a basis for an application to the ECtHR. It is important to be aware that in this context, “fairness” is procedural and not substantive. Therefore, if your complaint is based on the unfairness of a domestic hearing, it is likely to be rejected if the person has had the procedural benefit of adversarial proceedings in the state concerned (*Khan v United Kingdom*).¹⁰
- **Extradition cases:** As a general rule, Article 6 does not apply to extradition proceedings. However, in exceptional cases, Article 6 may be raised as a bar to extradition where the facts indicate that the person risks suffering a ‘flagrant denial of justice’ in the requesting country. This principle was established in *Soering v United Kingdom*¹¹ and has since been confirmed in a number of ECtHR judgments (see e.g. *Mamatkulov and Askarov v Turkey*).¹² There have been some indications from the Court about the types of unfairness which could amount to a flagrant denial of justice; these include convictions *in absentia*, trials of a summary nature, detention without review by an independent and impartial tribunal, and deliberate refusal of access to a lawyer.

However, in the 22 years since *Soering*, the ECtHR has only once found that an extradition would be in violation of Article 6¹³. What is required is a breach so fundamental that it amounts to a nullification of the rights guaranteed under Article 6.

See also the points above on page 5 regarding the Charter of Fundamental Rights.

⁹ [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":\["830666"\],"itemid":\["001-85775"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)

¹⁰ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58841>

¹¹ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#%7B%22dmdocnumber%22%3A%5B%22695496%22%5D%2C%22display%22%3A%5B0%5D%7D>

¹² <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68183>

¹³ In *Othman v United Kingdom*, discussed on page 3 of this guidance issued by the ECtHR in June 2012:

http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Expulsions_et_extraditions_EN.pdf

How do I lodge an application?

Your application must be submitted in writing. This should be done using the application form provided on the ECtHR website. However, it is also acceptable to apply by letter as long as this contains the essential content required by the application form. Your application must set out:

- The name, date of birth, nationality, sex, occupation and address of the applicant;
- Your name, occupation and address as the applicant's legal representative;
- The name of the contracting party against whom the application is made;
- A succinct statement of the facts;
- A succinct statement of the alleged ECHR violation and related arguments;
- A succinct statement of the applicant's compliance with the admissibility criteria; and
- The object of the application.

Your application must include copies of all relevant documents and decisions so far made in relation to the case. Your client must also provide authority for you to act on their behalf as their representative. There is no advantage to be gained from attending the Court in person to file your case and this will not speed up the process.

If you apply by letter and do not include all of the above information, you will be sent an application form to complete. It is important that you return this within 8 weeks of the date when you received the registry's letter. Failure to do this will affect the date of introduction of your application and you will risk not meeting the six month time limit referred to above (Admissibility criteria).

Your application should be sent to:

The Registrar
European Court of Human Rights
Council of Europe
67075 Strasbourg - Cedex
France

What happens next?

See our diagram on page 4 to understand the key stages. Your application will initially be heard by a committee of judges who will decide whether it is admissible. If the committee finds it inadmissible, this decision is final. There will be no reasons given and there is no right of appeal. You will not be able to proceed beyond this stage. In order to avoid this situation, it is important to ensure that you have complied with the admissibility criteria set out above.

If your application is not struck out as inadmissible at the committee stage, it will be allocated to one of the ECtHR's four sections, where a panel of seven judges will consider the case. At this stage, your

application will also be communicated to the government of the State against whom you are filing a complaint. If the case is of great significance, it may be transferred to the Grand Chamber.

What will the Court consider?

The Court may immediately declare your case inadmissible. Alternatively, the Court will undertake a detailed assessment of your application. This will involve consideration of both the admissibility and the merits of the case. Decisions on these two issues may be taken together or separately, depending on the discretion of the court.

1. Admissibility: The Court may rule your application inadmissible if it finds that you have failed to meet any of the admissibility criteria set out above. You will be given reasons for a finding of inadmissibility at this stage – however, there is no appeal process and you will not be able to proceed any further if you lose.

2. Merits: Your application may also be rejected if the ECtHR considers that it is ‘manifestly ill-founded’, in other words, that it is not arguable. One of the most common reasons for this outcome in Article 6 cases is that applications are filed as “fourth instance” complaints, as explained above. If your application is held to be admissible, the other party or parties will then be given the opportunity to make representations and responses in relation to the substantive merits of the application. This process is usually conducted in writing, although occasionally a hearing may be held if this is deemed necessary. The Court will decide whether there has been a breach of the ECHR.

How long will I have to wait?

Once your application has been received by the ECtHR, it may be months or even years before you hear anything back on your case. The Court aims to deal with cases within three years, but some can take longer. If an application under Article 6 is classified as urgent and your client is facing an imminent threat of physical harm, it may be processed as a priority case. Once a final judgement has been reached, the Court will notify you of the date on which this decision will be made publicly available on the ECtHR website.

Is legal aid available?

The ECtHR has a legal aid system¹⁴ but payments are low and will depend on meeting eligibility criteria. You can only apply once the Court has communicated the case to the government of the state. The application is made directly to the Court, by completing a form on assets and income: this declaration then has to be certified by the claimant’s national authorities. If hearings are to be held,

¹⁴ The granting of legal aid for cases going before the European Court of Human Rights is governed by the Rules of Court (2012) - rules 100 – 105. See also: http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD37731DA/0/REGLEMENT_EN_2012.pdf

the award of legal aid will cover your and your client's expenses in attending it, as well as legal fees and other expenses necessarily incurred.

Can I appeal the decision?

There is no right of appeal against Committee, Chamber or Grand Chamber judgments. However, once a final decision has been passed by the Chamber, you may request a referral of the case to the Grand Chamber for fresh consideration. This is the only form of appeal permitted by the Court. It is rare for such a referral to be accepted by the Grand Chamber. If the referral is accepted, the final judgment cannot be appealed against.

Interim Measures and how to request them

What is an interim measure?

An interim measure is an ECtHR order that the status quo be maintained pending the Court's determination of a claim. In other words, it is an order that a State temporarily carries out/refrains from carrying out a particular action. Interim measures are granted by the Court in cases where *'there is plausibly asserted to be a risk of irreparable damage to the enjoyment of the core rights under the ECHR'*¹⁵.

In *Mamatkulov and Askarov v Turkey* the Court held that an interim measure is sought by an applicant and granted by the Court *'in order to facilitate the effective exercise of the right of individual petition.'* Failure to honour an interim measure will therefore amount to a violation of Article 34 ECHR unless a State can show that it took all reasonable steps to comply¹⁶.

Key provisions

The provisions governing interim measures are found in the latest edition of the ECHR Rules of Court, issued on 01.09.2012. The relevant rule is Rule 39, which is supplemented by a Practice Direction¹⁷. Rule 39 states:

1. *The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.*
2. *Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.*
3. *The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.*

¹⁵ *Mamatkulov and Askarov v Turkey* (App. No. 46827/99)

¹⁶ *Paladi v Moldova* (App.No. 39806/05)

¹⁷ Practice Direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 05.03.2003 and amended on 16.10.2009 and 07.07.2011

When can the Court grant an interim measure?

Rule 39 gives the Chamber, or its President, the power to grant any interim measure it considers appropriate in order to safeguard the interests of the parties, or to ensure the proper conduct of proceedings.

Who has standing to make an application?

Any person who has submitted or intends to submit an application to the Court under Article 34 ECHR (see above) has standing to apply for an interim measure. Where appropriate, the Court may also grant a measure of its own accord. A party may submit an application regardless of his nationality so long as he is in the jurisdiction of one of the State parties to the ECHR.

What are the criteria for granting an interim measure?

The Court will only grant an interim measure against a State in ‘*exceptional cases*’¹⁸. For a case to be ‘exceptional’ the Court must find, following a review of all the relevant information, that there is a ‘*real risk of serious irreversible harm*’ if the measure is not applied.

What kinds of cases has the court previously considered ‘exceptional’?

The application of Rule 39 has usually concerned the right to life (Article 2) and the right not to be subjected to torture or inhumane or degrading treatment or punishment (Article 3). The Court has very rarely granted interim measures where the applicant complained of unjustified interference with family/private life (Article 8). Requests for interim measures are most common in asylum and extradition cases. Although many attempts have been made to obtain interim measures to stop a person’s extradition for trial, whether on Article 3 or Article 6 grounds, these rarely succeed¹⁹.

How does the Court assess risk of harm?

The Court will apply the principle of “subsidiarity” to applications under Rule 39. Hence a risk will only be considered sufficiently serious if there is no possibility of an effective remedy at a domestic level. In extradition cases, for example, an interim measure will not be granted where it remains open to the applicant to pursue domestic legal avenues that would have the effect of suspending removal. However, a potential domestic remedy will only be considered effective if it will have a suspensive effect both in law and fact.

What is the standard of proof and on whom does it fall?

There are no hard and fast rules about the burden of proof in the context of Rule 39. It is up to the applicant to establish that he faces an imminent risk of irreparable harm contrary to his rights under the ECHR. In extradition cases, the Court primarily relies on evidence of the current and anticipated

¹⁸ See Practice Direction

¹⁹ See, however, *Ismoilov v Russian Federation* (2947/06): in which Rule 39 successfully invoked against extradition to Uzbekistan where the defendants faced torture and an unfair trial; and *Olaechea v Spain* (24668/03): a Peruvian national who succeeded in obtaining interim measures to prevent extradition from Spain

future situation when determining the existence of risk. The Court will look at the applicant's own account of perceived risk (giving less weight to his or her past experiences) and also at reports from recognised NGOs, the UN and national aid agencies.

When should an application be made?

The Practice Direction states that applications should be received by the Court as soon as possible following the challenged domestic decision. In extradition cases, however, it may not always be appropriate to wait for the final decision. As a benchmark, applications should normally be sent in sufficient time to give the Court at least one working day to respond before the date set for extradition or any other anticipated event.

Who should make the application?

The applicant or his 'representative' may make an application. Where the applicant does not submit the application himself it must be accompanied by a signed written authority. If a written authority cannot be obtained the reason must be explained in appropriate detail when the application is made, otherwise the request may be rejected. The representative can be a family member, friend, lawyer or NGO. Once the application has been communicated by the ECtHR to the Government concerned, the applicant must be legally represented.

How is an application made?

There is no specific application form or format for submitting a Rule 39 request. An applicant may choose to submit a request on the Court's General Application Form to be found on its website²⁰, or via letter. Regardless of how the request is made it should be marked in bold:

Rule 39 URGENT

Contact person [name and contact details...]

In extradition cases the request should be marked:

Rule 39 URGENT

Contact person [name and contact details...]

Removal expected on [date, time and destination...]

What else should the application contain?

According to the Practice Direction, the application must explain in detail:

- i. the grounds on which the applicant's fears are based;
- ii. the nature of the alleged risks; and
- iii. which ECHR provisions have been violated.

²⁰ <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack/>

It is not sufficient merely to refer to other submissions or documents: the above information must be set out in the application itself. Any supporting documents, in particular, any relevant domestic decisions, should be submitted along with the application. Where a case is already pending before the Court the application should include the Application Number.

How does the Court reach a decision?

Once an application is submitted it will be considered by the Court as quickly as possible. There is no oral hearing: the merits are considered exclusively on the strength of the application papers. In certain cases, the Court President or Vice President may take an action beyond granting the interim measure. They may, for example, make an admissibility decision about the Rule 39 application and communicate the case to the respondent Government for its observations, before making a decision.

How long does an interim measure last?

The Court will specify the period during which the measure is to remain in place. The Court may order that a measure will remain in place 'until further notice', in which case it will remain until the end of the claim, or it may specify a time-limit. A measure may be lifted either by the individual judge who granted it, or by the Chamber.

Is there an appeal process?

No appeal lies against the decision on a Rule 39 request. However, unsuccessful applicants may submit a further application if new elements arise. Whether it grants or refuses an interim measure, the Court never gives reasons. An unsuccessful application under Rule 39 does not however, prevent an applicant continuing with the main proceedings under Article 34.

Rule 39 health warning

Between 2006 and 2010, the Court experienced an increase of over **4,000%** in the number of requests under Rule 39. As a result, it published a statement in 2011²¹ in which it reminds applicants that it is not an appeal court for asylum cases. The Court said:

"Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly with respect for human rights, the Court should only be required to intervene in truly exceptional cases."

One result of this massive increase in applications is that the Court has become extremely strict about procedure under Rule 39. Applications that do not conform to the guidance set out in the Practice Direction, and outlined above, will be rejected and the Court may not even inform the applicant of this.

²¹ http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf

Checklist for applying under Rule 39

- Applicant faces an imminent risk of irreparable harm contrary to his rights under the ECHR.
- Applicant has exhausted all domestic avenues
 - ↳ In extradition and asylum cases it may not be appropriate to await the outcome of the final domestic decision.
- The applicant has exhausted all domestic avenues
- Applicant intends to apply/has applied to the Court under Article 34 ECHR
- There is sufficient time to allow the Court one day to consider
 - ↳ If this is not the case reasons must be given.
- The application is marked in bold:
 - Rule 39 URGENT**
 - Contact person [name and contact details...]**
 - (and in extradition cases)
 - Removal expected on [date, time and destination...]**
- The application sets out, in detail:
 - i. the grounds on which the applicant's fears are based;
 - ii. the nature of the alleged risks; and
 - iii. which Convention provisions that have been violated.
- The application is accompanied by any supporting documents, particularly any decisions of the domestic courts
- If sent via a representative, the application is accompanied by a signed written authority