

**APPLICATION N° 21439/93**

**Maurizio BOTTA v/ITALY**

**DECISION** of 15 January 1996 on the admissibility of the application

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**Article 8 of the Convention, taken alone and in conjunction with Article 14 of the Convention** *Lack of facilities necessary to make beaches accessible for persons with disabilities, despite a legal obligation on private beach establishments to provide such facilities (Complaints declared admissible)*

**Article 26 of the Convention**

- a) *The obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible To be effective, a remedy must be capable of remedying directly the impugned state of affairs*
- b) *Where doubts exist as to the effectiveness of a domestic remedy, that remedy must be tried*
- c) *The burden of proving the existence of effective, sufficient and accessible remedies is on the State invoking non exhaustion of domestic remedies*
- d) *A remedy must exist with a sufficient degree of certainty to be regarded as effective*
- e) *Lack of facilities necessary to make beaches accessible for persons with disabilities, despite a legal obligation on private beach establishments to provide such facilities Decision to discontinue proceedings relating to an alleged offence under Section 328 of the Italian Criminal Code*

*On the facts, neither of the remedies (one civil and one criminal) referred to by the Government, each of which rested on a single precedent, could be considered as effective*

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## THE FACTS

The applicant, who is an Italian citizen, was born in Milan in 1939 and lives in Trezzano sul Naviglio (in Milan province). He is physically disabled and previously practised as a chartered accountant. He is currently unemployed and lives at home with charitable assistance

The applicant is represented before the Commission by Mr Bruno Nascimbene, a professor of international law and a member of the Milan Bar

The facts of the case, as submitted by the parties, may be summarised as follows.

### *The particular circumstances of the case*

In August 1990, for the second year running, the applicant went to the seaside resort of Lido degli Estensi, near Comacchio (in Ferrara province) to holiday with a lady who is also physically disabled.

The applicant quickly realised that none of the private beach establishments offered the equipment and services necessary to make the beach and the sea accessible for persons with disabilities (in particular, specially constructed access-ways and toilet facilities) notwithstanding the fact that the relevant Italian legislation required that all concession contracts relating to private beaches should include a clause obliging the concessionaire to provide these facilities and the competent local authority to monitor compliance. According to Comacchio Municipal Council, such clauses were inserted only into concession contracts made after the relevant provisions were enacted

For a time, the applicant used his private car to obtain access to public beaches where there were no facilities, but this possibility was then denied him because the access roads were closed by order of the harbour-master's office

On 26 March 1991, the applicant wrote to the mayor of Comacchio, requesting him to ensure that the shortcomings of the previous year were rectified. He received no answer to this letter

In August 1991, the applicant went back to Lido degli Estensi and observed that none of the measures which he had requested - and which were required by law - had been taken. Therefore the applicant was obliged to apply to the local branch of the harbour-master's office for permission to use his private car to obtain access to a public beach with no facilities

At the same time, the applicant complained to other bodies. The President of the Lido degli Estensi private beaches cooperative replied that the concession contracts did not contain any obligation on his members to equip their premises with the facilities which the applicant was calling for. The local branch of the harbour-master's office

stated that it had to receive an official request before it could authorise the construction of special access-ways on a beach. The mayor, for his part, argued that it was for the private beach establishments to provide the above-mentioned facilities and offered to permit the applicant to use his car to gain access to a public beach. Two policemen suggested that he should go and see the mayor. Lastly, a brigadier of carabinieri (1) advised him to file a criminal complaint.

In an undated note, the local branch of the harbour-master's office authorised the applicant to use his car to obtain access to a public beach without facilities until 31 August 1991.

On 9 August 1991, the applicant decided to file a criminal complaint with the carabinieri against the Minister for Merchant Shipping, the harbour-master of Ravenna and the mayor and deputy mayor of Comacchio, claiming that, in failing to take any measures to make the private beach establishments provide such facilities for disabled persons as the law required them to, on pain of having their licence revoked, they had committed the offence of failing to fulfil one of their official responsibilities (omissione d'atti d'ufficio), as defined in Section 328 of the Italian Criminal Code.

On 20 December 1991, the applicant contacted the Ferrara Public Prosecutor's Office to enquire as to the progress of the proceedings.

On 5 May 1992, the Public Prosecutor's Office applied for the proceedings commenced as a result of the applicant's complaint to be discontinued. The applicant was not notified of this application, despite the provisions of Section 408 (2) and (3) of the Code of Criminal Procedure.

On 12 May 1992, the preliminary investigations judge (giudice per le indagini preliminari) attached to Ferrara District Court ordered that the proceedings be discontinued. The reason given in the decision was that the investigation had not found any evidence that the offence defined in Section 328 of the Criminal Code had been committed, given that all the concession contracts relating to the private beaches contained a clause providing that the concessionaires had a duty to make the beaches accessible for persons with disabilities, as well as to provide at least one changing-hut and one toilet designed for their use.

On 1 September 1992, the applicant again contacted Ferrara Public Prosecutor's Office enquiring about the progress of the proceedings.

In reply, Ferrara Public Prosecutor's Office telephoned the applicant on 16 September 1992 to inform him that the proceedings commenced as a result of his complaint had been discontinued. He then wrote to the Public Prosecutor's Office on 18 September 1992 asking them to send him a copy of the discontinuance order and

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(1) A military corps with special police functions.

enclosing the necessary tax stamps, despite the fact that the civil servant at the Public Prosecutor's Office had not been able to tell him how much it would cost

On 3 October 1992, the applicant received a copy of the order

*Relevant domestic law*

a) Substantive legislative provisions

Law No 13 of 9 January 1989 contains provisions intended to guarantee persons with disabilities effective access to private buildings and establishments and to eliminate architectural barriers to such access (the so-called "barriere architettoniche") Section 1 (2) of this Law provides, in particular, that within three months of its coming into force, the Minister for Public Works should issue regulations laying down the technical requirements for the construction of private buildings or public sector housing. The same Law also makes mayors responsible for certain matters in particular, for carrying out adaptation projects designed to benefit, and requested by, persons with disabilities. In particular, Section 11 provides that, after receiving applications from relevant persons, the mayor shall calculate the financial resources required by the municipality in order to carry out the works and shall convey this information to the regional authority, which, in turn, shall calculate its own requirements and apply to the Ministry for Public Works for the necessary finance, which shall be drawn on the *ad hoc* fund set up under Section 10 of the same Law.

Pursuant to Section 1 (2) of the said Law, on 14 June 1989 the Ministry for Public Works adopted regulations (No 236) under which all future concession contracts to be awarded in relation to private beaches would have to contain a clause obliging the concessionaires to provide at least one changing-hut and one toilet specially designed for use by persons with disabilities and, further, to provide a special access way enabling such persons to gain access to the beach and the sea.

On 23 January 1990, the Ministry for Merchant Shipping drew these provisions to the attention of all harbour-master's offices in Italy.

Further, section 23 (3) of Law No 104 of 5 February 1992 made the grant or renewal of State concessions conditional upon the establishments concerned taking these measures. Moreover, Law No 118 of 30 March 1971 contains similar provisions as regards the removal of "barriere architettoniche" in public buildings or buildings which are open to the public.

b) Case-law and procedural provisions

As regards the remedies available under the criminal law, there is only one relevant precedent that is, a judgment of 13 December 1989 made by the "pretore" (single judge sitting at first instance) of Florence. In his judgment, the pretore held that a mayor who had failed to have a plan for removing the "barriere architettoniche"

affecting disabled persons in public buildings approved by the relevant municipal bodies, or had failed to do so within the statutory period, had committed the offence of failing to fulfil one of his official responsibilities (as defined in Section 328 of the Criminal Code)

As regards procedural requirements, Section 408 (2) and (3) of the Italian Code of Criminal Procedure (the CCP) provide that notice of any application by the Public Prosecutor's Office for a discontinuance order shall be served on any complainant who, at the time of filing his complaint or thereafter, has declared a wish to be informed of a potential discontinuance ( circa l'eventuale archiviazione), and that the Public Prosecutor's Office is responsible for effecting such service. The notice must state that the complainant has ten days within which to examine the contents of the case-file and to oppose the making of a discontinuance order by way of an application, stating grounds, for the preliminary investigation to be extended, pursuant to Section 410 CCP.

According to case-law, only an "explicit and formal request to be informed of a potential discontinuance order gives rise to a right to receive notice of an application by the Public Prosecutor's Office for such an order. It must, therefore, be a formal document, for which there is no valid substitute (see Court of Cassation, judgment of 30 May 1990)

As regards the complainant's ability to oppose the Public Prosecutor's application for a discontinuance order, Section 410 CCP provides that, in order to do so, a complainant must apply for the preliminary investigation to be extended and must indicate what purpose a further investigation will serve and what relevant evidence exists, failing which the application will be struck out. The Court of Cassation has interpreted this provision very narrowly and has established in its case-law that a complainant's application is inadmissible if he or she points merely to evidence which is manifestly superfluous or irrelevant (see, *inter alia*, the Court of Cassation judgment of 23 March 1992, in that case, the complainant's application merely criticised the investigation carried out by the Public Prosecutor's Office and requested a more thorough one, in particular by obtaining documents and further technical and pathological expert reports)

No appeal lies against a discontinuance order, except an appeal on a point of law to the Court of Cassation under Section 409 (6) CCP. This provision refers to Section 127 (5) CCP, which sets out very precise circumstances in which the order may be set aside. According to case-law, these circumstances would include the situation where the complainant had not received notice of the Public Prosecutor's application for a discontinuance order despite having requested to be informed of any potential discontinuance in the manner required by Section 408 (2) CCP.

Furthermore, Section 413 CCP provides that the complainant may apply for Principal State Counsel to take over the investigation under the provisions of Section 412 (1) CCP. However this provision has been interpreted by the courts in such a way as to restrict Principal State Counsel's power (or, in certain cases, duty) to take

over an investigation so that it applies only in narrowly-defined situations where the investigation has reached a veritable impasse - for example, where the Public Prosecutor's Office which requested the discontinuance order fails to comply with the preliminary investigations judge's direction to pursue the investigation, where the Public Prosecutor's Office fails to comply with a discontinuance order and continues to pursue the investigation, or where there is a difference of opinion between the judge and the Public Prosecutor's Office requesting the discontinuance order which renders the application for discontinuance unjustified.

In the domain of civil proceedings, the only direct precedent is an order given by the pretore of Rome on 4 June 1980. In that case, a number of persons with disabilities had complained of the fact that, when Rome's underground railway was built, no provision was made for access or use by the disabled, in breach of the relevant legislation. The pretore held that fundamental rights were at issue in the case and issued an emergency injunction under Section 700 of the Code of Civil Procedure ordering the authority concerned to provide an alternative mode of transport above ground, equipped for use by persons with disabilities and following the same route as the underground. Section 700 of the Code of Civil Procedure provides that any person having well-founded reasons to believe that, during the time required to make a claim in the normal way, the subject-matter of that claim would be threatened with imminent and irreparable harm may apply to the competent judge for emergency interim measures designed, according to the facts of the case, to ensure that the substantive decision will be effective.

In the context of the protection of fundamental rights, it is also appropriate to cite Court of Cassation judgment No 5172 of 6 October 1979, which opened the way for private persons to rely on Section 700 of the Code of Civil Procedure so as to challenge a public authority's plan to build water purification plants which posed a threat to the health of neighbouring residents.

## COMPLAINTS (Extract)

The applicant complains, firstly, that he was subjected to inhuman and degrading treatment and that the lack of facilities necessary to make the beach and the sea accessible for him - a lack which was in breach of the relevant provisions of statute and delegated legislation - restricted, in practice, his right to liberty and security of person. On the basis of this, he alleges that Articles 3 and 5 of the Convention have been violated.

Secondly, he complains that he has been discriminated against in the enjoyment of these rights on the ground of his physical condition. Under this head, he invokes Article 14 of the Convention.

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## THE LAW (Extract)

1 The applicant complains, firstly, that he was subjected to inhuman and degrading treatment and that the lack of facilities necessary to make the beach and the sea accessible for him - a lack which breached the relevant provisions of statute and delegated legislation - restricted, in practice, his right to liberty and security of person. On this basis, he alleges that Articles 3 and 5 of the Convention have been violated.

The Commission considers that the complaints which the applicant has brought under Articles 3 and 5 of the Convention should be examined under Article 8 of the Convention alone. In effect, the applicant is complaining of an interference with his private life and personal development caused by the State's failure to adopt the measures necessary to rectify omissions on the part of the concessionaires of private beaches.

Article 8 of the Convention provides that,

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

The applicant also complains that he has been discriminated against in the enjoyment of the above-mentioned rights on the ground of his physical condition and invokes, under this head, Article 14 of the Convention.

According to Article 14 of the Convention,

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government submit, firstly, that the organs of the Convention have consistently held that the Convention does not guarantee, as such, a right for criminal proceedings to be brought against a third party.

The Government then raise a preliminary objection, arguing that the application is inadmissible on the grounds of non-exhaustion of domestic remedies. Specifically, they argue that the applicant did not make a request under Section 408 (2) CCP to be informed of any application for a discontinuance order relating to his complaint so as

to be entitled to oppose it under Section 410 CCP. In this regard, the Government also argue that the applicant did not even apply under Section 413 CCP for Principal State Counsel attached to the relevant Court of Appeal to take over the investigation under Section 412 (1) CCP

Further, the Government maintain that, in any event, the applicant could have made a more effective claim had he either applied to the relevant administrative authorities under the provisions of Law No. 13 of 9 January 1989 and Law No. 118 of 30 March 1971, or brought proceedings in the civil courts

In particular, on the question of the civil remedies at the applicant's disposal, the Government affirm that the Italian courts are now using, *inter alia*, Article 2 of the Italian Constitution to provide effective protection for individual rights such as the right to free movement, work, health, the protection of persons with disabilities and, more generally, the right to a full social life. According to the Government, the applicant therefore clearly had a right (*diritto soggettivo*) on the basis of which he could have sued in the civil courts, relying, *inter alia*, on the numerous statutory provisions which nowadays lay down the measures necessary to eliminate obstacles affecting persons with disabilities. In particular, the Government refer to the 4 June 1980 decision of the pretore of Rome, which is an important precedent in the field of the protection of persons with disabilities. Although that decision has been criticised, the Government see it as arising out of a long line of consistent case law developed by the Court of Cassation since its judgment of 6 October 1979 aimed at protecting fundamental rights (on the facts, the right to health)

For his part, the applicant states that he did indeed repeatedly request to be notified if the proceedings arising out of his complaint were in danger of being discontinued. However, he was not informed that the Public Prosecutor's Office had applied for a discontinuance order and, therefore, he was not able to oppose it. It is true that he could have applied to the Court of Cassation on the grounds of this omission. But according to the case-law, Section 408 (2) requires a formal document for a complainant to be considered as having requested to be informed of any application for a discontinuance order. Since, apparently, his request could not be considered as such in the light of the case-law (as the Government implicitly suggest) the applicant fails to see how the Court of Cassation could have allowed his appeal. This kind of formalism makes this remedy, therefore, relatively inaccessible. In any event, the applicant claims to have exhausted it to the extent that it was accessible.

As regards the other remedies raised by the Government, the applicant maintains, firstly, that neither Law No 13 of 1989 on the removal of obstacles in private buildings, nor Law No 118 of 1971 on public buildings and buildings open to the public establishes bodies responsible for monitoring their implementation. There is no administrative-law precedent on the point and all the applicant could have done would have been to request the relevant administrative authorities to revoke the concession contract.



The applicant then emphasises that the civil precedent to which the Government refer is the sole existing one, and further points out that there is only one precedent in the criminal field too, namely the 13 December 1989 decision of the pretore of Florence which would tend to support his case.

As for the possibility of an appeal in the ordinary courts, the applicant observes that until the Court of Cassation judgment of 20 February 1992, case-law ruled out any appeal aimed at obliging organs of the State to take positive action, save where such organs had acted as a subject of private law or where the obligation was contractual. According to this line of case-law, which can now be considered as well-established, a judgment ordering a public authority to carry out a positive action would, in practice, have taken the place of the administrative decision in question and would have interfered with the exercise of the discretionary power vested in organs of the State. Following the above-mentioned Court of Cassation judgment, the courts opened the door to claims obliging the State to redress the consequences of conduct which was prejudicial to certain fundamental individual rights, but it is doubtful whether the judiciary could force a public authority to rectify an omission, given that, in such a case, the courts would have to dictate the terms on which the authority was to carry out this positive action, thus taking over the latter's power of discretion. Therefore, the decision of the pretore of Rome has remained the only one of its kind.

By way of introduction, as regards the fact referred to by the Government that the Convention does not contain a right to have a third party prosecuted, the Commission observes that the outcome of the criminal proceedings commenced on the applicant's initiative is not, in this part of the application, at issue as such, but only in so far as it has affected the chances of the alleged violation of other rights guaranteed by the Convention being remedied: that is, in the context of Article 26 of the Convention

As regards the Government's preliminary objection on the grounds of non-exhaustion of domestic remedies, the Commission recalls, firstly, that the exhaustion rule as laid down in Article 26 of the Convention demands the use only of such remedies as are available to the persons concerned and are sufficient, that is to say, capable of providing redress for their complaints. It is also recognised that it is for the Government which raise the contention to indicate the remedies which, in their view, were available to the persons concerned and which ought to have been used by them until they had been exhausted (see Eur. Court H.R., *De Wilde, Ooms and Versyp v Belgium* judgment of 18 June 1971, Series A no. 12, p. 33, para. 60)

Secondly, the Commission recalls that Article 26 must be applied with some degree of flexibility and without excessive formalism (see, among other authorities, Eur. Court H.R., *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 18, para. 34, and *Geouffre de la Pradelle v. France* judgment of 16 December 1992, Series A no. 253-B, p. 40, para. 26), and that it must be sufficiently certain that the remedies referred to by the Government exist, not only in theory but also in practice.

failing which they will lack the requisite accessibility and effectiveness (see, for example, Eur Court H.R., De Jong, Baljet and Van den Brink v. Netherlands judgment of 22 May 1984, Series A no 77, p. 19, para. 39).

The Commission observes that the present case falls within a swiftly-evolving area of Italian law. This is evidently why there is so much uncertainty as to which remedies to pursue in order to obtain protection against situations such as the one at issue. Moreover, such uncertainties typically arise in any legal system which is confronted with a new situation and with the need to find new forms of protection. It is exactly in situations such as these that the Commission must show a degree of flexibility, so as to avoid placing an excessive burden on applicants.

In such a situation, an applicant is not dispensed from exhausting every remedy, for, as here, there may be precedents which, despite standing alone, do show that redress is not completely impossible to obtain, albeit difficult and of doubtful effect. In this regard, it should be recalled that even where doubts exist as to the effectiveness of a domestic remedy, that remedy must be tried (see, for example, No 10148/82, Dec 14.3 85, D R 42 p 98). In the present case, therefore, the applicant was not dispensed from trying at least one of the remedies which the existence of certain precedents had revealed.

At the material time, the two principal remedies cited by the Government, one civil and one criminal, had an equal chance of success, since each was based on one precedent similar to the applicant's case. Faced with several alternative remedies, all equivalent in terms of probable effectiveness and accessibility, the applicant was, therefore, not obliged to exhaust the civil-law remedy rather than, or in addition to, the criminal one (see, *mutatis mutandis*, No 11932/86, Dec 9 5 88, D R 56 p 199 and No 11471/85, Dec 19 1 89, D R 59 p 67).

Moreover, none of the other remedies identified by the Government seems to have any relevance to the case.

In particular, as regards the suggestion that the applicant could have applied to the administrative authorities referred to in Law No. 13 of 1989 and Law No. 118 of 1971, the Commission notes that those Laws impose certain obligations on the administrative authorities referred to therein, but make no provision as to ways of enforcing those obligations.

Further, as to whether the applicant could have applied for Principal State Counsel to take over the investigation, the Commission notes that Section 413 CCP refers, in this regard, to Section 412 (1) CCP, which specifies the circumstances in which Principal State Counsel may exercise this power. None of these circumstances appears to have arisen in the present case.

It could be asked whether the applicant should have appealed to the Court of Cassation, once he had learned of the order to discontinue the proceedings based on his complaint, on the grounds that he had not been informed that the Public Prosecutor's Office had applied for this order despite his request to be kept informed of the progress of the proceedings. The Commission considers that it is unnecessary to give a ruling on this issue, since, even assuming that the applicant could have challenged, in one way or another, the application for a discontinuance order, he would, on the facts, have had no chance of success.

Indeed, the Commission observes that the Italian courts have interpreted this remedy very restrictively: a complainant will be given leave to challenge an application for a discontinuance order only where he is able to point to evidence in support of his allegations which is precise, relevant and, above all, new. But in the instant case it is difficult to see what other evidence the applicant could have adduced, or what other investigations could have produced useful new evidence, given that the facts of the case, as set out by the applicant in his criminal complaint, were clear and patent. Moreover, this emerges from the wording of the discontinuance order itself, since the preliminary investigations judge did not question the existence of the situation complained of, but merely defined this situation legally in such a way as to exonerate the persons indicted by the applicant from any criminal liability. Therefore, the applicant was, in any case, dispensed from opposing the order.

Accordingly, since the respondent Government have not indicated any other alternative or concurrent remedy which would appear to be effective and to comply with the requirements of Article 26, the Commission considers that the Government's preliminary objection cannot be upheld.

As to the substance of the case, the Government consider that the domain of private life is closely bound up with a person's emotional life. They emphasise that, according to the case-law of the Convention organs and academic opinion, the function of the protection of private life is to ensure that an individual has the opportunity to develop his own personality in relationships with other persons, without any external interference, in circumstances where there are none of the legal bonds without which family life in the proper sense of the expression can exist, but where there are close *de facto* relationships analogous to family ones (for example, the relationship between two homosexuals, between foster-mother and child, etc.) According to the Government, in the applicant's case, the issue of emotional life does not arise. Therefore, it would be quite wrong to extend the scope of Article 8 in such a loose manner - all the more so since, as the European Court of Human Rights held in the case of *B v France*, judgment of 25 March 1992, Series A no 232-C, the way in which the principle in question is drafted is not clear-cut, so that its scope needs to be defined precisely and rigorously, particularly as regards the definition of the positive obligations which it imposes on the State.

In any event, the Government refer to evidence supplied by Comacchio Municipal Council, according to which, at the material time, the provisions of Italian

law on which the applicant was relying had only just come into force. Therefore, it had been extremely difficult for the businesses concerned to put them into effect at once. A period of transition had been necessary and by now all the private beach establishments had complied with the law. Furthermore, the administrative authorities in Comacchio had done all they could to give the applicant access to a public beach and to make his stay as pleasant as possible.

The applicant maintains, for his part, that the domain of "private life" is surely wider than simply that of the emotions. Indeed, the applicant observes that, contrary to the Government's opinion on this point, the case-law of the Convention organs itself suggests that private life is not wholly confined to the emotional sphere and that the concept should be interpreted with a degree of flexibility and in the light of the facts of each case.

According to the applicant, the heart of the concept is that the individual should have the opportunity to establish and develop relationships with other human beings, an opportunity which is essential for the development of the personality.

As regards the State's positive obligations, the applicant acknowledges that the question whether such obligations exist, and what their scope is, will depend on where the balance between the general interest and the interests of the individual is struck. However, he submits that this question of balance is not at issue where public authorities have failed to comply with pre-existing legal obligations, as in this case.

Lastly, the applicant argues that if discrimination occurs where an individual belonging to a particular category is treated differently from persons in other categories, without any justification, then he has certainly been discriminated against in the enjoyment of his rights. It is of little importance, concludes the applicant, for the State to enact, "on paper", provisions to eliminate certain kinds of discrimination if the State itself fails to comply with those provisions in practice.

The Commission finds that, on this point, the application raises complex issues of fact and law which cannot be resolved at this stage of the examination of the application but which require an examination of the merits. It follows that this part of the application cannot be declared manifestly ill founded under Article 27 para 2 of the Convention.

The Commission further notes that no other ground of inadmissibility has been established in relation to this complaint.