

Admissibility

Exhaustion of local remedies – article 56(5)

The only remedies that are required to be exhausted are ordinary judicial remedies (*Abubakari Mohamed v The United Republic of Tanzania*, Merits, Application 007/2013, 3 June 2016, para 64; *African Commission on Human and Peoples' Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 97). Extra-ordinary remedies such as special constitutional petitions or a review need not be exhausted (*Wilfred Onyango Nganyi & 9 others v Tanzania v The United Republic of Tanzania*, application 006/2013, judgment, 18 March 2016, para 95; *Alex Thomas v United Republic of Tanzania*, application 005/2013, judgment, 20 November 2015, paras 60 – 65; *Abubakari Mohamed v The United Republic of Tanzania*, Merits, Application 007/2013, 3 June 2016, para 72).

In a case against Malawi the Court held that the complainant in a case of alleged unfair dismissal had not appealed against a judgment of the Industrial Relations Court and had therefore not exhausted local remedies (*Urban Mkandawire v Republic of Malawi*, application 003/2011, judgment, 21 June 2013, para 40). Judges Niyungeko and Guissé in a joint dissenting opinion held that the case should have been declared admissible as the state had not argued that local remedies had not been exhausted and the issue had been before both the High Court and Supreme Court of Appeal before newproceedings before the Industrial Relations Court. Mr Mkandawire applied for interpretation and review of the African Court's judgment. However, this application was unsucessful (*Urban Mkandawire v Republic of Malawi*, application 003/2011, application for interpretation and review of the judgment of 21 June 2013, ruling, 28 March 2014). In a case against Tanzania the Court held that the applicants could not bypass the Court of Appeal since it had not ruled on the case on the merits (*Frank David Omari and others v The United Republic of Tanzania*, application 001/2012, ruling, 28 March 2014, para 127).

Where the case before the Court deals with alleged violations related to a criminal trial, the exhaustion of appeals in relation to the criminal trial, where alleged violations at the trial court has been raised, is sufficient to exhaust local remedies. The applicant need not make a constitutional challenge (*Alex Thomas v United Republic of Tanzania*, application 005/2013, judgment, 20 November 2015, para 60)

An NGO complainant does not have to exhaust local remedies if the organisation is not entitled to bring an action in the matter before national courts (*Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe human and peoples' rights movement v Burkina Faso*, application 013/2011, judgment, 28 March 2014).

A local remedy would also deemed ineffective and therefore unavailable if the applicant has no standing before the institution which has the jurisdiction to grant the

remedy (*Lohé Issa Konaté v Burkina Faso*, application 004/2013, judgment, 5 December 2014 para 112). In *Konaté v Burkina Faso* seeking remedy from the Constitutional Council which had the jurisdiction to grant the order the applicant sought (annulment of the legislation which criminalises libel) was deemed unavailable because individuals had no standing before the Constitutional Council.

By the tenor of the joint provisions of article 6(2) of the Protocol establishing the Court and article 56(5) of the African Charter, the requirement of exhaustion of local remedies anticipates judicial remedies which ‘meet the criteria of availability, effectiveness and sufficiency’ and which are not unduly prolonged (*Tanganyika Law Society, The Legal and Human Rights Centre v The United Republic of Tanzania*, application 009/2011; *Reverend Christopher R. Mtikila v The United Republic of Tanzania*, application 011/2011, judgment, 14 June 2013, paras 82.1, 82.3; *African Commission on Human and Peoples’ Rights v Libya*, Merits, Application 002/2013, 3 June 2016, paras 67-70; *Actions Pour la Protection des Droit de L’homme (APDH) v The Republic of Cote D’Ivoire*, application 001/2014, Judgement, 18 November 2016, para 93; (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 93).

A local remedy is deemed effective if it offers prospects of success, is found satisfactory by the complainant or is capable of redressing the complainant. A local remedy is therefore deemed ineffective and need not be exhausted if the local institution from which the remedy would be sought does not have the jurisdiction to issue the remedies the applicant seeks (*Lohé Issa Konaté v Burkina Faso*, application 004/2013, judgment, 5 December 2014 paras 108-113). In *Konaté v Burkina Faso* local remedies were deemed ineffective because the *cour de cassation* from which the applicant would have had to seek a remedy had no jurisdiction to grant the remedy sought by the applicant i.e. annulment of the legislation which criminalizes libel.

Where the highest judicial authority of the respondent state has already pronounced itself on the issues in contention, albeit in a different case, such a remedy may be deemed ineffective, as a new applicant cannot be reasonably expect a different conclusion by filing a new application (*Actions Pour la Protection des Droit de L’homme (APDH) v The Republic of Cote D’Ivoire*, application 001/2014, Judgement, 18 November 2016, para 102-103).

The role concerning the exhaustion of local remedies does not require that the applicant before the Court must have been the same applicant before the domestic courts. The applicant only has to demonstrate that the respondent state has had the opportunity to deal with the matter through the appropriate domestic judicial proceedings (*African Commission on Human and Peoples’ Rights v Kenya*, application 006/2012, Judgement, 26 May 2017, para 94).

Being kept in secret detention without access to a lawyer deprives the accused of access to remedy and therefore make such remedies unavailable (*African Commission*

on Human and Peoples' Rights v Libya, Merits, Application 002/2013, 3 June 2016, paras 68-70). An exemption to the rule of exhaustion of local remedies is when such remedies are unduly prolonged. In *Zongo*, the Court held that the 'local judicial procedure' should be calculated from the date of the start of investigations, 13 December 1998, to the close of the procedure with the expiry of the deadline for appeal to the *cour de cassation*, 21 August 2006. The Court held that this procedure was unduly prolonged and that there was therefore no need for the applicant to approach the *cour de cassation* as would otherwise have been required. (*Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe human and peoples' rights movement v Burkina Faso*, application 013/2011, judgment, 28 March 2014).

A local remedy would not be deemed to have been unduly prolonged if there is a justifiable reason for prolonging the case, such as a country in the middle of a civil war which adversely affects the functioning of the judiciary or delays caused by the victim or her family (*Wilfred Onyango Nganyi & 9 others v Tanzania v The United Republic of Tanzania*, application 006/2013, judgment, 18 March 2016, para 91). The frustration of applicant with the procedure of the local courts could not excuse his failure to exhaust local remedies (*Peter Joseph Chacha v The United Republic of Tanzania*, application 003/2012, judgment, 28 March 2014, para 145). Where the average duration of cases is two years and two months, local remedies may not be considered as unduly prolonged (*Chacha v Tanzania* para 148).

In a dissenting opinion by three judges in *Chacha v Tanzania*, the minority held that the point in time from which the court ought to consider whether or not there has been undue delay in accessing local remedies is the time where the victim attempts to enforce his human rights through the courts. The fact that the cases are dismissed due to technicalities do not prevent the time from running.

In the context of human rights protection, the rule regarding the exhaustion of local remedies should be applied with a certain degree of flexibility and without excessive formalism (*Chacha*). With regards to the rule of exhaustion of local remedies, consideration must be given not only to theoretical remedies in the domestic system, but also to the general legal and political context as well as the personal situation of the applicant (*Chacha*). In some case, the burden of proof regarding the exhaustion of local remedies must be distributed equally between the parties to the case (*Chacha*).